SUBJECT INDEX.

ALPHABETICAL LIST OF CASES RELIED ON.

ALPHABETICAL LIST OF CASES DISTINGUISHED.

STATUTES CITED.

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 649.

R. C. TWAY COAL COMPANY,
KENTUCKY CARDINAL COAL CORPORATION,
HARLAN-WALLINS COAL CORPORATION,
ET AL., - - - - - - - - - - *Petitioners,*

v.

SELDEN R. GLENN, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF KENTUCKY.

BRIEF FOR PETITIONERS.

I.

OPINION OF COURT BELOW.

The opinion of the United States District Court for the Western District of Kentucky (R. 38-80), which is here under review, is reported in 12 Fed. Supp. 570.

II.

JURISDICTION.

The decree of the United States District Court for the Western District of Kentucky was entered No-

vember 14, 1935 (R. 85-87). An appeal to the United States Circuit Court of Appeals for the Sixth Circuit was allowed November 23, 1935 (R. 222-223), and the transcript of the record was filed in that Court on December 11, 1935. On December 20, 1935, and before the case was heard or submitted in the Circuit Court of Appeals, a petition for a writ of certiorari was filed in this Court, and on December 23, 1935, certiorari was granted, 296 U. S. XVI, as authorized by Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (Section 347, Title 28, U. S. C. A.).

The case involves the constitutionality of the Bituminous Coal Conservation Act of 1935, approved August 30, 1935 (Section 801, *et seq.*, Title 15, U. S. C. A.; 49 Stat. 991; Public No. 402, 74th Congress), the lower court having held the Act constitutional in its entirety.

III.

BITUMINOUS COAL CONSERVATION ACT.

The Act which is copied in full in the appendix to this brief is entitled, "An Act to stabilize the bituminous coal mining industry and promote its interstate commerce; to provide for cooperative marketing of bituminous coal; to levy a tax on bituminous coal and provide for a drawback under certain conditions; to declare the production, distribution, and use of bituminous coal to be affected with a national public interest; to conserve the bituminous coal resources of the

United States; to provide for the general welfare, and for other purposes; and providing penalties."

Section 1 reads:

> "That it is hereby recognized and declared that the mining of bituminous coal and its distribution by the producers thereof in and throughout the United States are affected with a national public interest; that the service of bituminous coal in relation to the industrial activities, the transportation facilities, the health and comfort of the people of the United States; the conservation of bituminous coal deposits in the United States by controlled production and economical mining and marketing; the maintenance of just and rational relations between the public, owners, producers, and employees; the right of the public to constant and ample supplies of coal at reasonable prices; and the general welfare of the Nation require that the bituminous coal industry be regulated as herein provided.
>
> "It is further recognized and declared that all production of bituminous coal and distribution by the producers thereof bear upon and directly affect its interstate commerce and render regulation of all such production and distribution imperative for the protection of such commerce and the national public service of bituminous coal and the normal governmental revenues derivable from such industry; that the excessive facilities for the production of bituminous coal and the overexpansion of the industry have led to practices and methods of production, distribution, and marketing of such coal that waste such coal resources of the Nation, disorganize the interstate

commerce in such coal and portend the destruction of the industry itself, and burden and obstruct the interstate commerce in such coal, to the end that control of such production and regulation of the prices realized by the producers thereof are necessary to promote its interstate commerce, remove burdens and obstructions therefrom, and protect the national public interest therein; that practices prevailing in the production of bituminous coal directly affect its interstate commerce and require regulation for the protection of that commerce, and that the right of mine workers to organize and collectively bargain for wages, hours of labor, and conditions of employment should be guaranteed in order to prevent constant wage cutting and the establishment of disparate labor costs detrimental to fair competition in the interstate marketing of bituminous coal, and in order to avoid those obstructions to its interstate commerce that recur in the industrial disputes over labor relations at the mines."

Section 2 of the Act creates a National Bituminous Coal Commission which will hereinafter be referred to as the Commission, composed of five members appointed by the President, by and with the advice and consent of the Senate, for a term of four years, or until the prior termination of the Act, which by its terms expires four years after the date of its approval by the President.

Section 4 provides for the complete regulation of the bituminous coal industry through a working agreement to be known as the "Bituminous Coal Code," to

be formulated by the Commission as therein directed. That section sets out, in great detail, the matters to be dealt with in the Code.

By its terms the entire bituminous coal producing area of the United States is divided into nine minimum price areas and still further divided into twenty-three producing districts, each of such minimum price areas embracing one or more producing districts as specifically set out.

It is provided by Section 4 that the code established in accordance with its terms shall be administered and enforced by the Commission, as to all matters other than labor relations between the producers and their employees, through district boards selected by each of the twenty-three districts in the manner therein provided, and as to such labor relations, by the Commission through a Bituminous Coal Labor Board consisting of three members appointed by the President of the United States by and with the advice and consent of the Senate.

The regulations provided for by Section 4 are directed at each of the two distinct phases of the business of bituminous coal producers, one the producing end of the business, and the other the selling end thereof. The regulations dealing with the strictly producing end of the business are found in Part III of Section 4 under the heading, "Labor Relations." It is therein provided:

1. That employees shall have the right to organize and bargain collectively with their employer, through

representatives of their own choosing, free from the interference, restraint or coercion of their employer in the designation of such representatives or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

2. That no employee and no one seeking employment shall be required, as a condition of employment, to join any company union.

3. That employees shall have the right to select their own check-weighman to inspect the weighing or measuring of coal.

4. That employees shall not be required, as a condition of employment, to live in company houses or to trade at the store of their employer.

5. That whenever maximum daily and weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than two-thirds of the annual national tonnage produced for the preceding calendar year and representatives of the majority of the mine workers employed, such maximum hours of labor shall be binding upon all code members.

6. That if wage agreements are negotiated by collective bargaining in any district or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage produced in such district, or in each of such districts in a contracting group, during the preceding calendar year, and representatives of the majority of the mine workers therein, the code members operating in such dis-

trict or group of districts shall accept as the minimum wages for the various classifications of labor employed by them the wages so agreed upon.

7. That the Bituminous Coal Labor Board, provided for in Section 4 of the Act, shall have authority to adjudicate disputes arising between code members and their employees concerning all matters of labor relations dealt with in Part III of Section 4.

All code members are required to accept each of the foregoing conditions.

The provisions dealing with the selling end of the business, required by Section 4 to be incorporated in the code, are found in Part II of Section 4 under the heading "Marketing," and may be summarized as follows:

1. The fixing of minimum prices at which coal may be sold by code members, such prices to be determined according to the formula attempted to be set up in the Act.

2. The fixing of maximum prices when in the judgment of the Commission it is necessary so to do in the public interest.

3. The regulation of contracts and trade practices in the sale of coal by code members for the purpose of making effective the prices fixed by the Commission.

4. The defining and outlawing of unfair methods of competition.

All code members are required to accept each of these provisions.

Ostensibly, producers are left free to accept the

code and operate under its provisions or to refuse to do so, but as a practical matter a producer who desires to continue in business has no choice but to accept the provisions of the code and to operate thereunder.

Section 3 provides:

> "There is hereby imposed upon the sale or other disposal of all bituminous coal produced within the United States an excise tax of 15 per centum on the sale price at the mine, or in the case of captive coal the fair market value of such coal at the mine, such tax, subject to the later provisions of this section, to be payable to the United States by the producers of such coal, and to be payable monthly for each calendar month, on or before the first business day of the second succeeding month, and under such regulations, and in such manner, as shall be prescribed by the Commissioner of Internal Revenue: *Provided,* That in the case of captive coal produced as aforesaid, the Commissioner of Internal Revenue shall fix a price therefor at the current market price for the comparable kind, quality, and size of coals in the locality where the same is produced: *Provided further,* That any such coal producer who has filed with the National Bituminous Coal Commission his acceptance of the code provided for in section 4 of this Act, and who acts in compliance with the provisions of such code, shall be entitled to a drawback in the form of a credit upon the amount of such tax payable hereunder, equivalent to 90 per centum of the amount of such tax, to be allowed and deducted therefrom at the time settlement therefor is required, in such manner as shall be prescribed by the Commissioner of In-

> ternal Revenue. Such right or benefit of drawback shall apply to all coal sold or disposed of from and after the day of the producer's filing with the Commission his acceptance of said code in such form of agreement as the Commission may prescribe. No producer shall by reason of his acceptance of the code provided for in section 4 or of the drawback of taxes provided in section 3 of this Act be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producers."

Section 5 provides that the acceptance of the Code by producers shall be on forms provided by the Commission, such acceptances to be acknowledged before some official authorized to take acknowledgments. That section also provides that the membership of any coal producer in the Code, and his right to a drawback on the taxes levied under Section 3 may be revoked by the Commission in the manner therein provided for, upon proof that such member has wilfully failed or refused to observe the provisions of the Code.

Section 6 makes provision for a court review of the orders of the Commission and of the Labor Board, but upon such review the findings of the Commission or the Labor Board, as to facts, if supported by substantial evidence, are made conclusive.

Section 9 provides that those producers who refuse to accept and maintain membership in the Code shall not only be liable for the entire tax imposed by Sec-

tion 3, but shall also be subject to other Acts of Congress regulating industries and their labor relations or providing for codes of fair competition therein.

Subsection (e) of Part II of Section 4, in connection with Section 12, outlaws contracts for the sale of coal made prior to the effective date of the Act if the prices fixed in those contracts are below the minimum prices enumerated in those provisions of the Act.

Section 14 still further penalizes non-code-member producers by denying to them the right to sell coal to the United States or to any agency thereof, or to any contractor for use in carrying out any contract with the United States or with any agency thereof.

Section 15 provides:

> "If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby."

Section 20 provides that Section 3 shall become effective on the first day of the third calendar month after the enactment of the Act or as soon thereafter as the Commission shall have formulated the Code and forms of acceptance for membership therein.

IV.

STATEMENT OF THE CASE.

Pleadings.

Petitioners are engaged in operating bituminous coal mines in Harlan County, Kentucky; respondent is the Collector of Internal Revenue for the District of Kentucky.

The relief sought in this action was an injunction to prevent the collection from the petitioners, who do not desire to accept the Code provided for in the Act, of the so-called tax imposed by Section 3 upon those bituminous coal producers who refuse to accept and operate under the Code.

The action was filed on September 10, 1935, before the Commission provided for in the Act had been appointed, and of course before the Code had been formulated and promulgated. The Commission was appointed and the Code formulated and promulgated shortly after the bill was filed. The petitioners contend in their bill that the Congress of the United States, under the Constitution, has no jurisdiction over and no power to legislate upon the matters required by Section 4 of the Act to be embraced in the Bituminous Coal Code therein required to be formulated; and particularly that the fixing of minimum and maximum prices of coal free on board transportation facilities at the mines as therein authorized, the regulation and control of contracts for the sale of coal and

the regulation of the relations between producers and their employees in the production of coal, including the regulation and fixing of wages and hours of service, as authorized in Part III of Section 4, are each and all matters not within the competency of Congress under the Constitution of the United States and that the attempted regulation by Congress of the above enumerated matters is violative of the due process clause of the Fifth Amendment to the Constitution of the United States and of the rights of the states and the people reserved to them by the Tenth Amendment.

It is further alleged that Section 4 is unconstitutional for the reason that it attempts to delegate legislative power.

It is charged that Sections 3 and 9 of the Act, insofar as they purport to impose upon those producers of bituminous coal who refuse to accept and operate under the provisions of Section 4 and of the Code formulated thereunder a monthly tax equal to 15 per cent of the sale price at the mine of the coal produced by them each month, while exempting producers who accept the Code from 90 per cent of such tax, is not a good faith exercise of the taxing power conferred upon Congress by the Constitution, but an unconstitutional attempt on the part of Congress under the guise of taxation to coerce acceptance and compliance with the Code and to punish those producers who are unwilling to surrender their constitutional right to conduct their business free of unconstitutional interference and reg-

ulation by Congress; that the imposition of such a penalty would operate to deprive petitioners of their property without due process of law in violation of the Fifth Amendment and is an unconstitutional invasion of the rights reserved to the states and to the people by the Tenth Amendment.

