SUBJECT INDEX.

ALPHABETICAL LIST OF CASES.

Table of Statutes Cited.

Supreme Court of the United States

OCTOBER TERM, 1935.

No. ———.

R. C. TWAY COAL COMPANY,
R. C. TWAY, AS PRESIDENT AND DIRECTOR OF R. C. TWAY COAL COMPANY, AND
L. A. SHAFER, AS DIRECTOR OF R. C. TWAY COAL COMPANY, *Petitioners and Appellants Below,*

v.

C. H. CLARK, - - *Respondent and Appellee Below.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Your petitioners respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a suit in equity brought in the United States District Court for the Western District of Kentucky by the respondent, C. H. Clark, in his capacity as a

stockholder and director of R. C. Tway Coal Company, against the petitioners, R. C. Tway Coal Company, R. C. Tway, as President and Director of R. C. Tway Coal Company, and L. A. Shafer, as Director of R. C. Tway Coal Company.

The bill (R. 1-8) alleged that the respondent is a stockholder and a member of the board of directors of the petitioner, R. C. Tway Coal Company, which is a corporation organized under the laws of the Commonwealth of Kentucky, with its principal office and place of business in the city of Louisville, in the Western District of Kentucky, and engaged in the business of mining bituminous coal from its mines located in Harlan County, Kentucky, and in selling the coal so produced; that under its charter its affairs are conducted by a board of directors of three members, elected by the stockholders annually at a meeting held for that purpose; that the board of directors is composed of the respondent and petitioners, R. C. Tway and L. A. Shafer, Tway also being President of the corporation; that the majority of the board of directors, acting under the conviction that the Bituminous Coal Conservation Act of 1935 (Sections 801-827, both inclusive, Title 15, U. S. C. A., October, 1935, Special Pamphlet) was unconstitutional, determined that the company would not accept the provisions of the Code required to be formulated under Section 4 of that Act and would not operate thereunder; that the respondent, believing that this action of the board of directors was founded upon an incorrect view of the law, and, if persisted in, would subject the company to the payment

of the fifteen per cent tax provided for in Section 3 of the Act, and that the payment of such a tax would destroy the company, addressed to the company and the board of directors a letter, demanding that the board reconsider its action, and upon such reconsideration elect to accept the Bituminous Coal Code provided for in the Act and to operate under its provisions. The letter is set out on page 4 of the record.

It was alleged that in response to this demand of the respondent a special meeting of the board of directors was held on September 10, 1935, to consider same, and, after consideration, the board of directors by a majority vote, the respondent voting against such action, adopted a resolution reaffirming the prior decision of the board not to accept the Code and not to operate under its provisions (R. 5).

Thereupon a special meeting of the stockholders, at which all the stock was represented, was held for the purpose of considering the demand of the respondent, and the stockholders by a majority vote, respondent voting against same, adopted a resolution approving the action of the majority of the board of directors not to accept the Code and not to operate under its provisions (R. 5-6).

It was alleged that Congress under the Constitution has the power to deal with and regulate the business of producing, selling and distributing bituminous coal, to the extent and in the manner that these matters are required to be dealt with in the Code formulated under Section 4 of the Act, and particularly that Congress has the constitutional power to fix minimum

and maximum prices at which bituminous coal may be sold and to regulate wages, hours of service and trade practices in the bituminous coal-producing industry; that the levy of fifteen per cent upon those bituminous coal producers who refuse to accept and operate under the Code required to be formulated under Section 4 of the Act is a valid exercise of the taxing power of Congress under the Constitution; that the profit realized by the company for many years past has not been, is not now, and will not in the future be in excess of five per cent of the sale price of the coal mined and sold by it, and that the tax of fifteen per cent imposed upon the company for failure to accept and comply with the Code can only be paid out of its capital assets, thus resulting in a disastrous loss to the company and in its ultimate bankruptcy; that in view of these facts it is the duty of the company, in the proper performance of its corporate functions, to accept the Code and to operate under its provisions, and of R. C. Tway and L. A. Shafer, as directors, to cause the company to accept said Code and to operate under its provisions, and that their failure to do so will work irreparable damage and injury upon the company and upon the respondent and other shareholders of the company.

