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,

vs.

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

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

INDEX.

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DISTRICT COURT OF THE UNITED STATES

WESTERN DISTRICT OF KENTUCKY.

TRANSCRIPT OF RECORD.

Proceedings in the District Court of the United States For the Western District of Kentucky, at a Regular Term Begun and Held at the Federal Court Hall in the City of Louisville, Kentucky, on March 11, A. D. 1935.

R. C. Tway Coal Company, et al., - - - Plaintiffs,

vs.

Selden R. Glenn, Individually and as Collector of Internal Revenue for the District of Kentucky, - - - - - - - Defendant.

Be it remembered, that heretofore, to-wit on September 10, 1935, came the plaintiffs, by their counsel, Woodward, Dawson & Hobson, and tendered their Bill in Equity, which was filed and which is in words and figures as follows:

BILL IN EQUITY—Filed September 10, 1935.

1.

The plaintiffs state that they are each miners and producers of bituminous coal, and that their respective mines are located in Harlan County, in the Eastern District of Kentucky. The plaintiffs, R. C. Tway Coal Company, Harlan Central Coal Company, Harlan Fuel Company, Crummies Creek Coal Company, Three Point Coal Company, Clover Fork Coal Company, Harlan Collieries Company, High Splint Coal Company, Cornett-Lewis Coal Company, Green-Silvers Coal Corporation and Kentucky King Coal Company, are each corpora-

tions organized under the laws of the Commonwealth of Kentucky and are each citizens of that State. The plaintiffs, Kentucky Cardinal Coal Corporation, and Mary Helen Coal Corporation, are each corporations organized under the laws of the Commonwealth of Virginia and are citizens of that State. The plaintiffs, Harlan-Wallins Coal Corporation and the P. V. & K. Coal Company, are each corporations organized under the laws of the State of Delaware and are each citizens of that State, and the plaintiff, Creech Coal Company, is a corporation organized under the laws of the State of Arizona and is a citizen of that State. Plaintiffs state that they are each, as corporations, authorized to contract and to be contracted with and to sue in their respective corporate names, and that they are each authorized by their articles of incorporation to engage in the business of mining and producing bituminous coal and to sell the coal produced by them.

2.

The defendant, Selden R. Glenn, is a citizen of the Commonwealth of Kentucky, residing in Louisville, Jefferson County, in the Western District of Kentucky, and is the duly appointed, qualified and acting Collector of Internal Revenue for the District of Kentucky, and as such Collector it is his duty to collect in the District of Kentucky all taxes, assessments and levies made or attempted to be made by the United States of America which are collectible in Kentucky through the Internal Revenue Department, including the so-called taxes and penalties hereinafter referred to.

3.

This is a suit in equity of a civil nature, arising under the Constitution and laws of the United States, as will be hereinafter more fully set out, and it presents and involves an actual controversy between each of the plaintiffs and the defendant, and the matter in controversy as to each of the plaintiffs, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

As will hereinafter more fully appear, the plaintiffs have a common interest in the constitutional questions here involved and in obtaining the relief herein sought.

4.

Heretofore the Congress of the United States passed, and on the 30th day of August, 1935, the President of

the United States approved an Act entitled: "An Act to stabilize the bituminous coal mining industry and promote its interstate commerce; to provide for the 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 of said Act is as follows:

> "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 inter-

state 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 these 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 3 of the Act 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 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."

Section 9 likewise provides that producers refusing to accept the code formulated under section 4 of the Act shall be liable for the full amount of the 15% tax imposed by section 3.

Section 4 of the Act requires the formulation by the Commission of a working agreement to be known as the "Bituminous Coal Code," such code to deal with the matters enumerated in section 4 and to otherwise conform to the provisions and requirements of that section. The entire bituminous producing coal area of the United States, by section 4 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 in section 4. It is provided by section 4 that the code required to be 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. Each district board, subject to the supervision and approval of the Commission, is required to immediately establish minimum prices free on board transportation facilities at the mines for all kinds, qualities and sizes of coal produced in their respective judisdictions, with full authority in establishing such minimum prices to make such classifications of

coals and price variations as to mines and consuming market areas as it may deem necessary and proper.

It is further provided that in order to sustain the stabilization of wages, working conditions and maximum hours of labor, such minimum prices shall be established so as to yield a return per net ton for each district in its minimum price area, equal as nearly as may be to the weighted average of the total costs per net ton of the tonnage of such minimum price area, such total costs per net ton to be determined according to the formula attempted to be set up in said section. The district boards are further required, under the rules and regulations established by the Commission and subject to the supervision and approval of the Commission, to coordinate in common consuming market areas, upon a fair competitive basis, the minimum prices, and the rules and regulations established by them for their respective districts, and in effecting such coordination such district boards are required to take into account the factors set out and the rules attempted to be laid down in said section.