The bill contains many allegations intended to show such unusual and extraordinary circumstances as to render inapplicable Section 3224 Revised Statutes, (Section 1543, Title 26, U. S. C. A., 1935 Compilation; Section 154, Title 26, U. S. C. A., Old Compilation), which prohibits suits for the purpose of enjoining the assessment or collection of a tax. These allegations, summarized, disclose that, whereas the alleged tax exacted of non-code-member producers is 15 per cent of the gross sale price of the coal produced each month, the net profit realized and realizable by each of the petitioners, as well as by the industry generally, does not exceed 5 per cent of such gross sale price; that because of this fact, petitioners will sustain a tremendous loss each month should they be compelled to pay the tax as a penalty for refusing to accept and operate under the Code; that the entire capital and surplus of each petitioner is invested in its mining plant, equipment and necessary working capital, and the necessary and deliberately intended result of the imposition of the so-called tax is to leave them no choice, if they refuse to operate under the provisions of Section 4 and of the Code formulated thereunder, except to close down their operations, which can only be done at a

heavy monthly expense in the way of upkeep or else to operate at such a disastrous monthly loss as to quickly render them insolvent and unable to operate; in either of which events the value of their property and their investment therein would be destroyed; that all of the petitioners, except three, operate on leaseholds and that their mining plants, together with all of their equipment, are located upon land owned by their respective landlords; that by the terms of their respective leases, it is provided that in event the total coal mined in any one year is not sufficient at the fixed royalty rate to produce the minimum royalty stipulated in their respective leases, then in addition to the royalty paid on the coal actually mined, the lessee must pay such further sum as is necessary to bring the total royalty or rental payments for the particular year involved up to the stipulated annual minimum royalty; that the landlord has a first lien upon all the improvements placed upon the premises by the lessee and upon all mining equipment used in the operation of its mine to secure him in the payment of the stipulated royalty, and there is reserved to the landlord the right to forfeit the lease if the lessee remains in default in the payment of royalty beyond the time stipulated in its lease; that under the terms of the respective leases the lessee may mortgage its plant and equipment only with the consent of the landlord and subject to his prior lien for unpaid royalties, and that this fact, together with the further fact that their operating statements would disclose that they could not operate their mines and pay the monthly penalties

exacted by the Act without sustaining a tremendous loss each month, makes it impossible, as a practical matter, to borrow money upon the security of their property with which to pay such penalties; that even if they could borrow money on the security of their property for such purpose it could be repaid only through a sacrificial sale of same under foreclosure; that therefore the only practical way by which they could possibly raise money with which to pay the penalties imposed over any substantial period of time, would be through a sale of their property; that should they attempt to operate and pay the monthly penalties as they accrue and thereafter promptly apply for a refund of such payments, and should the Commissioner of Internal Revenue promptly deny such application, a suit for the recovery thereof could not be filed and an authoritative adjudication of their rights had until the latter part of 1936, and in the meanwhile their capital and surplus will have been consumed, their property sacrificed and they will have been rendered bankrupt.

It is further alleged that Congress has made no appropriation out of which to pay any judgment for refund which might be ultimately secured, and it is, therefore, entirely uncertain when they would be reimbursed on account of the so-called taxes exacted of them, should they secure judgment for same.

It is alleged that for all of these reasons the provisions of the Federal Statutes authorizing a suit for the recovery of taxes illegally collected does not afford the petitioners a full, complete and adequate remedy

at law, and to compel them to resort to such a remedy in this case would operate to deprive them of their property without due process of law; that the respondent has announced his intention to collect from the petitioners the so-called taxes as they mature and upon their failure or refusal to pay to subject their property to the payment of the so-called taxes; that if they attempt to operate without paying the illegal exactions imposed upon them by the Act, unless protected by a court of equity, their property will be sold to satisfy such illegal exactions and they will each be subject to the imposition of a fine of not exceeding $10,000.00, and the officers in charge of their business to such a fine or imprisonment for twelve months or to both such fine and imprisonment.

In an amended bill (R. 26-28), petitioners show that substantially all the bituminous coal produced in the United States, including their own production, is sold f. o. b. railroad cars at the mine and that a substantial part of this production, including their own production, is sold to customers living in the same state in which the coal is produced, and that substantially all the men employed by each of them in connection with their mining operations are employed in the production of coal with no duties whatever to perform in connection with the sale of the product after it is mined.

A second amended bill (R. 31-33) alleges that each of the petitioners, with the exception of Kentucky King Coal Company, at the time of the approval of the Act, had outstanding written contracts for the sale

of coal which are outlawed under the provisions of Sections 4 and 12 of the Act.

The amended bills were controverted of record (R. 34), and an answer filed to the original bill (R. 16-24). The answer denies many of the allegations of the bill, pleads lack of equity therein, that the action was premature and can not be maintained because of the provisions of Section 3224 of the Revised Statutes, and in paragraph II affirmatively pleads the national extent and importance of the bituminous coal industry, its alleged direct relation to interstate commerce, the economic distress of the industry, the hearings conducted by Congress from time to time concerning the conditions in the industry, and the alleged burdens and restraints upon, and the interruptions to, interstate commerce resulting from the condition of the industry and asserting the power of Congress to regulate both the producing and selling end of the business. This paragraph of the answer also shows that substantially 15 per cent of the total annual production of bituminous coal in the United States is sold in the states where produced. Paragraph 3 of the answer pleads that petitioners are not entitled to maintain the action for the alleged reason that under Section 3 of the Act, without waiving any of their constitutional rights, they can join the Code and thus avoid the infliction of penalties in the form of taxes imposed upon non-code members.

Evidence.

The petitioners introduced evidence partly by oral testimony and partly by stipulation to sustain the jurisdictional allegations of the bill; to show the entire intrastate character of the production end of their business; to show that a substantial part of the selling end of their business is intrastate commerce, and to sustain the allegations of the bill as to the existence of such extraordinary and unusual conditions as to render Section 3224 Revised Statutes (Section 1543, Title 26 U. S. C. A., 1935 Compilation), inapplicable as to each of them (R. 89-121).

The only proof offered by respondent (R. 123-215) was for the purpose of sustaining the allegations of paragraph II of the answer. An objection to this testimony was sustained, but same was made a part of the record as an avowal (R. 37). The trial judge, however, in his opinion, took judicial notice of substantially all of the matters covered by the evidence offered by respondent.

Rulings of the District Court.

The District Court delivered a written opinion (R. 38-80), holding that Section 3224 Revised Statutes (Section 1543, Title 26 U. S. C. A., 1935 Compilation) is inapplicable and that, therefore, petitioners were entitled to maintain the action; that same was not premature; that the Act was not subject to the constitutional objections urged by the petitioners, but

valid in its entirety, and that while Section 3 of the Act to the extent that it levies a monthly exaction equal to 13½ per cent of the sale price at the mine of the coal sold by them upon those producers who do not accept the provisions of the Code, while exempting therefrom those producers who do accept the Code, is not a revenue provision, it is a valid exercise of the power of Congress to impose penalties for the purpose of coercing compliance with the regulations of the Code. A decree was entered in accordance with that opinion (R. 85), but the respondent was enjoined, pending the final determination of the cause on appeal, from collecting from the petitioners or any of them, the 15 per cent tax during that time, upon condition that each of the petitioners would pay into Court, on or before the 10th day of each month, beginning with the 10th day of December, 1935, a sum equal to 1½ per cent of the gross sale price at the mine of the coal sold by them during the previous month, beginning with the month of November, 1935, and a further sum equal to 1 per cent of each of such payments to cover the Clerk's fees for receiving and paying out money, the 1½ per cent to be held by the Clerk subject to the final outcome of this litigation and to the further order of the Court. The Court's finding of facts (R. 81-85), is substantially in accord with the allegations of the bill as amended and with the evidence offered in support thereof.

V.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

The errors assigned (R. 220-222) are directed solely to the rulings of the Court holding the Act constitutional, and to those necessarily flowing from such rulings.

In this brief the only assigned errors we shall rely upon are those directed to the rulings of the Court on the constitutionality of the Act.

We are not advised as to whether respondent on this hearing will urge that petitioners have any right to maintain the action for the reasons set out in the answer, but inasmuch as these questions are in the record we shall also briefly discuss them.

VI.

SUMMARY OF ARGUMENT.

1. Though apparently peremptory in its terms, Section 3224 Revised Statutes does not prevent the granting of an injunction against the collection of a tax where the circumstances are so extraordinary and exceptional that the ordinary statutory procedure of suing for a refund of taxes after payment will not afford the taxpayer a full, complete and adequate remedy. The facts alleged and proved in this case, without contradiction, and found to exist by the Court, clearly demonstrate the inadequacy of the remedy afforded by refund proceedings.

2. An equitable proceeding for the purpose of securing injunctive protection against threatened injury is not premature if the injury threatened is certain to occur, though not immediately, and although no right has yet been violated. Such certainty of injury existed at the time of the institution of this action, and certainly exists now.

3. The fact that by accepting the Code petitioners could avoid the payment of 90 per cent of the tax and not waive their right to test the constitutionality of any provision of the Code, does not prevent the maintenance of this action. This action challenges the constitutionality of the Act, and the power of the Commission to formulate and enforce the Code. Petitioners contend that they cannot be compelled to accept the Code. Certainly, therefore, they are not required to accept it in order to have it determined if they can be compelled to do so. The questions presented are purely judicial ones.

4. Congress has no power under either the Commerce clause or the taxation clause of the Constitution to regulate the production of bituminous coal or the intrastate sale thereof. Each of these phases of the coal business are exclusively within State control.

5. In this Act Congress has undertaken to regulate the entire business of bituminous coal mining under the pretext of executing its power to levy taxes and to regulate interstate commerce. The regulations cover not only the production of coal but the sale thereof, whether made in interstate commerce or intra-

state commerce and as these regulations are not separable the entire Act must fall, even though it be conceded that Congress has the power to regulate the prices of coal sold in interstate commerce.

6. Even if separable, the provisions for the fixing of the price of coal sold in interstate commerce are invalid; first, because they are not a good faith exercise of the power of Congress to regulate interstate commerce and second, because the coal business is not one in which prices can be fixed.

7. It is clear that Section 3 is not a revenue measure, but one to coerce acceptance of the Code. As the regulations required to be incorporated in the Code are beyond the power of Congress, of course the taxing power can not be used to compel acceptance.

8. The Act improperly delegates legislative power as to the fixing of prices, wages and hours of service.

VII.

ARGUMENT.

Right to Maintain Action.

POINT 1.

Section 3224, Revised Statutes, is Inapplicable.

We do not question the binding effect of Section 3224 Revised Statutes upon courts of equity in the ordinary case involving the constitutionality of a federal tax. The statute, which provides that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," is merely

declaratory of what had been the well-established equity rule in the federal courts before its enactment in 1867. *Miller* v. *Standard Nut Margarine Co.,* 284 U. S. 498, 508. Where it appears, however, that in addition to the illegality of an exaction in the guise of a tax:

> "* * * there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the Collector." *Miller* v. *Standard Nut Margarine Co., supra.*

See also: *Hill* v. *Wallace,* 259 U. S. 44.

This rule grows out of the principle that tax statutes can not be so applied or enforced as to deny the taxpayer due process. In the ordinary case the general statutory remedy (Section 3226, Revised Statutes, Section 1672, Title 26, U. S. C. A., 1935 Compilation) available to a taxpayer, by which he may sue for the recovery of the tax after its payment, is adequate, and affords due process. If the particular remedy provided for the recovery of taxes after their illegal collection is doubtful or inadequate, however, a Court of equity is not bound by Section 3224. Apparently, this was the reason which prompted this Court to grant a stay against the collection of the processing taxes involved in the case of *Rickert Rice Mills, Inc.,* v. *Fontenot,* No. 577, October Term, 1935, and which was finally disposed of on January 13, 1936.

This Court has never undertaken, but on the contrary has declined, to lay down any definite rule by which it can be determined when the remedy afforded

by Section 3226, Revised Statutes, or similar statutes, is so inadequate as to render Section 3224 inapplicable. It is clear from the opinions that each case must be determined upon its own facts. We make no claim that mere hardship resulting from the payment of an unconstitutional tax is sufficient to render Section 3224 inapplicable. If however the exaction, as is the case here, is one which must be paid at frequently recurring intervals, and is so unreasonable in amount that it can not possibly be paid out of the earnings of the business upon which it is imposed, and if it is imposed for the deliberate purpose of coercing compliance with a prescribed course of action by destroying the business of him who refuses to submit to the prescribed course of action, and if it is reasonably clear that the business of a non-conforming taxpayer would be destroyed before he could obtain redress in a suit for refund, it would seem that there can be no doubt of the right of such non-conforming taxpayer to have the validity of the tax determined in advance of its payment. See: *Hill* v. *Wallace, supra; Miller* v. *Standard Nut Margarine Co., supra.*

All these elements exist in this case. Their existence was alleged in the bill, proven as to each petitioner, and found to exist by the Court (R. 62).

Respondent in the lower court leaned heavily on the case of *Bailey* v. *George,* 259 U. S. 16, in support of his contention that Section 3224 stands as an insuperable barrier to the maintenance of this action. That case, however, does not justify respondent's confidence in it. That case involved the correctness of

the action of the District Court which had granted a permanent injunction against the collection of the so-called tax imposed by the Child Labor Tax Law of February 24, 1919. In that case the bill merely alleged the assessment of the tax; that a claim for abatement thereof had been made and denied; that the Collector was about to distrain complainant's property and sell it in satisfaction of the tax; that the Act imposing the so-called tax was unconstitutional, and that

> "* * * Your petitioners have exhausted all legal remedies and it is necessary for them to be given equitable relief in the premises."