The prayer was for a decree, adjudging it to be the duty of the company to accept the Code and to operate under its provisions, and the duty of Tway and Shafer, as directors of the company, to cause the company to accept said Code and operate under its provisions, and

that they be mandatorily enjoined to do so, and perpetually enjoined from refusing to do so.

The petitioners filed a motion to dismiss the bill (R. 8-9), in which motion they expressly recognized the respondent's right to the relief sought, in event the Bituminous Coal Conservation Act of 1935 is constitutional, but insisted that the respondent's bill should be dismissed and all relief denied, because the Act is unconstitutional for the following reasons:

> "1. Because Congress, under the Constitution of the United States, 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 because the fixing of minimum and maximum prices of coal free on board transportation facilities at the mines; the requirement that coal shall be sold by producers to all customers similarly circumstanced at the same price; 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 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 reserved rights of the States and the people, secured to them by the Tenth Amendment thereof.

"2. Because Sections 3 and 9 of the Act, in so far as they purport to impose upon those producers of bituminous coal who refuse to accept and operate under the provisions of Section 4 of the Act, and of the Code formulated thereunder, a tax equal to fifteen per cent of the sale price at the mine of the coal produced by them, is not a good-faith exercise of the taxing power conferred upon Congress by Clause 1, Section 8, Article 1, of the Constitution of the United States, but is an unconstitutional attempt on the part of Congress, under the guise of taxation, to coerce all producers of bituminous coal into accepting and operating under the Bituminous Coal Code provided for by Section 4 of the Act, and to punish those producers of bituminous coal who are unwilling to surrender their constitutional right to conduct their business free of unconstitutional interference and regulation by Congress; and the imposition of such penalty operates to deprive producers who refuse to accept the provisions of the Code of their property without due process of law, in violation of the Fifth Amendment, and is an unconstitutional invasion of the rights of such producers, reserved to them by the Tenth Amendment of the Constitution of the United States.

"3. Because Section 4 of the Act undertakes to delegate legislative power to the National Bituminous Coal Commission, and to the other agencies created by the Act.

"4. Because the tax attempted to be imposed upon those producers who refuse to accept and operate under the provisions of the Code required to be formulated under Section 4 of the Act is

> arbitrary, capricious and confiscatory, and was deliberately intended by Congress to be confiscatory."

Upon the filing of this motion to dismiss, the parties filed a stipulation (R. 10), in which the petitioners again admitted the right of the respondent to the relief sought, if the Act is constitutional. The stipulation contained other matters not here material.

Thereafter they filed a supplemental stipulation (R. 11), in which it was agreed that all the bituminous coal produced in the United States, with the exception of an immaterial amount consigned to prepay stations, is sold f. o. b. railroad cars at the mine of the producing company, and that approximately fourteen per cent of the total annual production is sold to customers living in the State in which the coal is produced, and the remainder in other States; that the R. C. Tway Coal Company sells approximately twenty-five per cent of its production to customers in the State of Kentucky; that the greatest competitors of the Harlan coal field, in which the R. C. Tway Coal Company's mine is located, are mines located in the States of Ohio, West Virginia and Pennsylvania; that approximately four per cent of all the bituminous coal produced in Kentucky is sold to customers in that State; approximately sixty-two per cent of all the bituminous coal produced in Ohio is sold to customers in that State; approximately fifty per cent of the total production of the State of Pennsylvania is sold to customers in that State, and approximately eleven per cent of the

total production of West Virginia is sold to customers within that State; that the R. C. Tway Coal Company ordinarily employs in its mine about three hundred men, whose duties are exclusively concerned with the mining of coal, and that only six of its employees have anything whatever to do with the selling end of the company's business, and that these facts are typical of the other bituminous coal mines in the Harlan coal field; that the average total sales per month of the R. C. Tway Coal Company amount to approximately $44,000, and that the fifteen per cent monthly tax thereon would amount to $6,600, whereas the profits realized by the company on such sales do not and will not exceed five per cent thereof; that the United States Attorney for the Western District of Kentucky was invited to appear and defend the constitutionality of the Act, but failed to do so.

Thereafter, by stipulation, respondent was permitted to offer as evidence in his behalf, subject to relevancy and materiality, the same evidence which was offered by the defendant in his behalf in the case of R. C. Tway Coal Company, *et al.,* v. Selden R. Glenn, Individually, and as Collector of Internal Revenue for the District of Kentucky, which was then pending in the District Court of the United States for the Western District of Kentucky, and which involved the constitutionality of the Bituminous Coal Conservation Act of 1935.

