doctrine are sufficiently indicated by the extracts printed in the margin from the cases of *Byrne* v. *Schuyler Electric Manufacturing Co.*;[5] *Central R. R. Co.* v. *Collins*;[6] *Davis* v.

---

[5]65 Conn. 366. A minority stockholder brought a suit to enjoin the fulfillment of a contract alleged to be *ultra vires* his corporation, and to secure cancelation thereof (p. 344). The referee found that "the plaintiff failed to show that he was in any way injured by the transactions of which he complains, nor does it appear that he will be in any way benefitted if the relief that he seeks is granted him" (p. 353). The court, however, on consideration of this finding, ruled "it does not seem to this court that the question of the profitableness or unprofitableness of the transaction affects at all the plaintiff's right."

[6]40 Ga. 582, 617. A minority stockholder's suit to enjoin an *ultra vires* act. The court overruled the contention that the action would be advantageous to the stockholder, stating:

> "We do not think the profitableness of this contract, to the stockholders of the Central and Southwestern Railroad stockholders, has anything to do with the matter. These stockholders have a *right*, at their pleasure, to stand on their contract. If the charters do not give to these companies the *right* to go into this new exterprise [sic], any one stockholder has a right to object. He is not to be forced into an enterprise not included in the charter.
>
> "That it will be to his interest is no excuse; that is for him to judge. By becoming a stockholder he has contracted that a majority of the stockholders shall manage the affairs of the company within its proper sphere as a corporation, but no further; and any attempt to use the funds, or pledge the credit of the company not within the legitimate scope of the charter, is a violation of the contract which the stockholders have made with each other, and of the *rights—the contract* rights—of any stockholder who chooses to say, 'I am not willing.' It may be that it will be to his advantage, but he may not think so, and he has a legal right to insist upon it that the company shall keep within the powers granted to it by the charter: 1 Shelford on Railways, 71; 1 My. & K., 162-3; 4 Y. & Coll., 618; 2 Dan. P. C., 521; 5 Hill, 386; 18 Barbour, 318; 43 N. Hamp., 525; 6 Angel & Ames on Corp., 4th edition, and cases cited."

Congregation Beth Tephila Israel;[7] *and Beman* v. *Rufford.*[8]

It thus appears that in the present case it was pleaded, proved and found that an independent ground of equity jurisdiction exists, entitling the petitioner as a matter of law to enjoin the doing of an *ultra vires* act by the corporation and its officers and directors under coercion of an unconstitutional statute, and that this right exists wholly irrespective of any question of injury, either to the peti-

---

[7]40 App. Div. 424, 426-427. A member of a religious corporation sued to set aside an *ultra vires* contract. The court said:

> "It is argued that the congregation of which the plaintiff was a member acquired all the property of the other, and hence that he was in no way prejudiced. This is no answer to the plaintiff's complaint. He has a right to keep the corporation of which he is a member within its chartered powers. And the *ultra vires* act cannot be defended by the pretense that it is advantageous. (*Tomkinson* v. *Southeastern Railway Company,* 35 Ch. Div. 677; *Mills* v. *Central Railroad Company,* 41 N. J. Eq. 1, 12, 13.)"

[8]1 Sim. N. S. 550. In granting an injunction in a suit by minority shareholders of a railway to restrain enforcement of their corporation's *ultra vires* agreement with another railroad company, Baron Cranworth said:

> "The bill, however, is filed by the shareholders of the *Oxford, Worcester and Wolverhampton Railway Company,* and the principle on which they are entitled to file it on behalf of themselves and all the other shareholders, is that this Court will not allow any of them to say that they are not interested in preventing the law of their Company from being violated. It will not allow any of them to speculate as to whether it would be more advantageous to do something which the Act of Parliament does not authorize to be done; and therefore it is that a very small number or, indeed, one of the shareholders may file a bill on behalf of the whole body, although, at a meeting of the Company, a large majority of the other shareholders may have sanctioned that course of proceeding which the bill complains of. The shareholders so filing this bill, say that the Company, together with the directors of it, have entered into a contract, * * * different from that which was contemplated by the Act of Parliament, and so to apply funds, which the plaintiffs say are their funds, in a mode in which they were never authorized to be applied; and, therefore, the plaintiffs seek to restrain them."

tioner or to the corporation. In this aspect, again, the case is a much stronger one than *Ashwander*. In that case the concurring opinion states: "Nor is there any basis in law for the assertion that the contract was ***ultra vires*** the Company" (pamphlet print p. 2).