The Court pointed out that the above quoted language was merely a legal conclusion of the pleader, supported by no allegation of specific facts, and said:

> "In spite of their averment, the complainants did not exhaust all their legal remedies. They might have paid the amount assessed under protest and then brought suit against the Collector to recover the amount paid with interest. No fact is alleged which would prevent them from availing themselves of this form of remedy."

In that case there was no showing that the business and property of the complaining taxpayer would be destroyed by the exaction of the tax. There is such a showing in this case. In that case there was no showing that the remedy at law was not as full and complete as the equitable remedy sought. In this case there is such a showing. In fact, the showing made in this case conclusively establishes that the remedy at law is but a shadow.

POINT 2.

The Action Was Not Premature.

At the time this action was filed, as heretofore stated, the Bituminous Coal Commission had not been appointed, and, of course, the Code had not been formlated and promulgated. It was certain, however, that the Commission would be appointed and that the Code would be formulated. The President, by Section 2 of the Act, is mandatorily required to appoint such Commission, and by Subsection (c) of Part III of Section 4, to appoint the Bituminous Coal Labor Board. At the time the bill was filed the only uncertainty about these appointments was just when they would be made and the appointees. Neither was there any uncertainty about the formulation and promulgation of the Code. Section 4 mandatorily requires this to be done. The only uncertainty about this matter was when it would be done. There was no uncertainty about the exaction of the so-called tax from non-code member producers. The Act requires the exaction. The only uncertainty was just when the exaction would become effective. Section 20 of the Act provides that it shall become effective on the first day of the third calendar month after the enactment of the Act if the Code had been formulated and the form of acceptance for membership therein had been prepared at that time, and, if not, as soon as this was done. Therefore, by the terms of the Act the so-called tax became operative on the 1st day of November, 1935, or as soon thereafter as the Code had been formulated and the forms

of acceptance prepared. While by the terms of the Act (Section 3) each month's tax is not payable until the first business day of the second succeeding month after its accrual, yet pay day was certain to come.

In these circumstances, it can not be doubted that the injury feared by the petitioners was real, and certain to be inflicted. Such being the case, the action was not premature. *Pierce* v. *Society of Sisters of Holy Name,* 268 U. S. 510; *Pennsylvania* v. *West Virginia,* 262 U. S. 553; *City Bank Farmers Trust Co.* v. *Schnader,* 291 U. S. 24; *Swift & Co.* v. *United States,* 276 U. S. 311. As a matter of fact, the Code was formulated and the forms of acceptance prepared prior to the 1st day of November, 1935, and we assume this Court will take judicial notice of that fact. Therefore, the so-called tax feature of the Act has been effective since the 1st day of November, 1935. Payment of the November exaction was due January 2, 1936, and of the December exaction on February 1, 1936. Hence, assuming that the action was prematurely filed, to now require its dismissal and compel petitioners to bring a new action would sacrifice substance to form. See: *City Bank Farmers Trust Co.* v. *Schnader,* 291 U. S. 24, 34.

POINT 3.

The Fact that Section 3 Provides that Producers by Accepting the Code are Not "Precluded or Estopped from Contesting the Constitutionality of Any Provision of Said Code or Its Validity as Applicable to Such Producer," Does Not Prevent the Maintenance of this Action.

This proposition seems perfectly obvious. The questions raised by the petitioners are judicial ones and they are for the courts, not for administrative officers. If the petitioners were not contesting the power of Congress to provide for the regulations here complained of and for their enforcement, but were only objecting to the manner in which the administrative officers created by the Act were exercising the power conferred upon them, then, of course, the case would be one calling for the exhaustion of administrative remedies before resort to the courts; but no such situation exists here. The purpose of this action is to prohibit the collection from petitioners of the so-called tax imposed by Section 3. Petitioners deny the constitutional power of the respondent to collect same for the reason that its purpose is to coerce compliance with regulations which we contend Congress has no power to make. If petitioners join the Code and observe it they are not required to pay that part of the so-called tax which is imposed as a penalty upon non-members. Therefore, so long as they continue members they can never have judicially determined the right of Congress to impose upon them the penalty attempted to be inflicted upon non-members. The inevitable result of respondent's contention is that in order for

petitioners to have determined their constitutional liability for the tax imposed upon non-Code members they must join the Code and then, on account of refusing to comply with its terms, be expelled from membership. We submit that equitable jurisdiction cannot be made to depend upon any such futile procedure.

Constitutionality of the Act.

POINT 1.

Congress Has No Power Under Either the Commerce or Taxation Clause of the Constitution to Regulate Production of Bituminous Coal.

The business of coal mining naturally divides itself into two distinct activities, one, the production or mining of coal, and the other, the marketing or selling of same.

Beyond question that part of Section 4, entitled "Part III—Labor Relations," deals exclusively with the production end of the bituminous coal industry. All the regulations therein provided for have to do with the relations between employees engaged in the mining of coal and their employer as a producer of coal. Coal mining is just as much a local activity as is farming or manufacture. It is not commerce of any kind. It precedes commerce. It consists in the production and preparation for market of an article of commerce and it has never been thought that the National Government has power to regulate such activities through the exertion of either the commerce power

or the taxing power of Congress conferred by the Constitution. The recent case of *Schecter Poultry Corporation* v. *United States,* 295 U. S. 495, announced no new principle on this subject. This Court has consistently held that manufacture, production and preparation for market of articles of commerce are purely local activities and beyond the control of the National Government. *United States* v. *E. C. Knight Co.,* 156 U. S. 1; *Kidd* v. *Pearson,* 128 U. S. 1; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 129; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165; *Federal Compress & Warehouse Co.* v. *McLean,* 291 U. S. 17, each holding that manufacture is not commerce and not within the regulatory power of Congress. *Delaware, Lackawanna & Western Railroad Co.* v. *Yurkonis,* 238 U. S. 439; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *United Mine Workers of America* v. *Coronado Coal Co.,* 259 U. S. 344, each holding that coal mining is not interstate commerce. *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, holding that the mining of iron ore is not interstate commerce.

The fact that the greater part of the bituminous coal produced in the United States, including that produced by petitioners, at the time it is mined is intended for sale and shipment in interstate commerce, does not in the slightest change the purely local character of the business of producing coal or transform this activity into commerce, either interstate or intrastate in character.

In the case of *Kidd* v. *Pearson,* 128 U. S. 1, 21, this

Court, in discussing the contention that the manufacture of goods intended for interstate shipment brings such manufacture under the control of Congress under the commerce clause, said:

> "If it be held that the term includes the regulation of all such manufacturers as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are and must be, local in all the details of their successful management. * * * The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities,

could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed, and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question."

In the case of *United States* v. *Knight,* 156 U. S. 1, 13, the Court said:

> "The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."

In *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 259, the Court had this to say with reference to the suggestion that Congress has the power to regulate the production or manufacture of articles intended for sale and shipment into other States:

> "The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty of exportation of a product or article from a State determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of

> California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production."

In *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, it was claimed that inasmuch as the agreed facts disclosed that substantially all the ore produced was mined with the expectation that it would be, and actually was, immediately loaded on cars and shipped into other States to satisfy existing contracts, the mining of the ore constituted interstate commerce and that therefore the State was without power to impose a tax upon such mining. In response to this contention the Court said, page 178:

> "Plainly the facts do not support the contention. Mining is not interstate commerce, but, like manufacturing, is a local business subject to local regulation and taxation. * * * Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce."

In *Hammer* v. *Dagenhart,* 247 U. S. 251, 272, the Court said:

"Commerce 'consists of intercourse and traffic * * * and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.' The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. * * *

"Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation.

" 'When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state.'

"If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States."

In the case of *Utah Power & Light Company* v. *Pfost,* 286 U. S. 165, the Court pointed out the line of demarcation between the manufacture of electrical power and its substantially instantaneous transmission in interstate commerce. The Court said (p. 181):

"We are satisfied, upon a consideration of the whole case, that the process of generation is

> as essentially local as though electrical energy were a physical thing; and to that situation we must apply, as controlling, the general rule that commerce does not begin until manufacture is finished, and hence the commerce clause of the Constitution does not prevent the state from exercising exclusive control over the manufacture. * * *
>
> "Without regard to the apparent continuity of the movement, appellant, in effect, is engaged in two activities, not in one only. So far as it produces electrical energy in Idaho, its business is purely intrastate, subject to state taxation and control. In transmitting the product across the state line into Utah, appellant is engaged in interstate commerce, and state legislation in respect thereof is subject to the paramount authority of the commerce clause of the federal Constitution. The situation does not differ in principle from that considered by this court in *Oliver Iron Co.* v. *Lord,* 262 U. S. 172."

This case fully sustains our contention that the production end of the mining business, for the purpose of determining federal power over same, is as separate and distinct from the selling end thereof as if they were conducted by entirely different persons; and each of the foregoing cases makes it perfectly clear that Congress has no power under the commerce clause of the Constitution to regulate the production end of the bituminous coal industry.

In the enactment of this Act Congress apparently recognized the fact that coal mining is not interstate commerce. Its relation to and effect upon interstate commerce was depended upon by Congress to justify

its regulation under the commerce clause and doubtless such will be the contention here. Of course the mining of coal affects interstate commerce, but it is an indirect effect, no different from the indirect effect upon such commerce of the growing of wheat, corn, tobacco or cotton, the raising of live stock or the manufacture of goods. The contention is so effectively disposed of by this Court in the case of *Schecter Poultry Corporation* v. *United States,* 295 U. S. 495, 546, that we are content to rely upon that case as a complete answer to this contention.

Both on reason and authority it is equally clear that Congress is without power to regulate the production of coal through the pretended exertion of its power to tax for the general welfare. The reason for denying the power of Congress to regulate production is that the activity is exclusively within State control. Of course, being exclusively within State control, its regulation is as much beyond the power of Congress under the taxing clause as under the commerce clause.

The attempt of Congress to regulate production through the pretended exertion of the taxing power was condemned by this Court in the case of *Bailey* v. *Drexel Furniture Company* (Child Labor Tax Case), 259 U. S. 20, and again in the very recent case of *United States* v. *Butler,* —— U. S. ——, 80 Law Ed. 287, in which it was held that the taxing power of Congress cannot be exerted to regulate or control the production of agricultural products. See also *Hill* v. *Wallace,* 259 U. S. 44.

Respondent's position is not helped by the conten-

tion that the bituminous coal industry is one of such vital importance to the nation that it is necessary to regulate same in the interest of national welfare. We recognize the fact that Congress has the power, under the constitution, to levy taxes for the general welfare of the United States, but the case of *United States* v. *Butler, supra,* disposes of any claim that this power authorizes Congress, through its exertion to regulate a matter exclusively within State control. If Congress can regulate the production of coal through the exercise of the taxing power on the ground that such regulation is for the national welfare, it can also regulate the growing of agricultural products. Certainly the production of bituminous coal for fuel purposes, for which there are many substitutes, is of no greater national importance than the growing of food stuffs for which there are no substitutes. This Court has definitely said in the Butler case that national concern for the welfare of the farmer cannot justify the regulation of his business by Congress.

Therefore, we submit in all confidence: First, that the producing end of the coal business is not commerce nor does it so directly affect interstate commerce as to permit its regulation by Congress under the commerce clause. Second, that its regulation is a matter of exclusive State concern and therefore Congress can not regulate it under the claim of exerting its power to tax for the national welfare.

POINT 2.

Congress Has No Power to Regulate the Intrastate Marketing of Coal.

It was alleged and proven that approximately 14 per cent of all the bituminous coal produced in the United States is sold to customers living in the state where produced and that a substantial part of the production of each of the petitioners is sold to customers living in Kentucky, in which State the mine of each of them is located, and the Court so found (R. 82).

The Act (Section 4, Part III) undertakes to regulate the marketing of this coal including the prices at which and the contracts under which it is sold. Congress has no more power to do this than it has to regulate the producing end of the business of petitioners. The mere fact that petitioners in the conduct of their business sell coal in both interstate and intrastate commerce does not authorize Congressional regulation of the intrastate part of that business. The sale to each customer is an individual transaction and intrastate sales no more directly affect interstate commerce than does the production of coal. The fact that one who is engaged in the intrastate sale of an article of commerce also engages in the interstate sale thereof, cannot possibly confer upon Congress the power to regulate the intrastate sales thereof. This proposition is so obvious that it seems hardly necessary to cite authority, but the language of this Court in the case of *Howard* v. *I. C. Railroad Co.* (First Employers' Liability Cases), 207 U. S. 463, 502, is such a conclu-

sive demonstration of this proposition that we venture to quote it:

> "It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures."