Objection to this evidence as being irrelevant and immaterial was sustained, but it appears in the record as an avowal (R. 19-112), and the petitioners under

the same stipulation introduced as evidence the statement of Roy Carson (R. 112), which, in substance, shows that, measured by the consumption for the year 1929, it will take more than twenty-eight hundred years to exhaust the available supply of bituminous coal in the United States.

The case was submitted for final decree on the pleadings and on the stipulations hereinbefore referred to. While the Department of Justice declined to take charge of the defense of the constitutionality of the law, it did appear and file a brief as *amicus curiae,* questioning the good faith of the action and also contending that it was premature.

The case was heard with the case of R. C. Tway Coal Company, *et al.,* v. Selden R. Glenn, etc., and decided at the same time, the Court disposing of both cases in one opinion (R. 115-157).

The Court held that the case was not a collusive one nor premature, and that the jurisdictional facts existed, but it also held that the Act is a constitutional exercise of the power of Congress to regulate interstate commerce and does not violate the Fifth or Tenth Amendments to the Constitution of the United States, nor does it improperly delegate legislative power; that Sections 3 and 9 of the Act, to the extent that they levy a monthly exaction equal to thirteen and one-half per cent of the sale price at the mine of the coal sold by them upon those producers who do not accept the Code provided for in the Act and exempt therefrom those producers who accept the Code, are not a revenue measure, but represent a valid exer-

cise of the power of Congress to impose penalties for the purpose of coercing compliance with the regulations of the Act dealing with interstate commerce, and do not deprive the coal company of its property without due process of law, in violation of the Fifth Amendment, nor do they invade the rights reserved to the States and to the people under the Tenth Amendment.

It was further held that in view of the constitutionality of the Act, the continued refusal of the R. C. Tway Coal Company to accept the Code and to operate under its provisions would be a perversion of its corporate functions and destructive of the company's business and assets and of the interests of its stockholders, and that therefore it should accept and operate under the Code; and a decree was entered accordingly (R. 161-163).

The case was then appealed to the United States Circuit Court of Appeals for the Sixth Circuit, the record having been filed in that Court on December 19, 1935, and there is filed herewith a duly certified copy of the printed transcript of the record on said appeal, together with twenty-nine additional copies thereof.

The case has not been heard, submitted or decided by that Court.

II.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The statute here involved vitally affects a great industry of the Nation, and presents grave constitutional questions; and the public interest will be promoted by a prompt settlement in this Court of the questions involved.

2. The District Court, in holding that in the enactment of the law Congress did not transcend its constitutional powers, decided a Federal constitutional question in a way probably in conflict with the applicable decisions of this Court.

3. There is now pending before this Court a petition for a writ of certiorari to the Court of Appeals of the District of Columbia, wherein James Walter Carter is petitioner and appellant, and Carter Coal Company, *et al.,* are respondents and appellees, which involves the same questions as are here involved, the only difference being that the petitioner in that case sought to enjoin compliance with the Code, whereas here the respondent sought to compel compliance with the Code. In the Carter case, as petitioners are advised, the Supreme Court of the District of Columbia, Judge Adkins sitting, held the price fixing and taxing features of the Act constitutional, but that paragraph (g) of Part III of Section 4, which binds Code members to agreements upon hours of labor and wages negotiated between two-thirds of the employers and

more than a majority of the mine workers, is unconstitutional because it improperly delegates legislative power and is beyond the power of Congress under the commerce clause of the Constitution. There is also pending in this Court a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, wherein R. C. Tway Coal Company and eighteen other coal companies in Harlan County, Kentucky, are the petitioners and appellants, and Selden R. Glenn, Collector of Internal Revenue for the District of Kentucky, is the respondent and appellee. The petitioners and appellants in that case sought to enjoin Glenn, the respondent and appellee, from collecting the taxes imposed by Sections 3 and 9 upon non-conforming producers, upon the ground that the Act is unconstitutional. That case was heard in the District Court with this case, and of course the Court reached the same conclusion, holding the Act constitutional in its entirety. It is believed that if a writ of certiorari is granted in any of these cases, it will be conducive to the public interest that a writ be granted in each of them, to the end that they may be heard together in this Court, so that every phase of the vital questions involved may be presented.