Section 4 further authorizes the Commission, whenever it deems it necessary so to do, in order to protect the consumer of coal against unreasonably high prices therefor, to fix maximum prices free on board transportation facilities for coal in any district, such maximum prices to be established in accordance with the formula therein attempted to be set out.

All contracts for the sale of coal below the minimum or above the maximum therefor approved and established by the Commission and in effect at the time of the making of the contract, are declared by such section to be invalid and unenforceable, and after the date of the approval of the Act and until the minimum prices have been established as therein provided, producers accepting the code are prohibited from making any contract for the sale of coal calling for delivery more than thirty days from the date of the contract; and code members are further prohibited, while the Act is in effect, from making any contract for the sale of coal calling for delivery after the expiration of the 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 the making of such contract.

Section 4 further provides that the code formulated under its terms shall prohibit its members from engaging in certain practices enumerated in that section as unfair methods of competition, many of which are de-

signed and were intended to prohibit and prevent the evasion of the minimum prices fixed in the code and in section 4 of the Act, and to compel the producer to sell his coal to all persons similarly circumstanced at the same price.

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 through representatives of their own choosing, and from requiring any employee, as a condition of employment, to join a company union, and from prohibiting employees from selecting their own check weighmen 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.

It is further provided by section 4 that the code formulated under its terms shall provide 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 section 4 of the Act, 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 further provided by section 4 that any code member 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 the Act or by the code formulated thereunder, may sue for damages on account thereof 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 threefold damages and the costs of the suit, including a reasonable attorney's fee.

Section 5 of the Act provides that each producer of bituminous coal accepting membership in the code shall execute and acknowledge such acceptance on a form prepared and supplied by the Commission. This section further provides that the membership of any such producer in the code, and his right to a drawback on the taxes levied under section 3 of the Act, subject to the right of review as provided in the Act, may be revoked by the Commission upon written complaint and hearing as therein provided.

5.

Plaintiffs state 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, without excluding objections to the constitutionality of other provisions of the Act, plaintiffs charge particularly that 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 regulations 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. Plaintiffs state that section 4 is unconstitutional, for the further reason that it attempts to delegate legislative power.

6.

Plaintiffs state that Congress, notwithstanding its lack of power to legislate on the subjects required by section 4 to be embraced in the code to be formulated thereunder, undertook, through the pretended exercise of its taxing power under the Constitution, to coerce all bituminous coal producers in the United States to submit to the unconstitutional Act here under attack, and par-

ticularly to the unconstitutional regulations and requirements under section 4 of said Act and of the code required to be formulated thereunder.

7.

Each of the plaintiffs states that it does not desire to accept the provisions of section 4 of the Act and of the code directed to be formulated thereunder, and has no intention of accepting same and no intention of submitting itself to the jurisdiction of the Commission and the other agencies charged with the administration and enforcement of such code and no intention of operating under said provisions, but desires and intends to exercise its constitutional right to conduct its business of producing and selling bituminous coal, which business is a strictly private one and not affected with a public interest, the declaration of Congress in the preamble to the bill to the contrary notwithstanding, free of the unconstitutional regulations and restrictions contained in said Act, and particularly in section 4 thereof, and in the code required to be formulated thereunder; but they state that by reason of the provisions of sections 3 and 9 of the Act they are and will be penalized for their failure and refusal to accept and operate under the provisions of section 4 of the Act and of the code formulated thereunder by the imposition of a penalty, denominated in the Act of a tax, equal to fifteen per cent of the sale price at the mine of the coal produced by each of them, whereas those producers who agree to operate under the provisions of section 4 and of the code formulated thereunder are rewarded by a rebate and forgiveness of ninety per cent of the tax or penalty which they would otherwise be required to pay.

8.

They state that 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 of 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 bituminous coal who are unwilling to surrender their

constitutional right to conduct their business free of unconstitutional interference and regulation by Congress, and the attempted imposition of such penalty operates to deprive these plaintiffs of their property without due process of law, in violation of the Fifth Amendment, and is an unconstitutional invasion of the rights reserved to these plaintiffs by the Tenth Amendment to the Constitution of the United States.

9.

Plaintiffs state that the average total sale value at the mines of the coal produced and sold by each of them each calendar month, and the amount of penalty which the said Act attempts to impose upon them, in the guise of a tax because of their refusal to surrender their right to conduct their business free of unconstitutional interference by the National Government, is approximately as follows:

Name of Plaintiff	Average Total Sales Per Month	Monthly Penalty or Tax
R. C. Tway Coal Company.....	$44,000	$6,600
Kentucky Cardinal Coal Corp....	20,000	3,000
Harlan-Wallins Coal Corp.....	139,925	21,000
Creech Coal Company	63,000	9,500
Harlan Central Coal Company...	18,000	2,700
Harlan Fuel Company	54,000	8,100
Crummies Creek Coal Company..	68,000	10,000
Three Point Coal Company.....	33,000	4,900
Clover Fork Coal Company.....	14,000	2,100
Harlan Collieries Company	38,000	4,800
High Splint Coal Company	42,000	6,400
Cornett-Lewis Coal Company....	42,000	6,300
Kentucky King Coal Company..	7,000	1,100
P. V. & K. Coal Company	9,416	1,400
Green-Silvers Coal Corp	14,761	2,200
Mary Helen Coal Corp.	47,648	7,100

10.