The Shreveport case (*Houston, E. & W. T. R. Co. v. United States*), 234 U. S. 342, and cases bottomed

upon the reasoning of that case, have no application to the question here under discussion. In that case the Court was dealing with the power of the National Government to regulate intrastate rates on a railroad line which was the common instrumentality of both interstate and intrastate transportation. It was held that Congress, under its power to regulate an instrumentality of interstate transportation necessarily has the power to exercise such control over the intrastate rates charged by that instrumentality as may be deemed necessary to enable that instrumentality to earn enough to properly perform its functions as an interstate carrier, without throwing an undue burden on interstate traffic because of inadequate intrastate rates, and to prevent unjust discrimination against the interstate traffic moving over this common instrumentality of interstate and intrastate transportation. That case did not hold, and so far as we are advised, it has never been held, that Congress, under its power to regulate interstate railroads, has the power to regulate an isolated intrastate line of a railroad company having no physical connection with interstate lines, merely because the owner of the intrastate line also operates an interstate line of transportation.

The Schecter case, it seems to us, fully answers any contention which may be advanced that intrastate sales of coal so directly affect interstate sales as to bring the former within the orbit of Congressional power. Of course, if the regulation of intrastate sales is not within the power of Congress, but exclusively

within the power of the states, then the taxing power can not be used to effect such regulation for the same reason that it can not be used to regulate production.

POINT 3.

If It be Conceded that Congress, Within Proper Limits, Has the Power to Regulate the Business of Selling Coal in Interstate Commerce this Entire Act, Including the Provisions Dealing with Interstate Sales, Must Fall Because of the Inseparability of Its Provisions.

While Congress has no power to regulate the production of coal or the intrastate sale thereof, this Act undertakes to regulate the entire business of bituminous coal mining, including the two activities just mentioned; and it is clear from the Act that it was the judgment of Congress that the regulation of every phase of the business is essential to attain the ends aimed at in the legislation.

Section 1, after declaring that the business of the mining of bituminous coal and its distribution by the producers thereof is affected with a national public interest, then proceeds to declare:

> "That the service of bituminous coal in relation to the industrial activities, the transportation facilities, the health and comfort of the people of the United States; the conservation of bituminous coal deposits in the United States by controlled production and economical mining and marketing; the maintenance of just and rational relations between the public, owners, producers and employees; the right of the public to constant and ample supplies of coal at reasonable prices; and

the general welfare of the Nation require that the bituminous coal industry be regulated as herein provided."

Thus we find Congress not only declaring the necessity for regulating every phase of the industry but its purpose to do so. This declared intention of Congress to regulate every phase of the industry is three times thereafter reiterated in Section 1. In the first part of the second paragraph of that Section we find this language:

> "It is further recognized and declared that all production of bituminous coal and distribution by the producers thereof bear upon the directly affect its interstate commerce and render regulation of all such production and distribution imperative for the protection of such commerce and the national public service of bituminous coal and the normal governmental revenues derivable from such industry; * * *"

Again it is declared in the same paragraph:

> "That the excessive facilities for the production of bituminous coal and the overexpansion of the industry have led to practices and methods of production, distribution, and marketing of such coal that waste such coal resources of the Nation, disorganize the interstate commerce in such coal and portend the destruction of the industry itself, and burden and obstruct the interstate commerce in such coal, to the end that control of such production and regulation of the prices realized by the producers thereof are necessary to promote its interstate commerce, remove burdens and ob-

structions therefrom, and protect the national public interest therein."

Finally in the same paragraph of Section 1 it is declared:

> "That practices prevailing in the production of bituminous coal directly affect its interstate commerce and require regulation for the protection of that commerce, and that the right of mine workers to organize and collectively bargain for wages, hours of labor, and conditions of employment should be guaranteed in order to prevent constant wage cutting and the establishment of disparate labor costs detrimental to fair competition in the interstate marketing of bituminous coal, and in order to avoid those obstructions to its interstate commerce that recur in the industrial disputes over labor relations at the mines."

Thus four times in the first Section of the Act Congress declared the necessity for regulating not only all sales of coal but the *production* thereof and its intention in the legislation, which it was enacting, to regulate all of these activities. The repeated declaration of Congress of the necessity for regulating every phase of the bituminous coal industry to secure the desired result is conclusive evidence, it seems to us, that regulations of less scope would not have been acceptable to Congress.

Section 4 prescribes the regulations in detail which Congress in Section 1 declared its intention to enact. These prescribed regulations are preceded by this language:

> "For the purpose of carrying out the declared policy of this Act, the Code shall contain the following conditions, provisions, and obligations which will tend to regulate interstate commerce in bituminous coal and transactions directly affecting interstate commerce in bituminous coal."

And again preceding the enumeration of those provisions required to be incorporated in the Code dealing with the production end of the industry (Section 4, Part III—Labor Relations) we find the following language:

> "To effectuate the purposes of this Act, the district boards and code members shall accept the following conditions which shall be contained in said code."

The regulations required by Section 4 to be embodied in the Code are as all inclusive as Congress declared in Section 1 it was intended they should be. They cover not only the marketing end of the business but the production end as well; not only the interstate part of the marketing end of the business but the intrastate part thereof as well. So we have in this Act, first a declaration on the part of Congress, four times repeated, of the necessity for regulating every phase of bituminous coal mining in order to effectuate the desired end; second, the declaration of Congress, four times repeated, of its intention to make the regulations as broad as the declared necessity therefor; third, a declaration preceding the regulations that they were intended to carry out the declared policy of the Act; fourth, regulations which, in their scope,

cover the entire field which Congress declared its intention to cover and the necessity for covering. Therefore, notwithstanding the separability clause found in Section 15 of the Act, the regulations dealing with the interstate sale of coal, even if within the power of Congress, must fall because it is plain that they are a definitely intended part of an integrated scheme of regulation of the bituminous coal industry, many material features of such system of regulation being undoubtedly beyond the power of Congress; *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 241; *Hill* v. *Wallace,* 259 U. S. 44, 70; *Railroad Retirement Board* v. *Alton Railroad Co.,* 295 U. S. 330, 361, 362.

It was suggested on argument in the Court below that that part of Section 4, entitled "Part III—Labor Relations," and which undertakes to regulate the producing end of the industry, is so distinctly set apart in the Act from that part of Section 4, entitled "Part II—Marketing," that the former can be stricken out of the Act without destroying the validity of the latter, thus leaving in force the regulations dealing with the marketing end of the industry. We have endeavored to show that the regulations dealing with the production end of the industry are an inseparable part of the whole system of regulation set up by Congress, but if separable, the regulations dealing with marketing must fall.

The provisions dealing with the fixing of prices at which coal is sold and contracts for the sale of coal make no distinction between interstate and intrastate sales. They cover both character of sales and it is

plain that it was the intention of Congress that they should do so. The language of this Court in the case of Howard v. I. C. Railroad Co. (First Employers' Liability Cases) 207 U. S. 463, 501, is peculiarly applicable to this feature of the case. The Court said:

> "As the act before us by its terms relates to every common carrier engaged in interstate commerce and to any of the employes of every such carrier, thereby regulating every relation of a carrier engaged in interstate commerce with its servants and of such servants among themselves, we are unable to say that the statute would have been enacted had its provisions been restricted to the limited relations of that character which it was within the power of Congress to regulate. On this subject the opinion in the *Trade-mark Cases,* 100 U. S. 82, where an act of Congress concerning trade-marks was held to be unconstitutional, because too broad in its scope, is pertinent and instructive. The court said (p. 99):
>
> " 'If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the Act of Congress, and in others under state law.' "

So in this case if the Court should rewrite the Act so as to confine the fixing of prices and the regulation of contracts to sales made in interstate commerce we

would have an Act plainly never intended to be passed by Congress. Furthermore, when we consider that 14 per cent of the coal produced in the United States is sold within the State where produced it becomes at once apparent that price-fixing confined to interstate sales will be entirely ineffective in accomplishing the declared purpose of Congress to stabilize the industry.

POINT 4.

The Regulations Providing for Fixing Prices of Coal Sold in Interstate Commerce and for the Policing of Contracts in Connection Therewith are Invalid, Even if Separable.

Under the authority of such cases as *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282; *Pennsylvania Railroad Co.* v. *Clark Bros. Coal Mining Co.,* 238 U. S. 456; *Flanagan* v. *Federal Coal Co.,* 267 U. S. 222; *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189, it is clear that, to the extent petitioners sell coal to purchasers in other States, they are engaged in interstate commerce, even though the sale is effected at the mine and petitioners' connection with the coal ends when loaded in railroad cars at the mine. Nevertheless, if separable, we think those regulations are invalid: First, because they have no reasonable relation to any of the purposes or objects which Congress may take into consideration in exercising its power to regulate interstate commerce, but, on the contrary, as we have heretofore pointed out, their real purpose is to regulate matters not within the competency of Congress; and, second, assuming that under its power to regulate interstate commerce Congress has the power, in a

proper case, to fix the prices and regulate contracts with reference to the sale of articles in interstate commerce, it has no such power with reference to bituminous coal, as the business of producing and selling bituminous coal is not one so affected with a public interest as to authorize price-fixing and the regulation of contracts in respect thereto by Congress.

These two propositions will be discussed in the order stated.

1. In addition to what we have already said as to the purpose of this Act to regulate matters not committed to the control of Congress, we desire very briefly to call the attention of the Court to some other provisions of the Act which clearly show that even the regulation of prices of coal sold in interstate commerce was designed to regulate the producing end of the industry, and particularly the labor relations between the producer and his employees.

In that part of Section 4, entitled "Part II—Marketing," Congress again clearly discloses the object it had in mind in providing for the fixing of minimum prices. It is there declared:

> "In order to sustain the stabilization of wages, working conditions, and maximum hours of labor, said prices shall be established so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated 'Minimum-price area table,' equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area."

Congress has thus declared that the dominant purpose in the fixing of minimum prices was *the stabilization of wages and working conditions in the production end of the business.* Hence, it seems entirely clear that in fixing minimum prices Congress was not attempting in good faith to regulate the interstate traffic in coal, but to regulate the production thereof.

Part III of Section 4, dealing with labor relations, was designed to bring about uniformity and stabilization of wages, working hours and conditions, through collective bargaining; and it is clear that the establishment of minimum prices was for the primary purpose of enabling each producer to pay the minimum wages and observe the hours and working conditions thus collectively bargained for.

2. It can not be contended that Congress has any independent power to fix the prices at which articles of commerce are sold, or to regulate contracts with reference thereto. If the power exists, it is merely incidental to the exercise of its power to regulate interstate commerce. The power to regulate private business flows from the police power. Inasmuch as Congress has no police power in the respective States, it can attain the purposes which ordinarily call into play the exercise of the police power only as an incident to the legitimate exercise of some one or more of its granted powers. Therefore, if in the exercise of its power to regulate interstate commerce Congress seeks incidentally to promote the general welfare, through the fixing of prices of an article of commerce, certainly it can do so only if the fixing of such prices

is permissible in the independent exercise of the police power. Congress cannot, in the regulation of interstate commerce, incidentally fix prices, unless such price fixing would be a legitimate exercise of the police power by a legislative body possessing that power.

We think it is thoroughly settled that the legislative department is without power to fix either prices or wages, except in respect of those businesses affected with a public interest. The question has been many times before this Court, and in each case the problem was to determine if the particular business was one affected with a public interest; and this is always a question for the Court. *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522; *Tyson & Brother* v. *Banton,* 273 U. S. 418; *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1; *Ribnik* v. *McBride,* 277 U. S. 350; *Williams* v. *Standard Oil Co.,* 278 U. S. 235; *Adkins* v. *Children's Hospital of the District of Columbia,* 261 U. S. 525; *Nebbia* v. *New York,* 291 U. S. 502.

Probably the most recent and satisfactory definition of the phrase "affected with a public interest" is found in the case of *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 239. There the Court said:

> "As applied in particular intances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby in effect *granted* to the public. * * *

> Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance."

In the case of *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522, involving the constitutionality of the Industrial Relations Act of Kansas, the Court said (p. 537):

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a Colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."

In *Tyson & Brother* v. *Banton,* 273 U. S. 418, there was involved the constitutionality of an Act of New York, which declared that the price of admissions to theaters, etc., is a matter affected with a public interest and subject to State supervision, in order to safeguard the public against fraud, extortion, exorbitant rates and similar abuses, and forbidding, among

other things, the resale of any ticket or other evidence of the right to attend any theater or place of amusement, at a price in excess of fifty cents in advance of the price printed on the face of the ticket. It was held that the statute was, in effect, a fixing of the maximum price at which such tickets might be resold. It was held that the theater business, and the business of selling tickets thereto, was not one affected with a public interest. The Court said (p. 429):

> "In the endeavor to reach a correct conclusion in respect of this inquiry, it will be helpful, by way of preface, to state certain pertinent considerations. The first of these is that the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, * * * and, as such, within the protection of the due process of law clauses of the Fifth and Fourteenth Amendments. * * * The power to regulate property, services or business can be invoked only under special circumstances; and it does not follow that because the power may exist to regulate in some particulars it exists to regulate in others or in all.
>
> "The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business * * * but exists only where the business or the property involved has become 'affected with a public interest.' * * *
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> "A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of con-

> cern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right,' that synonym more nearly than any other expresses the sense in which it is to be understood.
>
> "The characterizations in some decisions of businesses as '*quasi* public,' * * * not 'strictly private' * * * and the like, while well enough for the purpose for which they were employed, namely, as a basis for upholding police regulations in respect of the conduct of particular businesses, can not be accepted as equivalents for the description 'affected with a public interest,' as that phrase is used in the decisions of this court as the basis for legislative regulation of prices. The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise can not always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on."