PRAYER FOR WRIT.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit,

commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in a case numbered and entitled on its docket No. 7292, R. C. Tway Coal Company, *et al.,* Appellants, v. C. H. Clark, Appellee; and that said decree of the United States District Court for the Western District of Kentucky may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

R. C. TWAY COAL COMPANY, ET AL.,
Petitioners.

By CHAS. I. DAWSON,
Counsel for Petitioners.

WOODWARD, DAWSON & HOBSON,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1935.

R. C. TWAY COAL COMPANY, ET AL., - *Petitioners,*

v.

C. H. CLARK, - - - - - *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF COURT BELOW.

The opinion of the United States District Court for the Western District of Kentucky (R. 115-157) was rendered November 14, 1935, and has not been officially reported.

II.

JURISDICTION.

1. The decree of the United States District Court for the Western District of Kentucky, a review of which is here sought, was entered November 14, 1935 (R. 161-163). An appeal to the United States Circuit Court of Appeals for the Sixth Circuit was allowed

November 22, 1935 (R. 169), and transcript of record was filed in the United States Circuit Court of Appeals for the Sixth Circuit on December 19, 1935. The case has not yet been heard or submitted in that Court, as is shown by the certificate of the Clerk of that Court appended to the certified copy of the transcript filed herein.

2. The statutory provision, which is relied upon to sustain the jurisdiction of this Court, is Section 240 of the Judicial Code, as amended by Act of February 13, 1925 (Sec. 347, Title 28 U. S. C. A.).

3. The suit is one in equity, of a civil nature, arising under the Constitution and laws of the United States (see Bill, R. 1-7) and the matter in controversy was alleged in the Bill (R. 2) to exceed the sum of three thousand ($3,000.00) dollars, which was not denied, and was so found by the Court (R. 158). The decree of the District Court was not an interlocutory one, but was a final decree entered after the introduction of proof and full hearing.

III.

STATEMENT OF THE CASE.

The statement in the preceding petition for writ of certiorari under I, pages 1-10, is hereby adopted and made a part of this brief without further elaboration.

IV.

SPECIFICATION OF ERRORS.

Petitioners intend to urge and rely upon each of the errors assigned in their assignment of errors in the District Court (R. 166-168), which are as follows:

"1. The Court erred in holding that the Bituminous Coal Conservation Act of 1935 is constitutional, and a valid exercise of the power of Congress to regulate interstate commerce.

"2. The Court erred in holding that said Act is not violative of the Fifth and Tenth Amendments to the Constitution of the United States.

"3. The Court erred in holding that said Bituminous Coal Conservation Act does not improperly delegate legislative power.

"4. The Court erred in holding that Sections 3 and 9 of the Act are a valid exercise of the power of Congress to impose penalties for the purpose of coercing compliance with the regulations of the Act dealing with interstate commerce.

"5. The Court erred in holding that Sections 3 and 9 of the Act do not deprive the defendant, R. C. Tway Coal Co., and the individual defendants of their property without due process of law, in violation of the Fifth Amendment.

"6. The Court erred in holding that Sections 3 and 9 of the Act do not violate the rights reserved to the respective States and to the people under the Tenth Amendment to the Constitution of the United States.

"7. The Court erred in holding that the refusal of the defendant company to accept the Code provided for in said Act and to operate thereunder is a perversion of its corporate functions, and in holding that the refusal of the defendant directors, for and on behalf of the company, to accept said Code and to operate under its provisions is an abuse of their power to conduct the affairs of the defendant company as such directors.

"8. The Court erred in ordering and directing the defendant company to accept said Code and to operate under its provisions, and in ordering the defendants, R. C. Tway, as President and Director of said company, and L. A. Shafer, as director of said company, to cause said company to accept said Code and to operate thereunder, and in permanently enjoining each of the defendants from refusing to accept said Code and from refusing to comply with its provisions.

"9. The Court erred in adjudging the costs of this proceeding against the defendants.

"10. The Court erred in refusing to hold that said Act is an unconstitutional attempt on the part of Congress to regulate matters not within the competency of Congress.

"11. The Court erred in refusing to hold 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 in refusing to hold that the fixing of minimum and maximum prices of coal free on

board transportation facilities at the mines, and the regulation and control of contracts for the sale of coal, are not within the competency of Congress under the Constitution.