They state that the profit realized and realizable by each of them on the gross sale price of the coal produced by them each month over the cost of production, under prudent and economical operation, is not over five per cent of such gross sale price, and such profit is not less than the profit realized by producers generally in the field in which plaintiffs' mines are located. It is thus apparent that the penalty of fifteen per cent imposed

upon them by sections 3 and 9 of the Act is far in excess of the profit realized by each of them on the gross sale price of the coal produced by them each month over and above the cost of producing same, and, if required to pay such penalty, their respective operations can only be conducted at a disastrous loss each month, which can be met only out of their capital and surplus, 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 of the Act and of code formulated thereunder, except to either close down their operations, or else to operate at such a disastrous monthly loss that they will quickly be rendered insolvent and unable to operate, in either of which events the Act operates to destroy and confiscate their property and their investment therein. None of the plaintiffs, except the Crummies Creek Coal Company, Clover Fork Coal Company and Harlan Collieries Company, own the fee to the coal land upon which its operation is located and from which it is mining coal; but with the three exceptions mentioned, they are each operating under a lease requiring them to pay a stipulated royalty per ton for each ton of coal mined and sold by them. It is further stipulated in their respective leases that in event the total coal mined in any one year is not sufficient at the fixed royalty rate to produce the minimum royalty fixed 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 required to bring the total royalty or rental payments for the particular year involved up to the stipulated annual minimum royalty. The mining plant of each of the lessee plaintiffs is located upon land owned by its landlord, and under the terms of the lease under which it is operating, the landlord has a first lien upon all the improvements placed upon the premises by the lessee and upon all mining equipment of every kind used in its operation, to secure the landlord in the payment of the stipulated royalty, and the lease under which each of the lessee plaintiffs is operating reserves 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. The plaintiffs state that even should they close down their mines because of the imposition of the so-called tax and of their inability to operate because of the imposition of such so-called tax, they would still be at a heavy expense in the upkeep of their properties, and particularly in keeping same free

from water. Each of the plaintiffs states that substantially all of its capital and surplus is invested in its mine and in the equipment thereon and therein, and the only way it could possibly raise money with which to pay the penalties imposed, over any substantial period of time, is to sell its property, or, if possible, to mortgage same, which would ultimately lead to a sacrifice thereof under foreclosure, as it would have no earnings, after paying such monthly penalties, out of which to satisfy such mortgage; and each of the lessee plaintiffs states that it could only mortgage its plant and its equipment with the consent of the landlord and subject to the prior lien of the landlord for unpaid royalties. Each of the plaintiffs states that it would be impossible to borrow money with which to pay such so-called taxes upon the security of its property, for the further reason that its operating statement would inevitably disclose that it could not operate its mines and pay the monthly penalties exacted by the terms of the Act without sustaining a tremendous loss each month. Therefore, such a statement, which any careful lender of money would demand, would clearly disclose that the money loaned could only be recovered through a sale of the pledged property.

11.

Plaintiffs state that while the so-called tax provision of the Act does not become effective until the first day of the third month following the date of the enactment of the Act, and the monthly payments required thereunder do not became due until the first business day of the second succeeding month, yet the Act imposes upon them such tremendous and unconscionable penalties for their refusal to operate under the terms of section 4 thereof, and of the code formulated thereunder, that they cannot afford to wait until the penalty or tax actually attaches, for the reason that should they do so, before their rights could be finally determined, their property would be confiscated and destroyed through the enforced payment of such penalties during the time their rights were being determined; and for this reason they directed their counsel to notify the defendant, to whom as Collector of Internal Revenue they are required to pay the so-called taxes, that they each regard the Act as unconstitutional and have no intention of accepting or agreeing to operate under the provisions of section 4 of the Act, or of the code formulated there-

under, and to inquire of the defendant what was his attitude with reference to the validity of the Act and what was his intention with reference to the collection of the so-called taxes imposed by the Act upon these plaintiffs; and the defendant, Glenn, in response to such inquiry, asserted that he regarded and intended to treat the Act as constitutional and intended to demand of each of the plaintiffs the amount of taxes assessable under the provisions of the Act, as they matured, and that upon their failure or refusal to pay, he would, by proper procedure, subject their property to the payment of the so-called taxes; and they state defendant will do so.