In *Ribnik* v. *McBride,* 277 U. S. 350, was involved an Act of the New Jersey Legislature, authorizing the fixing by a State agency of charges to be made by employment agencies. The Court recognized the power of the State to require a license and to regulate the business of such agencies, but held that the right to fix prices does not exist. It was said (p. 357):

> "An employment agency is essentially a private business. True, it deals with the public, but

so do the druggist, the butcher, the baker, the grocer, and the apartment or tenament house owner and the broker who acts as intermediary between such owner and his tenants. Of course, anything which substantially interferes with employment is a matter of public concern, but in the same sense that interference with the procurement of food and housing and fuel are of public concern. The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that 'public interest' which the law contemplates as the basis for legislative price control. * * * Under the decisions of this court it is no longer fairly open to question that, at least in the absence of a grave emergency, * * * the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power. And we perceive no reason for applying a different rule in the case of legislation controlling prices to be paid for services rendered in securing a place for an employee or an employee for a place."

It was urged in that case that price fixing was necessary to prevent extortion, fraud, imposition and discrimination, but in answer to this contention the Court said (p. 358):

"To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great, extent in connection with

> the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this court. These are grounds for regulation but not for price fixing, as we have already definitely decided. Tyson & Brother v. Banton, *supra.*"

In *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1, was involved the constitutionality of a statute of Minnesota, forbidding, under penalties, creameries to purchase cream at higher prices in one locality than in others, after due allowance for difference in the cost of transportation. The Court held the Act unconstitutional, as impairing the private right of freedom of contract guaranteed by the Fourteenth Amendment. The Act there involved did not make motive for such bidding an ingredient of the offense, as was the case in the State statute involved in the case of *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157.

In *Adkins* v. *Children's Hospital of the District of Columbia,* 261 U. S. 525, the Court was called on to pass upon the constitutionality of an Act of Congress creating a board with power to fix a minimum wage for women in all occupations within the District of Columbia, such wage to be sufficient, in the opinion of the board, to supply the necessary cost of living and to maintain women in good health and to protect their morals. This case is especially significant in view of the fact that under Clause 17, Section 8, Article 1, of the Constitution, Congress is given exclusive legislative power over the District of Columbia, and there-

fore possesses as full police power in legislating for the District as the States possess in their respective jurisdictions. Yet the Court held that Congress does not have the power to fix minimum wages for women in all occupations within the District of Columbia.

In *Williams* v. *Standard Oil Co.*, 278 U. S. 235, was involved the constitutionality of a law of Tennessee, which, among other things, provided for the fixing of prices at which gasoline could be sold in that State. The law was held invalid, for the reason that the business of selling gasoline is not so affected with a public interest as to authorize legislative fixing of prices. The Court said (p. 239):

> "It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest.' *Wolff Packing Co.* v. *Industrial Court,* 262 U. S. 522; *Tyson & Brother* v. *Banton, supra; Fairmont Co.* v. *Minnesota,* 274 U. S. 1; *Ribnik* v. *McBride,* 277 U. S. 350. Nothing is gained by reiterating the statement that the phrase is indefinite. By repeated decisions of this Court, beginning with *Munn* v. *Illinois,* 94 U. S. 113, that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property, or services, must be measured."

In response to the argument that the widespread use and enormous quantity of gasoline sold in the State of Tennessee, and the fact that it is indispensable in

carrying on commerce and other activities within the State clothed the business of selling gasoline with a public interest, the Court said (p. 240):

> "But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase 'affected with a public interest.' Those decisions control the present case."

New State Ice Co. v. *Liebmann,* 285 U. S. 262, involved the constitutionality of an Oklahoma statute, which provided that no person should engage in the business of manufacturing, selling and distributing ice without a license granted by the Corporation Commission, upon proof to that Commission of its necessity at the place desired. It was held that while the business of manufacturing, selling and distributing ice may be subjected to appropriate regulation in the interest of the public health, the business is not so clothed with a public interest as to authorize the Legislature to prohibit engaging in same without first having obtained the license referred to. The Court said (p. 277):

"It may be quite true that in Oklahoma ice is not only an article of prime necessity, but indispensable; but certainly not more so than food or clothing or the shelter of a home. And this court has definitely said that the production or sale of food or clothing can not be subjected to legislative regulation on the basis of a public use; and that the same is true in respect of the business of renting houses and apartments, except as to temporary measures to tide over great emergencies. See: *Tyson & Bro.* v. *Banton, supra,* pp. 437-438, and cases cited."

Cases Distinguished.

The case of *Munn* v. *Illinois,* 94 U. S. 113, upheld the power of the State of Illinois to fix prices charged by public grain elevators. That was one of the first cases in which this Court upheld the legislative power to fix prices in an ordinary business because same had become affected with a public interest. The case has often been relied upon, and sometimes misunderstood in its application. It was relied upon in the case of *Tyson & Brother* v. *Banton,* heretofore referred to, but this Court pointed out that that case and the other grain elevator cases following it were very different from the case then under consideration; that the grain elevators stood at the very gateways of commerce and took toll from all in their locality; that their business tended to a common charge and had therefore become affected with a public interest. This Court recognized that the Munn case contained some general language which might seem to justify the contention that it was

authority for the fixing of prices in other industries, but pointed out that this language must be considered in connection with the facts of the case in which it was used. It was said (p. 433):

> "There is some general language in the opinion which, superficially, might seem broad enough to cover cases like the present one. It was said, for example (p. 126): 'Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.' Literally, that would include all the large industries and some small ones; but in accordance with the well settled rule the words must be limited to the case under consideration. * * * Indeed, the language quoted is qualified immediately by a statement of the general rule, that—'When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.'
>
> "The significant requirement is that the property shall be devoted to a use in which the public has an interest, which simply means, as in terms it is expressed at page 130, that it shall be devoted to 'a public use.' Stated in another form, a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public."

Referring to the later elevator and warehouse cases, in which the right to fix prices was upheld, the Court said (p. 434):

> "The subsequent elevator and warehouse cases, *Budd* v. *New York,* 143 U. S. 517, and *Brass* v. *Stoeser,* 153 U. S. 391, while presenting conditions of less gravity, rest upon the authority of the *Munn* case. The differences among the three cases are in matters of degree."

German Alliance Insurance Co. v. *Lewis,* 233 U. S. 389, involved the validity of an Act of Kansas, authorizing the Superintendent of Insurance of that State to regulate and to fix the rates charged by fire insurance companies doing business in that state, but the case is no authority for fixing coal prices. That case was also considered by this Court in the case of *Tyson & Brother* v. *Banton, supra,* and it was pointed out that that case was decided upon the peculiar character of the insurance business, which more or less constitutes the administering of a common fund in which all insurants have an interest. The Court expressed the opinion that the language in that case may be regarded as giving warning that it should not be relied upon as authority for price fixing in other businesses. Referring to the case, the Court said (p. 436):

> "Answering the objection that the reasoning of the opinion would subject every act of human endeavor and the price of every article of human use to regulation, it was said (p. 415):
>
> " 'And both by the expression of the principle and the citation of the examples we have tried

> to confine our decision to the regulation of the business of insurance, it having become 'clothed with a public interest,' and therefore subject 'to be controlled by the public for the common good.'
>
> "This observation fairly may be regarded as a warning at least to be cautious about invoking the decision as a precedent for the determination of cases involving other kinds of business."

In the Tyson case, at page 434, this Court also remarked that the German Alliance Insurance case marked "the extreme limit to which this Court thus far has gone in sustaining price fixing legislation."

The cases of *Wilson* v. *New,* 243 U. S. 332, which involved the constitutionality of the Adamson Law, providing for the temporary fixing of wages of railroad employees, *Block* v. *Hirsh,* 256 U. S. 135, which involved an Act of Congress temporarily regulating rentals in the District of Columbia, and *Marcus Brown Holding Co.* v. *Feldman,* 256 U. S. 170, involving a New York statute, temporary in character, regulating rentals in that State, can not be regarded as authority to sustain the price fixing feature of the Act here under consideration. This Court in the Tyson case had this to say about the statutes involved in those cases (p. 437):

> "But in these cases the statutes involved were of a temporary character, to tide over grave emergencies, *Adkins* v. *Children's Hospital,* 261 U. S. 525, 551, 552, the emergency in the *New* case being of Nation-wide extent; it is clear that, in the opinion of this court, at least the business of renting houses and apartments is not so affected with

> a public interest as to justify legislative fixing of prices unless some great emergency exists. *Block* v. *Hirsh, supra,* p. 157; *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543, 548. And even with the emergency, the statutes 'went to the verge of the law.' *Penna. Coal Co.* v. *Mahon,* 260 U. S. 393, 416."

Furthermore, the statutes involved in the cases of *Wilson* v. *New* and *Block* v. *Hirsh* are distinguishable from the one here involved upon other grounds than the existence of a grave emergency and their temporary character. The Adamson Law, involved in *Wilson* v. *New,* was designed to prevent the Nation-wide paralysis of the interstate railroad transportation of the country—a business which has always been regarded as one affected with a public interest and subject to broad regulation by Congress, in the public interest, including the power to fix rates for transportation. The statute involved in the case of *Block* v. *Hirsh* applied only to the District of Columbia, in which District Congress, under the Constitution (Clause 17, Section 8, Article 1), has full legislative power, including the police power. The law was enacted in October, 1919, closely following the close of the World War, and before the abnormal housing conditions brought about as a result of the war had disappeared. There had been a tremendous influx of people to Washington, occasioned by the needs of the Government in the prosecution of the war. These people were, in large part, serving the Government in the war emergency, and the Act recited that its provisions were made necessary by emergencies growing

out of the war, resulting in rental conditions in the District dangerous to the public health and burdensome to public officers and employees, thereby embarrassing the Federal Government in the transaction of the public business. It is plain, therefore, that the legislation involved was justified both under the war power and under the police power possessed by Congress over the District.

The case of *Highland* v. *Russell Car & Snow Plow Co.,* 279 U. S. 253, is not helpful in the consideration of the problem we have here, as that case involved the validity of the Act of the President in fixing the prices of coal during the World War. Price fixing was upheld in that case as a valid exercise of the war power of the National Government.

Frost v. *Corporation Commission,* 278 U. S. 515, is distinguishable from the case here involved. In that case was involved the constitutionality of an Oklahoma Act, declaring that cotton gins were public utilities and providing that no one could engage in the ginning business without first securing a permit from a public commission empowered to regulate the business and to fix its rates and charges, as in the case of transportation and transmission companies. Neither in the court below nor in this Court was any challenge made to the declaration of the Legislature that cotton gins are public utilities. On the contrary, the opinion of this Court states (p. 519):

> "Both parties definitely concede the validity of these provisions, and, for present purposes at least, we accept that view.

> "It follows that the right to operate a gin and to collect tolls therefor, as provided by the Oklahoma statute, is not a mere license, but a franchise, granted by the state in consideration of the performance of a public service."

This case was exhaustively considered by the Court in the case of *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, heretofore referred to, and rejected as authority for treating the ice manufacturing business as one affected with a public interest. Referring to that case, the Court said (p. 273):

> "That case dealt with the business of operating a cotton gin. It was conceded that this was a business clothed with a public interest, and that the statute requiring a showing of public necessity as a condition precedent to the issue of a permit was valid. But the conditions which warranted the concession there are wholly wanting here. It long has been recognized that mills for the grinding of grain or performing similar services for all comers are devoted to a public use and subject to public control, whether they be operated by direct authority of the state or entirely upon individual initiative. At a very early period a majority of the states had adopted general acts authorizing the taking and flowage, *in invitum,* of lands for their erection and maintenance. In passing these acts, the attention of the legislatures no doubt was directed principally to grist mills; but some of the acts, either in precise terms or in their application, were extended to other kinds of mills. * * * The mills were usually operated by the use of water power, but this method of

> operation has been said not to be essential. * * * It was open to the proprietor of a mill to maintain it as a private mill for grinding his own grain, and thus free from legislative control; but if the proprietor assumed to serve the general public he thereby dedicated his mill to the public use and subjected it to such legislative control as was appropriate to that status. In such cases the mills were regarded as so necessary to the existence of the communities which they served as to justify the government in fostering and maintaining them, and imposing limitations upon their operation for the protection of the public. * * * The rule that mills whose services are open to all comers are clothed with a public interest was formulated in the light, and upon the basis, of historical usage, which had survived the limitations that otherwise might be imposed by the due process clause of the Fourteenth Amendment. While the cotton gin has no such background of ancient usage, and, as the opinion of Judge Phillips points out, there is always danger of our being led afield by relying over-much upon analogies, the analogy here is not without helpful significance."