Moreover, as in *Hill* v. *Wallace,* which, like this case, was both a suit to enjoin the corporation and its directors from complying with the regulatory features of the statute and to enjoin Federal officers from enforcing the penalty tax, the right to relief against the corporation and its directors exists independently of the right to injunction against the Federal officers, and the court would be required to determine the issue raised as between petitioner and the company and its directors even though impediments should be found to the granting of an injunction against the Federal officers. The precise point was considered and ruled upon in *Hill* v. *Wallace,* 259 U. S. 44, at 62, 63.

4. Injury from joining Code—loss of liberty.

The discussion under succeeding headings will disclose that acceptance of the Code will result in serious financial injury both to the Company and to the petitioner. However, there is still another ground of equity jurisdiction which does not require proof of financial injury. As pointed out in *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589, and other cases discussed in Point IX *ante,* the liberty guaranteed by the Fifth Amendment is not confined to physical liberty of the person but also comprises freedom to pursue any lawful occupation in a lawful manner. If the regulatory scheme of this statute is unconstitutional it clearly infringes the liberty thus guaranteed, and it would be wholly

untenable to say that the citizen cannot enjoin its enforcement without proving that that would result in financial injury to him.

The rule that the Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation,[1] plainly does not require proof of financial injury where the suit is one to protect that fundamental right of liberty.

If a citizen were deprived of physical liberty, as by incarceration under an unconstitutional statute, plainly no court of justice would accept the view that he had no standing in court for failure to show that the imprisonment would not better him financially and physically. If the constitutional guarantee of liberty is to mean anything more than liberty from illegal imprisonment, the argument requiring proof of financial injury must also be rejected where the statute infringes the liberty of the citizen to live and work as he will and earn his living in any lawful calling, unconstrained by the regimentation of an unconstitutional Code.

The Constitution gives the Federal Government no authority to regulate the breadwinning activities of the people upon the claim or showing, without more, that the regulation will result in financial benefit to them. If the Federal Government is to remain a government of limited powers, as it was created, the citizen must continue to have the right to enjoin unauthorized regulation of his trade or business by the Federal Government whether it puts money in his pocket or takes it out. Of course, the present record shows that the Code will not only be financially injurious to the Company and to the petitioner, but may

---

[1] *Tyler* v. *Judges, etc.*, 179 U. S. 405; *Hendrick* v. *Maryland*, 235 U. S. 610, 621.

be ruinous. Upon principle, however, that showing is unnecessary. A greater issue is at stake. In the protection of constitutional liberty it has always been the rule of this Court that the right to *acquire* property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired.[2] If that right is to continue to mean anything it must be accorded protection from unconstitutional regimentation, irrespective of any financial issue.

5. Injury from joining Code. Breach of contract.

No injury is plainer or more certain to accrue to the corporation from joining the Code than the liability to which it would be subjected for breach of its existing contracts for the sale and delivery of coal. The statute and the Code expressly provide that outstanding contracts shall be breached in order to comply with Code prices, with certain exceptions, and also forbid the making, after the date of enactment of the Act, of contracts which provide for delivery for a longer period than thirty days from date of the contract (Act, Sec. 4, Part II(e); Sec 12; Code, Part II, Sec. 8, R. 66). The Carter Coal Company has outstanding long term contracts entered into prior to the enactment of the Act for 850,750 net tons at an aggregate price f. o. b. mines of $1,004,765 which are not within any of the exceptions of the sections of the statute just referred to (FF. 39, R. 127; FF. 169, R. 208), and if it joins the Code it will of necessity be compelled to breach some at least of these contracts (R. 54), in view of the avowed purpose and

[2] *International News Service* v. *Associated Press,* 248 U. S. 215, 236, 237; *Truax* v. *Raich,* 239 U. S. 33, 37-38.

effect of this statute to increase coal prices (R. 326, 351, 369, 390). If the statute is unconstitutional the Company's contractees will be entitled to substantial damages. It also has entered into long term contracts since the enactment of the Act for 230,000 net tons, which it will automatically be required to breach on joining the Code (FF. 39, R. 129, FF. 169, R. 208).

Of course, the unconstitutional statute will be no protection in a suit to recover damages (*Norton* v. *Shelby County,* 118 U. S. 425, 442). Upon consideration of these facts the court below found as an ultimate finding "Should the Carter Coal Company join the Code, it would be compelled to cancel existing contracts * * *." (FF. 169, R. 208).