12.

They state that because each month's payment exacted of these plaintiffs by sections 3 and 9 of the Act will be far in excess of the profits on each month's operation, and can only be paid by a sale of their capital assets, or through a pledge of same under such conditions as would ultimately result in a sale thereof; and because of the further fact that if they should pay such so-called taxes as they accrue, it is within the power of the Commissioner of Internal Revenue, through delay in acting upon the application for a refund, to prevent any suits to recover such so-called taxes until after the expiration of six months after the payment thereof; and because of the further fact that even if they should promptly apply for a refund of the first month's so-called taxes required by the Act to be paid after same have been paid, and the Commissioner of Internal Revenue should promptly deny such application, a suit for the recovery thereof could not be filed and an authoritative adjudication of their rights determined until the latter part of 1936, their capital and surplus will have been consumed, their property sacrificed, and they will have been rendered practically bankrupt before they can recover in a refund action the so-called taxes exacted of them by the Act. They state that Congress has made no appropriation out of which and with which to pay any judgment for refund which may be ultimately secured by them, and it is therefore entirely uncertain when they would be reimbursed on account of the so-called taxes exacted of them by sections 3 and 9 of the Act, even after they secure judgment for same. For all of these reasons they state that that provision of the Federal Statutes which authorizes a suit for the recovery of taxes illegally collected does not afford the plain-

tiffs in this case 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. Nevertheless, if they refuse to pay the illegal exactions imposed upon them by sections 3 and 9 of the Act, unless protected by the exercise of the equity powers of this court, 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 ten thousand dollars, and the officers in charge of their business to a fine of not exceeding ten thousand dollars or imprisonment for twelve months, or both such fine and imprisonment.

Wherefore, reserving the right to hereafter ask for a preliminary injunction if the occasion arises, they pray that upon a final hearing of this cause the said Act be decreed and adjudged unconstitutional, and particularly that the court adjudge and decree as follows:

1. That section 4 of the Act, and of the code required to be formulated thereunder, deal with matters not within the competency of Congress, and that its enforced application to these plaintiffs would deprive them of their property without due process of law, in violation of the Fifth Amendment, and of the rights reserved to them by the Tenth Amendment to the Constitution of the United States.

2. That sections 3 and 9 of the Act are not a good faith exercise of the taxing power of Congress under the Constitution, but an attempt on the part of Congress, under the guise of exerting the taxing power to coerce these plaintiffs and other bituminous coal producers into an acceptance of and submission to regulations by Congress as to matters not within the power of Congress to regulate, and that said sections of the Act deprive these plaintiffs of their property without due process of law, in violation of the Fifth Amendment.

3. That these plaintiffs are not subject to the so-called taxes attempted to be imposed upon them by sections 3 and 9 of the Act, and that the defendant is without constitutional right to enforce or coerce the payment thereof.

4. That section 4 is an unconstitutional attempt to delegate legislative power.

They pray that upon such final hearing defendant be perpetually enjoined from collecting or attempting to collect from any of these plaintiffs the so-called taxes attempted to be imposed upon them by the Act.

They pray for their costs and all other proper and equitable relief to which they may appear to be entitled.

R. C. Tway Coal Company,
Kentucky Cardinal Coal Corporation,
Harlan-Wallins Coal Corporation,
Creech Coal Company,
Harlan Central Coal Company,
Harlan Fuel Company,
Crummies Creek Coal Company,
Three Point Coal Company,
Clover Fork Coal Company,
Harlan Collieries Company,
High Splint Coal Company,
Cornett-Lewis Coal Company,
Kentucky King Coal Company,
P V & K Coal Company,
Mary Helen Coal Corporation,
Green-Silvers Coal Corporation,
By Woodward, Dawson & Hobson,
Attorneys.

State of Kentucky }
Jefferson County }

The affiant, R. C. Tway, says that he is President of R. C. Tway Coal Co., one of the plaintiffs herein, and that the statements of the foregoing bill are true, to the best of his knowledge and belief.

R. C. Tway.

Subscribed and sworn to before me by R. C. Tway this 10th day of September, 1935.

(Seal) Leo Roberts.

My Commission Expires Aug. 23, 1938.

ANSWER OF THE DEFENDANT, SELDEN R. GLENN, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF KENTUCKY—Filed September 30, 1935.

Comes now the defendant above named, reserving all manner of exceptions that may be had to the uncertainties and imperfections of plaintiffs' bill of complaint and in answer thereto, or to so much thereof as he is advised is material to be answered, says:

1. Defendant admits the averments contained in paragraph one of the bill.

2. Answering paragraph two of the bill defendant admits that he is the duly appointed, qualified and acting Collector of Internal Revenue for the District of Kentucky, that he resides in the city of Louisville, is a citizen of the Commonwealth of Kentucky, and that he is by reason of his said office charged with the performance of certain duties prescribed by law. As to the nature and extent of the duties so prescribed, defendant respectfully invites the Court's attention to the statutes governing the same. Further answering said paragraph defendant avers that the taxing provisions of the Bituminous Coal Conservation Act of 1935 have not yet become effective and that no taxes whatsoever have been assessed, levied or imposed thereunder.