It will be observed that in the *Liebmann* case the Court noted the fact that it was conceded in the *Frost* case that the ginning business was one affected with a public interest, but in the opinion the Court discussed the relation of the operator of a cotton gin to the public served by it, and apparently reached the conclusion that the concession in the Frost case was justified because of that relationship.

The cases of *Stafford* v. *Wallace,* 258 U. S. 495, and *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, upholding the right of Congress to regulate and fix the prices of commission merchants and live stock dealers in the great stockyards of the country, are no authority for sustaining the price fixing feature of the Act here involved. It seems to us that those opinions were based upon the fact that the great stockyards of the country are essential agencies in the interstate transportation of live stock, and therefore fall in the same class as the railroads which they serve, and that the business conducted therein by commission merchants and live stock dealers directly affects the flow of interstate commerce through such stockyards, and hence the charges for the services rendered therein are subject to the same control as are railroad rates.

As we understand the case of *Nebbia* v. *New York,* 291 U. S. 502, it does not discard the long established rule of this Court that price fixing is justified only in respect of businesses affected with a public interest. It does hold that businesses affected with a public interest are not confined to public utilities or to businesses of a monopolistic nature, or to those in which the owner is bound to serve all who apply. It seems to us, however, that price fixing in the milk industry, upheld in that case, was sustained because it was thought that the facts in connection with that industry in the State of New York clearly showed that the business had become affected with a public interest. The legislation there involved was an exercise of the

police power, primarily in the interest of the health of the public, and the Court held that because of peculiar and unusual conditions in the milk industry, price fixing had a reasonable relation to the object sought to be accomplished, which was the assurance of an adequate supply of wholesome milk to the public, and was not an arbitrary exercise of the police power.

No comparable conditions, however, exist in the coal industry. There is no threatened shortage in production or supply. On the contrary, the only problem of the coal business is that which is incident to all businesses as to which at any given time there exists a capacity for production in excess of the market demand. If over production and the consequent economic disorganization and distress of a business justifies price fixing, then during periods of economic depression prices may be fixed by Congress in every important industry, the products of which move in interstate commerce.

We shall not consume space or time in a discussion of the power of Congress to prohibit the trade practices denominated in Section 4, Part II, as "Unfair Methods of Competition." These provisions were undoubtedly designed to make effective the price fixing provisions and must stand or fall with them.

POINT 5.

Section 3 is Not a Revenue Provision But an Integral Part of the Illegal Scheme to Regulate the Entire Bituminous Coal Industry.

We recognize the rule that when the validity of a federal statute is brought in question the Court is not justified in looking beyond the terms of the Act itself to determine if the Act is a good faith exertion of the taxing power. The Act will be examined in its entirety, and unless the contrary plainly appears it will be conclusively presumed that the legislation represents a good faith exercise of the constitutional power under which it purports to have been enacted. Collateral purposes or motives in the enactment of legislation are beyond the scope of judicial inquiry. *McCray* v. *United States,* 195 U. S. 27; *United States* v. *Doremus,* 249 U. S. 86; *Magnano Co.* v. *Hamilton,* 292 U. S. 40. On the other hand, if the Act upon its face plainly shows that admitted constitutional powers of legislation were invoked for the purpose of regulating matters beyond the control of Congress, the legislation must be condemned. *Hammer* v. *Dagenhart,* 247 U. S. 251; *Bailey* v. *Drexel Furniture Co.* (*Child Labor Tax Cases*), 259 U. S. 20; *United States* v. *Butler,* 80 L. Ed. 287; *Schecter Poultry Corporation* v. *United States,* 295 U. S. 495; *United States* v. *Constantine,* 80 L. Ed. 195.

Measured by the foregoing rule, we think it must be held that Section 3 was not enacted for the pur-

pose of raising revenue but for the sole purpose of coercing acceptance of and operation under the Code provided for in the Act. The provisions required to be incorporated in the Code have nothing in common with a revenue statute, nor have any of the other provisions of the Act with the exception of Section 3, which levies the so-called tax; Section 7, which makes applicable the provisions generally applicable to the collection and disposition of internal revenue taxes; Section 9, which reiterates the provisions of Section 3 denying to non-Code members the benefit of the drawback available to Code members; and Section 20, which fixes the effective date of the tax. All the other provisions of the Act deal with the regulation of the coal industry. Section 1, which declares the purpose of the legislation, makes no mention whatever of taxation.

It is true that ten per cent of the tax is imposed upon all producers whether Code members or not; but this can not possibly render valid the ninety per cent which is in the nature of a penalty to compel acceptance of the Code. Doubtless the imposition of ten per cent of the tax upon all producers was prompted by the belief of the draftsman of the Act that this part of the tax would be accepted by the Court as a revenue measure, thus validating the remainder thereof upon the theory that the imposition of one rate upon non-Code members and a much smaller rate upon Code members is a legitimate exercise of the power of Congress to classify for taxation purposes. Classification,

however, must be based upon some inherent difference between the classes taxed existing at the time the legislation is enacted. Certainly the legislative department can not impose an unconstitutional regulation upon the members of an industry and then provide that those who refuse to submit to such unconstitutional regulation shall be treated as a separate class from those who submit, and subject to a discriminatory and confiscatory tax.

There seems no escape from the proposition that Section 3 is an integral part of the scheme of regulation set up in the Act. As said by this Court in the case of *United States* v. *Butler, supra:*

> "The exaction can not be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. To do this would be to shut our eyes to what all others than we can see and understand."

We submit therefore that Section 3 is not separable, and must fall with the illegal regulations of which it is a part.

POINT 6.

The Act Delegates Legislative Power.

If it be conceded that Congress has the power to deal with the matters required by Section 4 to be incorporated in the Code, it can not delegate that power. ***Panama Refining Co.*** v. ***Ryan,*** 293 U. S. 388; ***Schechter Poultry Corporation*** v. ***United States,*** 295 U. S. 495.

Many of the provisions with reference to minimum price fixing, and particularly those requiring the coordination in common consuming market areas upon a fair competitive basis of the coal sold in such market areas (Section 4, Part III (b)), seem so indefinite as to afford no legislative standard for the guidance of the price fixing authorities. Furthermore, Part III of Section 4, Subsection (g), undertakes to fasten upon every member of the Code the maximum daily and weekly hours of labor which may be agreed upon between the producers of more than two-thirds of the annual national tonnage produced for the preceding calendar year and representatives of more than one-half of the mine workers employed, and the minimum wages which may be agreed upon between the producers of more than two-thirds of the annual tonnage production of any district or combination of districts and the majority of the mine workers therein are made obligatory upon all Code members in the territory affected. This seems to us to be delegation of legislative power run wild. As to those producers who do not participate in such agreement, wages and hours are thus fixed by private individuals, acting in their own interest. Inasmuch as the statute, for all practical purposes, compels all producers to become Code members, every producer is thus required to submit to hours of labor and wages, fixed by private persons whether he participates in the fixing thereof or not. The legislative department can not authorize private citizens to thus deal with the rights of others. *Eubank* v. *City*

of Richmond, 226 U. S. 137; *Washington, etc.,* v. *Roberge,* 278 U. S. 116.

For all the foregoing reasons, we respectfully urge that the Act be held unconstitutional; that the decree of the District Court be reversed, with directions to that Court to enter a decree, permanently enjoining the respondent from collecting or attempting to collect from petitioners any part of the so-called taxes attempted to be imposed by Section 3 of the Act, and further directing the return to the petitioners of all the money which they were required to pay into that Court as the condition for staying the collection of such taxes during the pendency of this appeal.

Respectfully submitted,

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APPENDIX.

[PUBLIC—No. 402—74TH CONGRESS]

[H. R. 9100]

AN ACT

To stabilize the bituminous coal-mining industry and promote its interstate commerce; to provide for cooperative marketing of bituminous coal; to levy a tax on bituminous coal and provide for a drawback under certain conditions; to declare the production, distribution, and use of bituminous coal to be affected with a national public interest; to conserve the bituminous coal resources of the United States; to provide for the general welfare, and for other purposes; and providing penalties.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is hereby recognized and declared that the mining of bituminous coal and its distribution by the producers thereof in and throughout the United States are affected with a national public interest; that the service of bituminous coal in relation to the industrial activities, the transportation facilities, the health and comfort of the people of the United States; the conservation of bituminous coal deposits in the United States by controlled production and economical mining and marketing; the maintenance of just and rational relations between the public, owners, producers, and employees; the right of the public to constant and ample supplies of coal at reasonable prices; and the general welfare of the Nation require that the bituminous coal industry be regulated as herein provided.

It is further recognized and declared that all production of bituminous coal and distribution by the producers thereof bear upon and directly affect its interstate commerce and render regulation of all such production and distribution imperative for the protection of such commerce and the national public service of bituminous coal and the normal governmental revenues derivable from such industry; that the excessive facilities for the production of bituminous coal

and the overexpansion of the industry have led to practices and methods of production, distribution, and marketing of such coal that waste such coal resources of the Nation, disorganize the interstate commerce in such coal and portend the destruction of the industry itself, and burden and obstruct the interstate commerce in such coal, to the end that control of such production and regulation of the prices realized by the producers thereof are necessary to promote its interstate commerce, remove burdens and obstructions therefrom, and protect the national public interest therein; that practices prevailing in the production of bituminous coal directly affect its interstate commerce and require regulation for the protection of that commerce, and that the right of mine workers to organize and collectively bargain for wages, hours of labor, and conditions of employment should be guaranteed in order to prevent constant wage cutting and the establishment of disparate labor costs detrimental to fair competition in the interstate marketing of bituminous coal, and in order to avoid those obstructions to its interstate commerce that recur in the industrial disputes over labor relations at the mines.

NATIONAL BITUMINOUS COAL COMMISSION

SEC. 2. (a) There is hereby established in the Department of the Interior a National Bituminous Coal Commission (herein referred to as "Commission"), which shall be composed of five members appointed by the President, by and with the advice and consent of the Senate, for a term of four years or until the prior termination of this title. The Commission shall annually designate its chairman, and shall have a seal which shall be judicially recognized. Any person appointed to fill a vacancy shall be appointed only for the unexpired term of his predecessor in office. The Commission shall have an office in the city of Washington, District of Columbia, and shall convene at such times and places as the majority of the Commission shall determine. The members of the Commission shall have no finan-

cial interest, direct, or indirect, in the mining, transportation, or sale of, or manufacture of equipment for, coal, oil, or gas, or in the generation, transmission, or sale of hydroelectric power, or in the manufacture of equipment for the use thereof, and shall not engage in any other business, vocation, or employment. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. The Commission shall, with due regard to the provisions of the civil-service laws or the Classification Act of 1923, as amended, appoint and fix the compensation and duties of a secretary and necessary clerical and other assistants, none of whom shall be related to any member of the Commission by marriage or within the third degree by blood. The members of the Commission shall each receive compensation at the rate of $10,000 per year and necessary traveling expenses. Such Commission shall have the power to make and promulgate all reasonable rules and regulations for carrying out the provisions of this Act, and shall annually make full report of its activities to the Secretary of the Interior for transmission to Congress. Upon all matters within its jurisdiction coming before it for determination, it shall have the power and duty of hearing evidence and finding facts upon which its orders and action may be predicated, and its findings of fact supported by any substantial evidence shall be conclusive upon review thereof by any court of the United States.

(b) (1) There shall be an office in the Department of the Interior to be known as the office of the Consumers' Counsel of the National Bituminous Coal Commission. The office shall be in charge of a counsel to be appointed by the President, by and with the advice and consent of the Senate. The counsel shall have no financial interest, direct or indirect, in the mining, transportation, or sale of, or the manufacture of equipment for, coal, oil, or gas, or in the generation, transmission, or sale of hydroelectric power, or in the manufacture of equipment for the use thereof, and shall not engage in any other business, vocation, or employ-

ment. The counsel shall receive compensation at the rate of $10,000 per year and necessary traveling expenses.

(2) It shall be the duty of the counsel to appear in the interest of the consuming public in any proceeding before the Commission and to conduct such independent investigation of matters relative to the bituminous coal industry and the administration of this Act as he may deem necessary to enable him properly to represent the consuming public in any proceeding before the Commission. In any proceeding before the Commission in which the counsel has entered an appearance, the counsel shall have the right to offer any relevant testimony and argument, oral or written, and to examine and cross-examine witnesses and parties to the proceeding, and shall have the right to have subpena or other process of the Commission issue in his behalf. Whenever the counsel finds that it is in the interest of the consuming public to have the Commission furnish any information at its command or conduct any investigation as to any matter within its authority, then the counsel shall so certify to the Commission, specifying in the certificate the information or investigation desired. Thereupon the Commission shall promptly furnish to the counsel the information or promptly conduct the investigation and place the results thereof at the disposal of the counsel.