"12. The Court erred in refusing to hold that the regulation of the relations between the producers of bituminous coal 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 of the Act, are each and all matters not within the competency of Congress.

"13. The Court erred in refusing to hold that the attempted regulation by Congress of the matters enumerated in the eleventh and twelfth assignments herein, and of the matters required by Section 4 of the Act to be embraced in the Bituminous Coal Code therein provided for, is violative of the due process clause of the Fifth Amendment to the Constitution of the United States, and of the reserved rights of the States and of the people, secured to them by the Tenth Amendment.

"14. The Court erred in refusing to hold that Sections 3 and 9 of the Act, in so far as they purport to impose upon the producers of bituminous coal who refuse to accept and operate under Section 4 of the Act and of the Code formulated thereunder a tax equal to fifteen per cent of the sale price at the mine of the coal produced by them, is not a good-faith exercise of the taxing power conferred upon Congress by Clause 1, Section 8, Article 1, of the Constitution of the United States, but is an unconstitutional attempt on the part of

Congress, under the guise of taxation, to punish those producers of coal who are unwilling to surrender their constitutional right to conduct their business free of unconstitutional interference and regulation by Congress, and in refusing to hold that such penalties operate to deprive the defendant, R. C. Tway Coal Company, and the individual defendants 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 defendant company and the individual defendants by the Tenth Amendment to the Constitution of the United States.

"15. The Court erred in refusing to hold that Section 4 of the Act is an unconstitutional delegation of legislative power.

"16. The Court erred in refusing to hold the Act unconstitutional in its entirety.

"17. The Court erred in refusing to hold the Act invalid in its entirety, because of the inseparability of its provisions.

"18. The Court erred in refusing to hold that the so-called tax attempted to be imposed upon those producers who refuse to accept and operate under the provisions of said Code required to be formulated under Section 4 of the Act is arbitrary, capricious and confiscatory, and was so intended by Congress.

"19. The Court erred in refusing to sustain the motion of the defendants to dismiss the bill."

V.

ARGUMENT.

POINT 1.

The Decision of the District Court, Holding that Congress, Under the Commerce Clause Has the Power to Regulate the Production of Bituminous Coal, is Contrary to and in Conflict With the Decisions of This Court.

Section 4 of the Act provides:

> "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:"

Then follows Part I, dealing with certain organization matters; Part II, dealing with the marketing of coal by Code members; and Part III, dealing with the labor relations between producers of coal and their employees.

Part III provides that district boards and Code members shall accept, and the Code formulated under Section 4 shall have incorporated therein, in brief, the following conditions:

(a) All producers accepting and operating under the Code are prohibited from interfering with or denying the right of their employees to organize and bargain collectively and from requiring any employee as a condition of employment to join a company union, and from denying employees the right to select their own check weighman to inspect the weighing and measuring of coal, and from requiring as a condition of employment that their employees shall live in company houses or trade at the store of their employer.

(b) That whenever maximum daily or 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 production of bituminous coal for the preceding calendar year and the representatives of more than one-half of the mine workers employed, such maximum hours of labor shall be accepted by and binding upon all Code members; and that any 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 provided for in said section and shall be accepted as the minimum wages for the various classifications of labor by the Code members operating in such district or group of districts.

It is thus apparent that the Act undertakes to regulate the relations between coal producers and the men employed in the production thereof, including hours of service and wages.

The District Court, in Paragraph 3 of the decree (R. 161) held:

> "The Bituminous Coal Conservation Act is a constitutional exercise of the power of Congress to regulate interstate commerce and is not violative of the Fifth or Tenth Amendments to the Constitution of the United States, nor does it improperly delegate legislative power."

This ruling of the District Court was necessarily based either upon the view of that Court that the production of coal for sale and shipment in part in interstate commerce is interstate commerce, or so directly affects interstate commerce as to authorize Congress to regulate same under the commerce clause of the Constitution.

A long line of decisions by this Court, it seems to us, thoroughly establishes that production of coal is not interstate commerce, or commerce of any sort. In support of this statement we cite the following cases: *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, each holding that manufacturing is not commerce; *Delaware, Lackawanna & Western R. R. 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,* 272 U. S. 172, holding that the mining of iron ore is not interstate commerce; and *Schecter Poultry Corporation* v. *United States,* 295 U. S. 495, holding that the slaughtering and preparation of fowls for market is not interstate commerce.