3. Answering the averments contained in paragraph three of the bill defendant denies that there exists between defendant and plaintiffs or any of them any case or controversy involving the sum or value of $3,000 or any other sum, or any case or controversy whatsoever. Defendant also denies that plaintiffs have a common interest in obtaining the anticipatory relief prayed for in the bill.

4. Answering paragraph four of the bill defendant shows that the averments in said paragraph are all conclusions and purport merely to summarize the terms, provisions and contents of certain sections of the Bituminous Coal Conservation Act of 1935 therein referred to. Defendant makes no further answer to said paragraph for the reason that this Court will take judicial notice of the precise contents of said Act.

5. Answering paragraph five of the bill defendant shows that all of the averments or charges therein contained are conclusions of law not requiring answer. Nevertheless defendant denies each and every charge or averment in said paragraph.

6. Answering paragraph six of the bill defendant

denies any lack of power in Congress to legislate on the subjects required by Section 4 of said Act to be embraced in the code to be formulated thereunder; denies that the action of Congress in enacting, under its taxing power, the tax provisions of said Act was in any sense pretended; nor was it designed to extend the powers of Congress to subject matters lying beyond its constitutional competence. Further answering said paragraph defendant shows that the regulations provided for by Section 4 of the Bituminous Coal Conservation Act of 1935 are valid regulations enacted by Congress under its paramount and expressly granted power to regulate commerce among the states and are, under and by virtue of such power, legally binding upon and enforceable against plaintiffs, as producers and distributors of bituminous coal whose operations are in or directly and substantially affect interstate commerce. Furthermore, said Act provides expressly that an acceptance of the contemplated code by plaintiffs or by any of them shall not preclude or estop them from contesting the constitutionality or validity of any code provision as applicable to them or to any of them.

7. Answering paragraph seven of said bill defendant avers that he is without knowledge otherwise than as informed by the averments of the bill of the actual desires or intentions of plaintiffs or any of them; denies that the business of producing and selling bituminous coal is not affected with a public interest; denies that the regulations and restrictions contained in said Act or in Section four thereof are unconstitutional; denies that the excise tax to be imposed by said Act is a penalty. Further answering said paragraph defendant incorporates without repetition his affirmative answer hereinabove set forth to paragraph six of the bill.

8. Answering paragraph eight of the bill defendant shows that all of the averments or charges therein contained are conclusions of law not requiring answer. Nevertheless, defendant denies each and every charge or averment in said paragraph.

9. Defendant is without knowledge as to any of the matters of fact averred in paragraph nine of the bill and as to the averments therein contained which are conclusions of law, defendant denies each and every such averment.

10. Answering paragraph ten of the bill defendant says that he is without knowledge of the profit realizable by plaintiffs or any of them or by producers generally in the field as a result of their respective operations; or of

the source or nature of their respective titles to or of the terms of the leases under which they occupy their respective properties; or of the amount or character of their respective capital investments or of the ultimate effect the payment of said tax would have upon their financial status or the financial status of any of them; or of any of the matters of fact averred in said paragraph. Further answering said paragaph defendant shows that all of the averments therein contained are immaterial herein because no tax has been levied, assessed or imposed on plaintiffs or any of them nor will plaintiffs or any of them ever be subjected by said Act to the injury alleged because they may elect to accept said code and the acceptance thereof will cause them no injury for the reason that such acceptance of the code to be formulated under said Act specifically does not estop or preclude them, or any of them, from refusing to abide by any or all regulations imposed by said Act or code and questioning the validity of the same, and said Act prescribes a full and adequate statutory remedy therefor.

11. Answering paragraph eleven of the bill defendant admits that the tax provisions of the Act do not become effective until the first day of the third month following the date of enactment of the Act and that the monthly tax payments required thereunder do not become collectible until the first business day of the second succeeding month thereafter. Defendant further shows that if the code provided for in Section 4 is not formulated by the first day of the third month following the date of enactment of the Act then the tax provisions of the Act will not go into effect until said code is formulated and the date of formulation promulgated by the President. Defendant shows further that said code has not as yet been formulated and that he has no means of knowing when said code will be formulated. Defendant admits that counsel for plaintiffs made such inquiry of him as is alleged in said paragraph, but avers that in response thereto he answered merely that he regarded the Act as constitutional and would perform the duties required of him by law. Defendant denies that said Act imposes tremendous or unconscionable penalties, or any penalties as alleged, or that plaintiffs cannot afford to wait until a tax is actually imposed upon them thereunder, and denies also that their property or the property of any of them would be confiscated and destroyed during such time as their asserted rights were being determined in a court of law or in the statutory method prescribed by the Act, that is to say, by appeal to a Circuit

Court of Appeals of the United States from an order of the National Bituminous Coal Commission. Further answering said paragraph defendant shows that the averments therein contained are immaterial for the reasons hereinabove stated with reference to the averments of paragraph ten of the bill.