(3) Within the limitations of such appropriations as the Congress may from time to time provide, the counsel is authorized, with due regard to the civil service laws and the Classification Act of 1923, as amended, to appoint and fix the compensation and duties of such assistants and clerks, and is authorized to make such expenditures, as may be necessary for the performance of the duties vested in him.

TAX ON BITUMINOUS COAL

SEC. 3. There is hereby imposed upon the sale or other disposal of all bituminous coal produced within the United States an excise tax of 15 per centum on the sale price at the mine, or in the case of captive coal the fair market value

of such coal at the mine, such tax, subject to the later provisions of this section, to be payable to the United States by the producers of such coal, and to be payable monthly for each calendar month, on or before the first business day of the second succeeding month, and under such regulations, and in such manner, as shall be prescribed by the Commissioner of Internal Revenue: *Provided,* That in the case of captive coal produced as aforesaid, the Commissioner of Internal Revenue shall fix a price therefor at the current market price for the comparable kind, quality, and size of coals in the locality where the same is produced: *Provided, further,* That any such coal producer who has filed with the National Bituminous Coal Commission his acceptance of the code provided for in section 4 of this Act, and who acts in compliance with the provisions of such code, shall be entitled to a drawback in the form of a credit upon the amount of such tax payable hereunder, equivalent to 90 per centum of the amount of such tax, to be allowed and deducted therefrom at the time settlement therefor is required, in such manner as shall be prescribed by the Commissioner of Internal Revenue. Such right or benefit of drawback shall apply to all coal sold or disposed of from and after the day of the producer's filing with the Commission his acceptance of said code in such form of agreement as the Commission may prescribe. No producer shall by reason of his acceptance of the code provided for in section 4 or of the drawback of taxes provided in section 3 of this Act be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producer.

BITUMINOUS COAL CODE

SEC. 4. The provisions of this section shall be formulated by the Commission into a working agreement, to be known as the "Bituminous Coal Code," and herein referred to as the "Code." Producers accepting and operating under its provisions are herein referred to as "Code members."

For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions, provisions, and obligations which will tend to regulate interstate commerce in bituminous coal and transactions directly affecting interstate commerce in bituminous coal:

PART I—ORGANIZATION AND PRODUCTION

(a) Twenty-three district boards of coal producers shall be organized. Each district board shall consist of not less than three nor more than seventeen members. The number of members of the district board shall, subject to the approval of the Commission, be determined by the majority vote of the district tonnage during the calendar year 1934 represented at a meeting of the producers of the district called for the purpose of such determination and for the election of such district board; and all known producers within the district shall be given notice of the time and place of the meeting. All but one of the members of the district board shall be producers or representatives of producers truly representative of all the mines of the district. The number of such producer members shall be an even number. One-half of such producer members shall be elected by the majority in number of the producers of the district represented at the aforesaid meeting. The other producer members shall be elected by votes cast in the proportion of the annual tonnage output for the preceding calendar year of the producers in the district, with the right on the part of the producers to vote their tonnage cumulatively: *Provided,* That not more than one officer or employee of any producer within a district shall be a member of the district board at the same time. The remaining member of each district board shall be selected by the organization of employees representing the preponderant number of employees in the industry of the district in question. The term of district board members shall be two years and until their successors are elected.

In case any marketing agency comprising a substantial

number of code members in any producing field within a district establishes, to the satisfaction of the Commission, that it has no representation upon the district board and that it is fairly entitled thereto, the Commission may, in its discretion, after hearing, increase the membership of such district board so as to provide for such representation.

Marketing agencies may be established or maintained within any district by a voluntary association of producers within any producing field therein, as such producing field may be defined by the district board, and function under such general rules and regulations as may be prescribed by the district board, with the approval of the Commission, for the purpose of marketing their coal with due respect for the standards of unfair competition as defined in this Act. Each such marketing agency shall impose no unreasonable or inequitable conditions of membership and shall be truly representative of at least one-third of the tonnage of any producing field or group of producing fields.

The term "marketing agency" or "agencies" as used in this Act shall include any trade association of coal producers complying with the requirements of a marketing agency and exercising the functions thereof.

The district boards and marketing agencies shall each have power to adopt bylaws and rules of procedure, subject to approval of the Commission, and to appoint officers from their own membership, to fix their terms and compensation, to provide for reports, and to employ such committees, employees, arbitrators, and other persons necessary to effectuate their purposes. Members of the district board shall serve, as such, without compensation, but may be reimbursed for their reasonable expenses. The territorial boundaries or limits of such twenty-three districts are set forth in the schedule entitled "Schedule of Districts" and annexed to this Act: *Provided,* That the territorial boundaries or limits of any district or districts may be changed, or said districts may be divided or consolidated, after hearing, by the Commission.

(b) The expense of administering the code by the respective district boards shall be borne by those subject to the jurisdiction of such boards, respectively, each paying his proportionate share, as assessed, computed on a tonnage basis, in accordance with regulations prescribed by such boards with the approval of the Commission. Such assessments may be collected by the district board by action in any court of competent jurisdiction.

(c) Nothing contained in this Act shall constitute the members of a district board partners for any purpose. Nor shall any member of a district board be liable in any manner to any one for any act of any other member, officer, agent or employee of the district board. Nor shall any member of a district board, exercising reasonable diligence in the conduct of his duties under this Act, be liable to any one for any action or omission to act under this Act, except for his own willful misfeasance, or for nonfeasance involving moral turpitude.

PART II—MARKETING

The district boards and code members shall accept and be subject to the jurisdiction of the Commission to approve or to fix minimum and maximum prices, as follows:

(a) All code members shall, in their respective districts, report all spot orders to the district board and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. All such records shall be held by the district board as the confidential records of the code member filing such information.

Each district board may set up and maintain a statistical bureau, and the district board may require that such reports and other information in this subsection described shall be filed with such statistical bureau in lieu of the filing thereof with the district board.

Each district board shall, from time to time on its own motion or when directed by the Commission, establish minimum prices free on board transportation facilities at the mines for kinds, qualities, and sizes of coal produced in said district, with full authority, in establishing such minimum prices, to make such classification of coals and price variations as to mines and consuming market areas as it may deem necessary and proper. In order to sustain the stabilization of wages, working conditions, and maximum hours of labor, said prices shall be established so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated "Minimum-price area table," equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area. The computation of the total costs shall include the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation, and depletion (as determined by the Bureau of Internal Revenue in the computation of the Federal income tax) and all other direct expenses of production, coal operators' association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of administration.

MINIMUM-PRICE-AREA TABLE

Area 1: Eastern Pennsylvania, district 1; western Pennsylvania, district 2; northern West Virginia, district 3; Ohio, district 4; Michigan, district 5; Panhandle, district 6; Southern numbered 1, district 7; Southern numbered 2, district 8; West Kentucky, district 9; Illinois, district 10; Indiana, district 11; Iowa, district 12; that part of Southeastern, district 13, comprising Van Buren, Warren, and McMinn Counties in Tennessee.

Area 2: Southeastern, district 13, except Van Buren, Warren and McMinn Counties in Tennessee.

Area 3: Arkansas-Oklahoma, district 14.

Area 4: Southwestern, district 15.

Area 5: Northern Colorado, district 16; southern Colorado, district 17; New Mexico, district 18.

Area 6: Wyoming, district 19; Utah, district 20.

Area 7: North Dakota and South Dakota, district 21.

Area 8: Montana, district 22.

Area 9: Washington, district 23.

The minimum prices so established shall reflect, as nearly as possible, the relative market value of the various kinds, qualities, and sizes of coal, shall be just and equitable as between producers within the district, and shall have due regard to the interests of the consuming public. The procedure for establishment of minimum prices shall be in accordance with rules and regulations to be approved by the Commission.

A schedule of such minimum prices, together with the data upon which they are computed, including, but without limitation, the factors considered in determining the price relationship, shall be submitted by the district board to the Commission, which may approve, disapprove, or modify the same to conform to the requirements of this subsection, and such approval, disapproval, or modification shall be binding upon all code members within the district, subject to such modification therein as may result from the coordination provided for in the succeeding subsection (b): *Provided,* That all minimum prices established for any kind, quality, or size of coal for shipment into any consuming market area shall be just and equitable as between producers within the district: *And provided further,* That no minimum price shall be established that permits dumping.

As soon as possible after its creation, each district board shall determine the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1934. The district board shall adjust the average costs so determined, as may be necessary to give effect to any changes in wage rates, hours of employ-

ment, or other factors substantially affecting costs, exclusive of seasonal changes, so as to reflect as accurately as possible any change or changes which may have been established since January 1, 1934. Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each district board in the respective minimum-price area. The Commission shall thereupon determine the weighted average of the total costs of the tonnage for each minimum-price area in the calendar year 1934, adjusted as aforesaid, and transmit it to all the district boards within such minimum-price area. Said weighted average of the total costs shall be taken as the basis for the establishment of minimum prices to be effective until changed by the Commission. Thereafter, upon satisfactory proof made at any time by any district board of a change in excess of 2 cents per net ton of two thousand pounds in the weighted average of the total costs in the minimum-price area, exclusive of seasonal changes, the Commission shall increase or decrease the minimum prices accordingly. The weighted average figures of total cost determined as aforesaid shall be available to the public.

Each district board shall, on its own motion or when directed by the Commission, establish reasonable rules and regulations incidental to the sale and distribution of coal by code members within the district. Such rules and regulations shall not be inconsistent with the requirements of this section and shall conform to the standards of fair competition hereinafter established. Such rules and regulations shall be submitted by the district board to the Commission with a statement of the reasons therefor, and the Commission may approve, disapprove, or modify the same, and such approval, disapproval, or modification shall be binding upon all code members within the district.

(b) District boards shall, under rules and regulations established by the Commission, coordinate in common consuming market areas upon a fair competitive basis the min-

imum prices and the rules and regulations established by them, respectively, under subsection (a) hereof. Such coordination, among other factors, but without limitation, shall take into account the various kinds, qualities, and sizes of coal, and transportation charges upon coal. All minimum prices established for any kind, quality, or size of coal for shipment into any consuming market area shall be just and equitable, and not unduly prejudicial or preferential, as between and among districts, and shall reflect, as nearly as possible, the relative market values, at points of delivery in each common consuming market area, of the various kinds, qualities and sizes of coal produced in the various districts; to the end of affording the producers in the several districts substantially the same opportunity to dispose of their coals upon a competitive basis as has heretofore existed. The minimum prices established as a result of such coordination shall not, as to any district, reduce or increase the return per net ton upon all the coal produced therein below or above the minimum return as provided in subsection (a) of this section by an amount greater than necessary to accomplish such coordination, to the end that the return per net ton upon the entire tonnage of the minimum price area shall approximate and be not less than the weighted average of the total costs per net ton of the tonnage of such minimum price area. Such coordinated prices and rules and regulations, together with the data upon which they are predicated, shall be submitted to the Commission, which may approve, disapprove, or modify the same to establish and maintain such fair competitive relationship, and such approval, disapproval, or modification shall be binding upon all code members within the affected districts. No minimum price shall be established that permits dumping. On the petition of any district board or other party in interest or on its own motion, after notice to the district boards, the Commission may at any time conduct hearings to determine whether the foregoing method of fixing minimum prices under subsection

(a) is prejudicial to any district with respect to the fair opportunity of such district to market its coal. Should the Commission so find, and further find that the prejudice cannot be removed through the coordination of minimum prices as provided for in this subsection (b), then the Commission may establish a different basis for determining minimum prices in such district, to the end that fair and competitive prices shall prevail in the marketing of the coal produced in such district: *Provided,* That the minimum prices so established as to any such district shall yield a return, per net ton, not less than the weighted average of the total costs, per net ton, of the tonnage of such district.

(c) When, in the public interest, the Commission deems it necessary to establish maximum prices for coal in order to protect the consumer of coal against unreasonably high prices therefor, the Commission shall have the right to fix maximum prices free on board transportation facilities for coal in any district. Such maximum prices shall be established at a uniform increase above the minimum prices in effect within the district at the time, so that in the aggregate the maximum prices shall yield a reasonable return above the weighted average total cost of the district: *Provided,* That no maximum price shall be established for any mine which shall not return cost plus a reasonable profit.

(d) If any code member or district board, or any State or political subdivision of a State, shall be dissatisfied with such coordination of prices or rules and regulations, or by a failure to establish such coordination of prices or rules and regulations, or by the maximum prices established for him or it pursuant to subsection (c) of this section, he or it shall have the right, by petition, to make complaint to the Commission, and the Commission shall, under rules and regulations established by it, and after notice and hearing, make such order as may be required to effectuate the purpose of subsections (b) and (c) of this section, which order shall be binding upon all parties in interest.