We also cite the cases of *United States* v. *Knight, supra; Kidd* v. *Pearson, supra; Heisler* v. *Thomas Colliery Co., supra; Oliver Iron Co.* v. *Lord, supra; Hammer* v. *Dagenhart, supra; Utah Power & Light Co.* v. *Pfost, supra;* as fully sustaining the proposition that Congress is without power under the commerce clause to regulate either manufacture or production, notwithstanding the fact that the articles manufactured or produced are intended for sale in interstate commerce or may have been sold in interstate commerce before the manufacture or production thereof.

We also cite and rely upon the case of *Schecter Poultry Corporation* v. *United States, supra,* in support of our contention that the production of coal does not, and in the constitutional sense can not, so directly affect interstate commerce as to bring that activity under the control of Congress under the commerce clause.

POINT 2.

The Decision of the District Court that Congress, Under the Commerce Clause, May Fix Prices for Coal Sold in Interstate Commerce, and Regulate the Contracts in Respect of Such Sales, is Contrary To and in Conflict With the Decisions of This Court.

The record shows (R. 11), and the Court found (R. 159) that the producers of bituminous coal, including the petitioner, R. C. Tway Coal Co., sell substantially all the coal produced by them f. o. b. railroad cars at the mines, to be immediately shipped, in part to customers in the State where produced and in part to purchasers in other States. Under the authority of *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, and *Pennsylvania Railroad Co.* v. *Clark Bros. Coal Mining Co.,* 238 U. S. 456, we concede that sales to customers in other States under such circumstances is interstate commerce.

It is our contention, however, that this fact does not give Congress, under the commerce clause, the power to fix prices for such interstate sales of coal, nor to regulate the contracts with reference thereto, as the fixing of prices and the regulation of contracts 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.

Furthermore, if it be conceded that under its power to regulate interstate commerce Congress has the power in any 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 justify price-fixing and the regulation of sale contracts in respect thereto by Congress.

In support of our contention we cite the cases of: *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522; *Tyson & Bro.* v. *Banton,* 273 U. S. 418; *Williams* v. *Standard Oil Co.,* 278 U. S. 235; *Ribnik* v. *McBride,* 277 U. S. 350; *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1; *Atkins* v. *Children's Hospital of the District of Columbia,* 261 U. S. 525; *New State Ice Co.* v. *Liebmann,* 285 U. S. 262.

POINT 3.

The Decision of the District Court Which, in Effect, Held that Congress, Under the Commerce Clause of the Constitution Has the Right to Regulate All Sales of Bituminous Coal and to Fix Prices Therefor, Whether Sold in Interstate or Intrastate Commerce, is Contrary To and in Conflict With the Decisions of This Court.

The record shows (R. 11) and the Court found (Paragraph 5, Findings of Fact, R. 159) that approximately fourteen per centum of all the bituminous coal produced in the United States is sold to customers in the State in which it is mined, and in the same paragraph of the findings of fact the Court found that about twenty-five per centum of all the coal produced by the R. C. Tway Coal Co. is sold to customers in

the State of Kentucky, in which State its mine is located.

It is clear that the price fixing and contract regulation provisions of Section 4 of the Act are intended to apply to all sales made by Code members, whether made in interstate or intrastate commerce. It is our contention that such being the broad sweep of the statute, the entire statute in this respect must fail: First, because Congress has no power to regulate in any way intrastate sales; and second, having attempted to cover a broader field than was assigned to it by the Constitution, the entire price fixing and contract regulation features of the Act must fail.

We cite in support of this proposition the following cases: *Employers' Liability Cases,* 207 U. S. 463; *Trade-mark Cases,* 100 U. S. 82; *Butts* v. *Merchants Transportation Co.,* 238 U. S. 126; *James* v. *Bowman,* 190 U. S. 127, 139; *I. C. Railroad Co.* v. *McKendree,* 203 U. S. 514; *United States* v. *JuToy,* 198 U. S. 252; *United States* v. *Reese,* 92 U. S. 214; *Baldwin* v. *Franks,* 120 U. S. 678.

POINT 4.