12. Answering paragraph twelve of the bill defendant denies that plaintiffs have not an adequate remedy at law for their asserted injuries to which they fear they may be subjected in the future, and avers that plaintiffs may pay any tax which may hereafter be assessed against them or any of them under the provisions of said Bituminous Coal Conservation Act of 1935 and thereafter sue in the Court of Claims or elsewhere to recover the same and that such remedies at law are by the provisions of Section 3224, Revised Statutes (U. S. C. Title 26, Sec. 154), expressly made exclusive. Further answering said paragraph, defendant shows that the averments therein contained are immaterial herein for the reasons hereinabove particularly set out in defendant's answer to paragraph ten of the bill.

13. Defendant denies each and every averment contained in the bill not hereinbefore expressly admitted, explained or denied.

II.

Further answering the bill of complaint and as a separate defense thereto, defendant says and avers:

Bituminous coal is consumed in every State of the United States in generating energy for the production of light, heat and power. It furnishes approximately 45 percent of the total energy consumed for such purposes in the United States. Its use for the aforesaid purposes is indispensable to the industrial and economic life and to the health and comfort of the inhabitants of every State and is vital to the national public welfare.

Commercially important deposits of bituminous coal within the United States are limited to 23 producing areas confined within the boundaries of 26 States and more than 70 percent of the total annual output is mined in four States. Approximately 85 percent of the bituminous coal produced within, the United States is consumed (a) in States other than the States in which it was mined, or (b) by railroads engaged in interstate commerce. Over 20 percent of the total annual production of bituminous coal is required for the use of such interstate railroads as fuel. The distribution of bitumi-

nous coal from the producing areas to the consuming public throughout the nation supplies over 17 percent of the total gross freight revenues of the railroads engaged in interstate commerce.

In view of the great present importance of bituminous coal as a source of energy for industrial and domestic purposes, and in view of the necessity of transporting it across State lines to reach the great majority of the users, it is of particular importance to the national public welfare that the distribution and marketing of bituminous coal in interstate commerce be not subjected to interruptions, dislocations, burdens, or restraints. For many years the distribution and marketing of bituminous coal in interstate commerce has been subject (a) to sudden unforseeable, recurrent and prolonged interruptions and stoppages in the shipment of such coal from the producing areas to the consuming markets; (b) to sudden, recurrent and extremely wide fluctuations in the price of such coal to the consuming public, resulting in hardship and inconvenience to the consuming public in other States than the State of production, and tending directly and substantially to restrict and control the movement of coal in interstate commerce; (c) to unfair and demoralized methods of competition throughout the industry which operate directly and substantially to burden and restrain interstate commerce in bituminous coal, and such burdens, restraints and interruptions have operated so as to affect seriously and injuriously a multitude of consumers of bituminous coal throughout the country, to cause a substantial waste of the coal resources of the nation, to bring about the bankruptcy of many coal producers and to result in widespread unemployment. Such conditions have resulted in serious and widespread reigns of disorder and violence requiring resort on the part of public authorities and of the private parties directly concerned therewith to the State and Federal courts of law and equity and necessitating the use of State militia and of Federal troops.

For the purpose of determining the cause or causes of the burdens, restraints and interruptions aforesaid and of providing appropriate legislative measures to remove or control the same, various Congresses of the United States have, since the year 1918, made or caused to be made, among others, the following fact-finding investigations into the conditions under which bituminous coal is produced, distributed and marketed throughout the United States, viz.

Hearings before the Committee on Manufactures of the Senate on Shortage of Coal (65th Cong., 2nd Sess., 1918);

Hearings before the Committee on Interstate Commerce of the Senate on Increased Price of Coal (66th Cong., 1st Sess., 1919, 1920, 1921);

Hearings before the Committee on Reconstruction and Production of the Senate on Coal and Transportation (66th Cong., 3rd Sess., 1920, 1921);

Hearings before the Committee on Education and Labor of the Senate on Conditions in the West Virginia Coal Fields (67th Cong., 1st Sess., 1921, 1922);

Hearings before the Committee on Labor of the House of Representatives on Labor Conditions in the Coal Industry (67th Cong., 2nd Sess., 1922);

Report of the United States Coal Commission pursuant to the Act of September 22, 1922, published in 1925;

Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on Coal Legislation 69th Cong., 1st Sess., 1926);