6. Injury from joining Code—liability for anti-trust law violation.

By joining the Code, the Company and its officers and directors become parties to a combination and agreement between competitors in the coal business who agreed to get together for the purpose of fixing and maintaining prices. Such a contract, agreement or combination is in restraint of trade, whether the prices fixed are reasonable or not; and, to the extent that it is operative in intrastate commerce it is violative of the anti-trust laws of the several States, and is violative of the anti-trust laws of the United States to the extent that it is operative in interstate commerce. (*United States* v. *Trenton Potteries,* 273 U. S. 392). The mere formation of the agreement or combination, without any proof of overt act or of consummation of the price fixing arrangement, is illegal (*Nash* v. *United States,* 229 U. S. 373, 378; *United States* v. *Kissel,* 218 U. S. 601, 608).

If the Guffey Act is unconstitutional it will afford no protection against civil or criminal proceedings under these anti-trust laws (*Norton* v. *Shelby County, supra*). Even an express provision in this unconstitutional statute purporting to exempt Code members from the provisions of anti-trust laws could not operate to exempt them from provisions of the *State* anti-trust laws, and in any event, the Guffey Act contains no such exemption, even the provision exempting Code members from the Federal anti-trust laws, which appeared in the bill when it passed the House, having been struck from the statute on the Senate floor.[1]

This liability under the anti-trust laws is not merely a threat to the Company itself, but is a threat to the petitioner in his capacity as President and director, for upon the Company's joining the Code he must either resign his position as President and Director, and lose the emoluments that go therewith, or be jointly liable with the Company, criminally as well as civilly, for any acts done under the Code which constitute "in whole or in part" a violation of the anti-trust acts.[2]

Even if it should be assumed that the Code imposes no contractual obligations, the anti-trust laws would be vio-

---

[1]79 Cong. Rec. 14409, 74th Cong., First Sess.

[2]Clayton Act, § 14, 38 Stat. 736 (15 U. S. C. A. § 24), reading as follows: *"Liability of directors and agents of corporation.* Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court."

lated, for they apply not merely to contracts, but also to combinations, as well as to conspiracies.[3]

Nor is it fruitful to speculate whether this Court in some future case may find some ground upon which to relieve persons who join this Code in good faith from prosecution under the anti-trust laws of the United States or of the several States, should the statute and Code be declared unconstitutional. No authority in the books at present establishes the right to such immunity, and the statute does not purport to confer it. The threat not merely of pecuniary liability from joining the Code, but of criminal conviction and imprisonment as well, is existent and very real.

7. Injury from joining Code—loss of business.

As already pointed out, the committee reports show that the purpose of this Act is to increase the price of bituminous coal, and the record shows that its effect will be to increase it (R. 260-265, 326, 351, 369, 390). Previous discussion has also established the injury which will thereby accrue through loss of business to competing fuels and through economies of consumers in the use of coal. (See FF. 53-55, R. 134-136.) Injury through the fixing of minimum prices which will in practice be the maximum prices and which the statute directs be made with no allowance for profit, is also very clear and very real. Injury through discrimination in classification of coals by a board of competitors upon which petitioner's company is not represented, has also been discussed. The record abounds in facts show-

[3]Sherman Act, Secs. 1, 2 (26 Stat. 209).

ing substantial grounds for apprehension of business loss and financial injury through joining the Code.

8. Injury from joining Code—disclosure of contracts and prices to competitors.

The statute and Code require Code members to report *all* orders to the district board and to file copies of *all* contracts, invoices, credit memoranda, etc. with that board (Act, Sec. 4, Part II(a)). In thus requiring that all such matters be disclosed, whether they relate to interstate or intrastate business, the statute clearly exceeds the power of the Congress under the Commerce Clause and is in patent violation of the Fourth Amendment. The opinion of this Court in *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298, 305, 306, might have been written with this very section of the present statute in mind. In that case, in holding invalid an order of the Commission requiring the company "to produce its records, contracts, memoranda and correspondence" for inspection of the Commission in connection with a supposed violation of the anti-trust laws, the Court said:

> "The mere facts of carrying on a commerce not confined within state lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company now may be. *Smith* v. *Interstate Commerce Commission,* 245 U. S. 33, 43. Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possi-

> bility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up."

And again at page 307:

> "The demand was not only general but extended to the records and correspondence concerning business done wholly within the State. This is made a distinct ground of objection. We assume for present purposes that even some part of the presumably large mass of papers relating only to intrastate business may be so connected with charges of unfair competition in interstate matters as to be relevant, *Stafford* v. *Wallace,* 258 U. S. 495, 520, 521, but that possibility does not warrant a demand for the whole."