Assuming the District Court Was Correct in Holding that Congress, Under the Commerce Clause, Has the Power to Fix Prices and to Regulate Contracts of Sale, the Failure of the District Court to Hold the Entire Act Invalid Because of the Attempt to Regulate Production is Contrary To and in Conflict With the Decisions of This Court.

An examination of Section 4 of the Act discloses that the regulation of production, and particularly the regulation of the relations between the producer and his employees, including, under certain conditions therein set out, the regulation of hours of service and wages, was intended to be an integral and vital part of the Code required to be formulated in accordance with the terms of that section, and to be observed by all Code members.

We have heretofore cited under Point 1 of the Argument of this brief authorities showing that Congress has no power to regulate production, and it is our contention that Part III of Section 4, which deals with the production end of the industry, so vitally affects the dominant aim and purpose of the entire statute that the courts are not justified in sustaining any part of the statute when the part just referred to is stricken. Of course, no proof is required in demonstration of the fact that uniformity of prices in the different price areas set up in the Act for the different grades of coal can not be secured without regulating the cost of production.

In support of this contention we cite: *Williams* v. *Standard Oil Co.,* 278 U. S. 235; *Lynch* v. *United States,* 292 U. S. 571; *Dorchy* v. *Kansas,* 264 U. S. 286; *Hill* v. *Wallace,* 259 U. S. 44; *Railroad Retirement Board* v. *Alton Railroad Co.,* 295 U. S. 330.

POINT 5.

The Holding of the District Court that Sections 3 and 9 of the Act, While Not Revenue Provisions, are a Valid exercise of the Power of Congress to Impose Penalties for the Purpose of Coercing Compliance With the Regulations of the Act Dealing With Interstate Commerce, is Contrary To and in Conflict With the Decisions of This Court.

Section 3 of the Act imposes upon the sale or other disposal of all bituminous coal produced in the United States a monthly excise tax of fifteen per centum on the sale price at the mine, or, in the case of captive coal, as defined in the Act, the fair market value of such coal at the mine, but that section, as well as Section 9, exempts those producers who accept the provisions of the Code and operate under it from the payment of ninety per centum of such tax.

It is our contention that these sections are not a good faith exercise of the taxing power conferred upon Congress by Clause 1, Section 8, Article 1 of the Constitution; nor do they represent a legitimate exercise of the taxing power for the purpose of coercing compliance with the legitimate regulation of interstate commerce, but are an unconstitutional attempt, under

the guise of taxation, to punish those producers of coal who are unwilling to surrender their constitutional right to conduct their business free of unconstitutional interference and regulation by Congress, and that the imposition of such penalties operates to deprive the 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 petitioners by the Tenth Amendment to the Constitution of the United States.

In support of this proposition we cite: *Hammer* v. *Dagenhart,* 247 U. S. 251; *Bailey* v. *Drexel Furniture Co.* (Child Labor Case), 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44; *McCulloch* v. *Maryland,* 4 Wheat. 316.

POINT 6.

The Ruling of the District Court, to the Effect that Section 4 of the Act is Not an Improper Delegation of Legislative Power, is Contrary To and in Conflict With the Decisions of This Court.

Price fixing and the regulation of contracts for the sale of coal, if authorized at all, are undoubtedly in the nature of legislative acts, and of course, as such, must be exercised by the legislative department.

It seems to us that Part II of Section 4, which deals with these subjects, is so general and indefinite as to furnish no standards to guide the authorities in performing this function. Certainly that part of Section 4 which undertakes to fasten upon all Code members

whatever hours of service may be agreed upon between more than two-thirds of the producers of the annual national tonnage for the preceding calendar year and representatives of more than one-half of the mine workers employed, and upon Code members operating in any district or group of districts, whatever minimum wages may be agreed upon between the producers of more than two-thirds of the annual tonnage in such territory and representatives of the majority of the mine workers therein, amounts to a complete surrender of legislative power to private groups. If we are correct in this contention, of course the Act is invalid.

In support of our contention on this point we cite: *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; and *Schecter Poultry Corporation* v. *United States,* 295 U. S. 495.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the constitutionality of the Act here under attack may be promptly, finally and authoritatively determined; and to that end a writ of certiorari should be granted, and this Court should review the decision of the United States District Court for the Western District of Kentucky, without awaiting a decision by the United States Circuit Court of Appeals for the Sixth Circuit, and that upon such re-

view, the decree of the District Court should be reversed.

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