Hearings before the Committee on Interstate Commerce of the Senate on Conditions in the Coal Fields of Pennsylvania, West Virginia, and Ohio (70th Cong., 1st Sess., 1928);

Hearings before the Committee on Interstate Commerce of the Senate on Proposed Bituminous Coal Legislation (70th Cong., 2nd Session., 1929);

Hearings before the Committee on Mines and Mining of the Senate on the Creation of a Bituminous Coal Commission (72nd Cong., 1st Sess., 1932);

Hearings before the Committee on Interstate Commerce of the Senate on Stabilization of the Bituminous Coal Mining Industry (74th Cong., 1st Sess., 1935);

Hearings before the Committee on Ways and Means of the House of Representatives on Stabilization of the Bituminous Coal Mining Industry (74th Cong., 1st Sess., 1935).

From the facts disclosed in and by the aforesaid legislative investigations, and otherwise, it was and is made evident and defendant avers the facts to be that the aforesaid burdens and restraints upon and interruptions to such commerce in bituminous coal are presently, primarily and directly due to and caused and occasioned by the existence of an abnormal and destructive competi-

tive rivalry for markets between the said several producing areas and between the producing units therein contained; that such unbridled competition has resulted in a reduction of the average mine realization price of bituminous coal to a level frequently below the average cost of production of such coal; that over 60% of the cost of producing bituminous coal in the United States is attributable to the cost of labor going directly into its production and that such labor cost is the principal element that is subject to appreciable adjustment; that as a direct result of such competition wages in said industry have been progressively forced down to a point below subsistence levels; that numerous controversies resulting in strikes and lockouts and in the interruption, cessation and dislocation of production and distribution have resulted directly from such price and wage reductions and from the refusal of employers to bargain collectively relative thereto and from various unfair labor practices; that to remove or control the aforesaid direct and substantial burdens upon and interruptions to interstate commerce in bituminous coal it is necessary that competition between the various producing areas aforesaid in the consuming markets of the several states be regulated by the elimination of unfair competitive marketing practices, by the fixing between fair and reasonable limits of the price at which such coal may be distributed in such consuming markets and by stabilizing and equalizing as between producing areas and between the producing units therein contained the wages and hours of labor of employees, and by otherwise eliminating the causes of strikes and lockouts.

The plaintiffs herein are engaged in the business of producing bituminous coal for distribution and sale in interstate commerce and of distributing and selling bituminous coal in such commerce and in the conduct of such business are subject and amenable to federal regulation to the extent and in the manner prescribed by the code provided for in Section 4 of the said Bituminous Coal Conservation Act of 1935.

III.

For a further, separate and distinct defense in point of law arising upon the face of the bill of complaint herein, defendant says that the facts alleged in said bill are insufficient to constitute a cause of action in equity because

1. The Bituminous Coal Conservation Act of 1935 exempts the plaintiffs from ninety per cent of the tax

imposed by said Act if they file an acceptance of the Code to be formulated under said Act. After such acceptance, the plaintiffs would only be subject to the aforesaid ninety per cent of the tax upon revocation of their membership in the said Code by the National Bituminous Coal Commission. Such revocation is subject to judicial review before becoming effective. The Act provides that acceptance of the Code will not preclude or estop any producer from contesting the constitutionality of any code provision or its validity as applied to him. The plaintiffs may, therefore, avoid the payment of ninety per cent of the said tax without in any way abandoning any constitutional rights or binding themselves to obey any unconstitutional provisions of the Code, and the Act provides an adequate and complete administrative and judicial remedy for the protection of their constitutional rights. The bill of complaint fails to allege that the payment of ten per cent of the tax will cause plaintiffs irreparable injury; nor does it allege that acceptance of the Code by plaintiffs will cause them any injury, irreparable or otherwise. Plaintiffs have thus not shown that they will suffer any irreparable injury except because of their own voluntary and arbitrary choice to refuse to file their acceptance of the Code and to avail themselves of the full and adequate protection and remedies provided in the Act. Under such circumstances, they are not entitled to relief in a court of equity.

2. The bill of complaint herein is premature since no tax is as yet in effect, since the tax prescribed by the Act cannot in any event become effective until November 1, 1935, and if no Code has been formulated by that date, until the date upon which the Commission formulates the Code prescribed by the Act, and since no tax has been levied or assessed against these plaintiffs.

3. This bill of complaint seeks an injunction to restrain the collection of a tax, and cannot be maintained in view of the provisions of Section 3224 of the Revised Statutes of the United States. (U. S. C., Title 26, Sec. 154.)

Wherefore, having thus made answer to all matters and things contained in plaintiffs' bill of complaint, defendant prays that plaintiffs take nothing by reason thereof and that he be hence dismissed with his costs.