It is true that the present statute states that "All such records shall be held by the district board as the confidential records of the Code member filing such information", but this pious statement does not alter the fact that every member of that board is an active competitor of the petitoner's Company. The fact that the right of privacy in business records and papers is of substantial financial value, is attested by the substantial judgments which have

been obtained for unlawful governmental violation of such right.[1]

9. Injury from joining Code—liability for Code expense.

The statute provides that Code members shall pay their proportionate share of the expense of administering the Code (Act, Sec. 4, Part I(b)). The court found that if the Company joins the Code, it "would be compelled to pay its proportionate share of administering the Code" (FF. 169, R. 208). The record shows that the Carter Coal Company was forced to pay $20,000 for its proportionate share of administering the Bituminous Coal Code against it under the N. R. A. during the twenty months of the existence of that Code (R. 260). Such an item is no inconsiderable one in a business whose net last year was less than $325,000 (FF. 35, R. 126). This item "would add to the cost of producing coal by the Corporation" and was "a material consideration" affecting petitioner's opposition to the Code (R. 260).

10. Injury through exaction of penalty.

In view of all of the foregoing facts, there can be no serious contention that acceptance of the Code by the Company does not constitute a most serious threat to the constitutional and property rights of the petitioner and of his Company alike. The facts clearly sustain the trial court's ultimate finding that "plaintiff had reasonable ground to contest the regulatory provisions of the statute" (FF. 168, R. 208).

---

[1]See *In re Pacific Ry. Comm.*, 33 Fed. 241, 253.

Irreparable injury through exaction of the penalty tax is also clear. As previously pointed out, the undisputed evidence shows, and the court below found, that the amount of penalty tax is substantially in excess of the net profits of the Company and that the exaction of it from respondent Company, while its competitors are relieved of the penalty, would promptly drive the Company out of business (FF. 40-41, R. 128-129). There is no dispute in the evidence upon this point.

11. Lack of remedy at law.

Obviously, the petitioner has no remedy *at all* in a court of law to prevent the Company and its officers and directors from assenting to the Code and causing the Company to become a member thereof. There has been no suggestion throughout the whole course of this litigation that this petitioner has any other remedy whatever to prevent that, other than in a court of equity and in this proceeding. The court below properly found that there was no other remedy (Conclusion 3, R. 213).

If the petitioner is entitled to an injunction preventing the Company from joining the Code, the further right to enjoin the assessment of the penalty tax against it is established by precedent[1] and by the special facts proved and found in this case. Should the Company be enjoined from accepting and complying with the Code and yet left open to the assessment and collection of the penalty tax, it would

---

[1]*Hill* v. *Wallace,* 259 U. S. 44; *Dodge* v. *Woolsey,* 18 How. 331. See *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 253; *Smyth* v. *Ames,* 169 U. S. 466; *Ex parte Young,* 209 U. S. 123; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; *Brushaber* v. *Union Pac. R. R.,* 240 U. S. 1.

be financially ruined and driven out of business long before it could satisfy the lengthy statutory procedure respecting claims for refund and suit at law to recover the illegal exaction.[2]

The court below, appreciating these facts (FF. 40, 41, R. 128, 129), concluded not merely that petitioner was without any remedy at law in respect of his suit against the Company and its officers and directors (Conclusion 3, R. 213), but that R. S. 3224 is not a bar to the relief which he prays against the Government officer respondents (Conclusion 5, R. 213), and that he has established a standing in equity entitling him to the relief prayed in his bill, if his constitutional objections to the Code be sound (Conclusion 4, R. 213). As respects the right to equitable relief against the exaction of the penalty tax, this conclusion is clearly sound, whether the exaction be regarded as a true tax[3] or as a penalty to enforce compliance with a course of conduct.[4]

CONCLUSION

It is submitted that so much of the decree as dismisses the bill of your petitioner should be reversed, and that the cause should be remanded to the court below with directions to grant the relief as prayed in the bill.

Respectfully submitted,

FREDERICK H. WOOD,
WILLIAM D. WHITNEY,
Counsel for Petitioner.

---

[2]R. S. 3226, as amended, (47 Stat. 169), 26 U. S. C. 1672-1673.
[3]*Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498.
[4]*Hill* v. *Wallace*, 259 U. S. 44, 62, (See *Graham* v. *Du Pont*, 262 U. S. 234, 258); *Lipke* v. *Lederer*, 259 U. S. 557; *Regal Drug Co.* v. *Wardell*, 260 U. S. 386.