Pending final disposition of such petition, and upon reasonable showing of necessity therefor, the Commission may make such preliminary or temporary order as in its judgment may be appropriate, and not inconsistent with the provisions of this Act.

(e) Subject to the exceptions provided in section 12 of this Act, no coal shall be sold or delivered at a price below the minimum or above the maximum therefor approved or established by the Commission, and the sale or delivery of coal at a price below such minimum or above such maximum shall constitute a violation of the code.

Subject to the exceptions provided in section 12 of this Act, a contract for the sale of coal at a price below the minimum or above the maximum therefor approved or established by the Commission at the time of the making of the contract shall constitute a violation of the code, and such contract shall be invalid and unenforceable.

From and after the date of approval of this Act, until prices shall have been established pursuant to subsections (a) and (b) of part II of this section, no contract for the sale of coal shall be made providing for delivery for a period longer than thirty days from the date of the contract.

While this Act is in effect no code member shall make any contract for the sale of coal for delivery after the expiration date of this Act at a price below the minimum or above the maximum therefor approved or established by the Commission and in effect at the time of making the contract.

The minimum prices established in accordance with the provisions of this section shall not apply to coal sold by a code member and shipped outside the domestic market. The domestic market shall include all points within the continental United States and Canada, and car-ferry shipments to the Island of Cuba. Bunker coal delivered to steamships for consumption thereon shall be regarded

as shipped within the domestic market. Maximum prices established in accordance with the provisions of this section shall not apply to coal sold by a code member and shipped outside the continental United States.

(f) All data, reports, and other information in the possession of the National Recovery Administration in relation to bituminous coal shall be available to the Commission for the administration of this Act.

(g) The price provisions of this Act shall not be evaded or violated by or through the use of docks or other storage facilities or transportation facilities, or by or through the use of subsidiaries, affiliated sales or transportation companies or other intermediaries or instrumentalities, or by or through the absorption, directly or indirectly, of any transportation or incidental charge of whatsoever kind or character, or any part thereof. The Commission is hereby authorized, after investigation and hearing, and upon notice to the interested parties, to make and issue rules and regulations to make this subsection effective.

(h) All sales and contracts for the sale of coal shall be subject to the code prices herein provided for and in effect at the time of the making of such sales and contracts. The Commission shall prescribe the price allowance to and receivable by persons who purchase coal for resale, and resell it in not less than cargo or railroad carload lots; and shall require the maintenance by such persons, in the resale of coal, of the minimum prices established under this Act.

UNFAIR METHODS OF COMPETITION

(i) The following practices shall be unfair methods of competition and shall constitute violations of the code:

1. The consignment of unordered coal, or the forwarding of coal which has not actually been sold, consigned to the producer or his agent: Provided, however, That coal which has not actually been sold may be forwarded, consigned to the producer or his agent at rail or

track yards, tidewater ports, river ports, or lake ports, or docks beyond such ports. Such limitations on the consignment of coal shall not apply to the following classes: Bunker coal, coal applicable against existing contracts, coal for storage (other than in railroad cars) by the producer or his agent in rail or track yards, or on docks, wharves, or other yards for resale by the producer or his agent.

2. The adjustment of claims with purchasers of coal in such manner as to grant secret allowances, secret rebates, or secret concessions, or other price discrimination.

3. The prepayment of freight charges with intent to or having the effect of granting a discriminatory credit allowance.

4. The granting in any form of adjustments, allowances, discounts, credits, or refunds to purchasers or sellers of coal, for the purposes or with the effect of altering retroactively a price previously agreed upon, in such manner as to create price discrimination.

5. The predating or postdating of any invoice or contract for the purchase or sale of coal, except to conform to a bona fide agreement for the purchase or sale entered into on the predate.

6. The payment or allowance in any form or by any device of rebates, refunds, credits, or unearned discounts, or the extension to certain purchasers of services or privileges not extended to all purchasers under like terms and conditions, or under similar circumstances.

7. The attempt to purchase business, or to obtain information concerning a competitor's business by concession, gifts, or bribes.

8. The intentional misrepresentation of any analysis or of analyses, or of sizes, or the intentional making, causing, or permitting to be made, or publishing, of any false, untrue, misleading, or deceptive statement by way of advertising, invoicing, or otherwise concerning the size,

quality, character, nature, preparation, or origin of any coal bought, sold, or consigned.

9. The unauthorized use, whether in written or oral form, of trade marks, trade names, slogans, or advertising matter already adopted by a competitor, or any deceptive approximation thereof.

10. Inducing or attempting to induce, by any means or device whatsoever, a breach of contract between a competitor and his customer during the term of such contract.

11. Splitting or dividing commissions, broker's fees, or brokerage discounts, or otherwise in any manner directly or indirectly using brokerage commissions or jobbers' arrangements or sales agencies for making discounts, allowances, or rebates, or prices other than those determined under this Act, to any industrial consumer or to any retailers, or to others, whether of a like or different class.

12. Selling to, or through, any broker, jobber, commission account, or sales agency, which is in fact or in effect an agency or instrumentality of a retailer or an industrial consumer or of an organization of retailers or industrial consumers, whereby they or any of them secure either directly or indirectly a discount, dividend, allowance, or rebates, or a price other than that determined in the manner prescribed by this Act.

13. Violations of the provisions of the code.

It shall not be an unfair method of competition or a violation of the code or any requirement of this Act (1) to sell to or through any bona fide and legitimate farmer's cooperative organization duly organized under the laws of any State, Territory, the District of Columbia, or the United States whether or not such organization grants rebates, discounts, patronage dividends, or other similar benefits to its members, (2) to sell through any intervening agency to any such cooperative organization, or (3) to pay or allow to any such cooperative organization or to any such intervening agency any discount, commission,

rebate, or dividend ordinarily paid or allowed, or permitted by the code to be paid or allowed, to other purchasers for purchases in wholesale or middleman quantities.

(j) The Commission shall have jurisdiction to hear and determine written complaints made charging any violation of the code specified in this part II. It shall make and publish rules and regulations for the consideration and hearing of any such complaint, and all interested parties shall be required to conform thereto. The Commission shall make due effort toward adjustment of such complaints and shall endeavor to compose the differences of the parties, and shall make such order or orders in the premises, from time to time, as the facts and the circumstances warrant. Any such order shall be subject to review as are other orders of the commission.

Part III—Labor Relations

To effectuate the purposes of this Act, the district boards and code members shall accept the following conditions which shall be contained in said code:

(a) Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from interference, restraint, or coercion of employers, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and no employee and no one seeking employment shall be required as a condition of employment to join any company union.

(b) Employees shall have the right of peaceable assemblage for the discussion of the principles of collective bargaining, shall be entitled to select their own checkweighman to inspect the weighing or measuring of coal, and shall not be required as a condition of employment to live in company houses or to trade at the store of the employer.

(c) A Bituminous Coal Labor Board, hereinafter referred to as "Labor Board," consisting of three members, shall be appointed by the President of the United States by and with the advice and consent of the Senate, and shall be assigned to the Department of Labor. The chairman shall be an impartial person with no financial interest in the industry, or connection with any organization of the employees. Of the other members, one shall be a representative of the producers and one shall be a representative of the organized employees, each of whom may retain his respective interest in the industry or relationship to the organization of employees. The Labor Board shall, with due regard to the provisions of the civil-service laws and the Classification Act of 1923, as amended, appoint and fix the compensation and duties of a secretary and necessary clerical and other assistants. The members shall serve for a period of four years or until the prior termination of this Act, and shall each receive compensation at the rate of $10,000 per annum and necessary traveling expenses. Any person appointed to fill a vacancy shall be appointed only for the unexpired term of his predecessor in office. Decisions of the Labor Board may be made by a majority thereof.

(d) The Labor Board shall sit at such places as its duties require, and may appoint an examiner to report evidence for its finding in any particular case. It shall notify the parties to any dispute of the time and place of the taking of evidence, or the hearing of the cause, and its finding of facts supported by any substantial evidence shall be conclusive upon review thereof by any court of the United States. It shall transmit its findings and order to the parties interested and to the Commission. The Commission shall take no action thereon for sixty days after the entry of the order of the Labor Board; and if within such sixty days an appeal is taken under the provisions of section 16 of this Act, no action on such finding and

order shall be taken by the Commission during the pendency of the appeal.

(e) The Labor Board shall have authority to adjudicate disputes arising under subsections (a) and (b) of this part III, and to determine whether or not an organization of employees has been promoted, or is controlled or dominated by an employer in its organization, management, policy, or election of representatives; and for the purpose of determining who are the freely chosen representatives of the employees the Board may order and under its supervision may conduct an election of employees for that purpose. The Labor Board may order a code member to meet the representatives of its employees for the purpose of collective bargaining.

(f) The Labor Board may offer its services as mediator in any dispute between a producer and its employees where such dispute is not determined by the tribunal set up in a bona fide collective contract; and upon the written submission by the parties requesting an award on a stated matter signed by the duly accredited representatives of the employer and employees, the Labor Board may arbitrate the matter submitted.

(g) Whenever the maximum daily and weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than two-thirds the annual national tonnage production for the preceding calendar year and the representatives of more than one-half the mine workers employed, such maximum hours of labor shall be accepted by all code members. The wage agreement or agreements negotiated by collective bargaining in any district or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage production of such district or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein, shall be filed with the Labor Board and shall be accepted as the minimum wages for

the various classifications of labor by the code members operating in such district or groups of districts.

ORGANIZATION OF THE CODE

Sec. 5. (a) Upon the appointment of the Commission it shall at once formulate said code and assist in the organization of the district boards as provided for in section 4, and shall prepare and supply to all coal producers forms of acceptance for membership therein. Such forms of acceptances, when executed, shall be acknowledged before any official authorized to take acknowledgments.

(b) The membership of any such coal producer in such code and his right to a drawback on the taxes levied under section 3 of this Act, may be revoked by the Commission upon written complaint by any party in interest, after a hearing, with thirty days' written notice to the member, upon proof that such member has willfully failed or refused to comply with any duty or requirement imposed upon him by reason of his membership; and in such a hearing any party in interest, including the district boards, other code members, consumers, employees, and the Commissioner of Internal Revenue, shall be entitled to present evidence and be heard: *Provided,* That the Commission, in its discretion, may in such case make an order directing the code member to cease and desist from violations of the code and upon failure of the code member to comply with such order the Commission may reopen the case upon ten days' notice to the code member affected and proceed in the hearing thereof as above provided.

The Commission shall keep a record of the evidence heard by it in any proceeding to cancel or revoke the membership of any code member and its findings of fact if supported by any substantial evidence shall be conclusive upon any proceeding to review or restrain the action and order of the Commission in any court of the United States.

When an alleged violation of the code relates to the provisions of part III of section 4 of this Act, the Commis-

sion shall accept as conclusive the certified findings and orders of the Labor Board and inquire only into the compliance or noncompliance of the code member with respect thereto.

(c) Any producer whose membership in the code and whose right to a drawback on the taxes as provided under this Act has been canceled, shall have the right to have his membership restored upon payment by him of all taxes in full for the time during which it shall be found by the Commission that his violation of the code or of any regulation thereunder, the observance of which is required by its terms, shall have continued. In making its findings under this subsection the Commission shall state specifically (1) the period of time during which such violation continued, and (2) the amount of taxes required to be paid to bring about reinstatement as a code member.

(d) Any code member who shall be injured in his business or property by any other code member by reason of the doing of any act which is forbidden or the failure to do any act which is required by this Act or by the code, may sue therefor in any district court of the United States in the district in which the defendant resides, or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Sec. 6. (a) All rules, regulations, determinations, and promulgations of any district board shall be subject to review by the Commission upon appeal by any producer and upon just cause shown shall be amenable to the order of the Commission; and appeal to the Commission shall be a matter of right in all cases to every producer and to all parties in interest. The Commission may also provide rules for the determination of controversies arising under this Act by voluntary submission thereof to arbitration, which determination shall be final and conclusive.

(b) Any person aggrieved by an order issued by the Commission or Labor Board in a proceeding to which such

person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission or Labor Board be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission or Labor Board, as the case may be, and thereupon the Commission or Labor Board, as the case may be, shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission or Labor Board shall be considered by the court unless such objection shall have been urged below. The finding of the Commission or Labor Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission or Labor Board, the court may order such additional evidence to be taken before the Commission or Labor Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or Labor Board, as the case may be, may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming,

modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission or Labor Board, as the case may be, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

The commencement of proceedings under this subsection shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(c) If any code member fails or neglects to obey any order of the Commission while the same is in effect, the Commission in its discretion may apply to the Circuit Court of Appeals of the United States within any circuit where such code member resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such code member and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission. The findings of the Commission as to facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.