Bunk Gardner,
United States Attorney,
Oldham Clarke,
Assistant United States Attorney,
Attorneys for defendant.

Answer of the Defendant, Selden R. Glenn, etc.

John Dickinson,
Assistant Attorney General,
F. B. Critchlow,
Special Assistant to the Attorney General,
Carl McFarland,
Special Assistant to the Attorney General,
Of Counsel.

State of Kentucky, }
County of Jefferson. } ss.

The affiant, Selden R. Glenn, Collector of Internal Revenue for the District of Kentucky and the defendant herein, says that the statements in the foregoing answer are true to the best of his knowledge and belief.

S. R. Glenn.

Subscribed and sworn to before me this 30th day of Sept., 1935.

J. S. Bate, Jr.,
Notary Public, Jefferson County, Ky.

My commission expires Sept. 23, 1936.
(Seal)

ORDER FILING DEFENDANT'S ANSWER—September 30, 1935—Entered by Judge Hamilton.

Came the defendant, by counsel, and tendered an answer of defendant, individually and as Collector of Internal Revenue for the District of Kentucky, which is ordered to be filed.

PETITION OF PIONEER COAL COMPANY AND BLACK STAR COAL COMPANY TO BE MADE PARTIES HEREIN—Filed Oct. 9, 1935.

Now come the petitioners and state that they are each corporations organized under the laws of the State of Delaware, and they are each citizens of that State. They are each, as such corporation, authorized to contract and be contracted with, and to sue in their respective corporate means. They state that they are each, as they are authorized to do by their respective charters, engaged in the mining and production of bituminous coal from their mines located in Bell and Harlan Counties, Kentucky, respectively, and in the sale of the coal so produced by them; that the average total sale price at the mines of the coal produced and sold by the petitioner, Pioneer Coal Company, each calendar month is $25,000, and by the petitioner, Black Star Coal Company, $65,000, and that the average monthly tax or penalty which they are required to pay under the Act referred to in the bill herein for their refusal to accept and operate under the Code provided for in the Act will amount to $3750 and $9750, respectively, whereas, the profit realized and realizable by each of them on the gross sale price of the coal produced by them each month, over and above the cost of production under prudent and economical operation, is not over five per cent of such gross sale price.

They state that except as herein specifically set out, each and all of the allegations of the bill herein are applicable to each of these petitioners, and they each adopt same as fully as if set out herein.

They further state that they have a common interest with the plaintiffs in the original bill in the constitutional questions involved therein, and in obtaining the relief sought by the original plaintiffs in their bill; and they therefore ask that they be made parties plaintiff to this action.

Woodward, Dawson & Hobson,
Attorneys for Plaintiffs.

ORDER—Filed October 9, 1935.

This day came Pioneer Coal Company and Black Star Coal Company, and tendered and offered to file their petition to be made parties plaintiff herein, which petition is ordered to be filed; and it appearing from same that the said petitioners have an interest in common with the other plaintiffs in the controversy herein involved, and in the relief sought; and it further appearing that the amount involved as to each of them, exclusive of interest and costs, is in excess of $3,000, and that to make them parties plaintiff will not interfere with the orderly progress of the case,—

It Is Ordered that they be and they are hereby made parties plaintiff to this action.

Elwood Hamilton,
Judge.

AMENDED BILL—Filed October 21, 1935.

The plaintiffs, R. C. Tway Coal Company, Kentucky Cardinal Coal Corporation, Harlan-Wallins Coal Corporation, Creech Coal Company, Harlan Central Coal Company, Harlan Fuel Company, Crummies Creek Coal Company, Three Point Coal Company, Clover Fork Coal Company, Harlan Collieries Company, High Splint Coal Company, Cornett-Lewis Coal Company, Kentucky King Coal Company, P. V. & K. Coal Company, Mary Helen Coal Corporation, Green-Silvers Coal Corporation, Pioneer Coal Company, Black Star Coal Company and Gatliff Coal Company, by leave of court amend their bill herein, and reaffirming each and all of the allegations of their original bill, by way of amendment, state that substantially all the coal mined and sold by each of them is sold f. o. b. the railroad cars at their respective mines, and that while the greater part of same is sold to customers in other States, a substantial part thereof is sold

to customers in the State of Kentucky, and thus they are each, in the selling end of their business, engaged in both interstate and intrastate commerce; that in the field in which they operate substantially four per cent of the entire production is sold to customers in the State of Kentucky, and this is true as to each of the plaintiffs, while some of the plaintiffs sell even a greater percentage of the coal produced by them to customers in Kentucky.

The total annual production of bituminous coal in the United States is approximately 330,000,000 tons, and that entire production, with the exception of an immaterial amount consigned to prepay stations, is sold f.o.b. the railroad cars at the mine of the producing company. Approximately 14 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 States other than the one in which the coal is produced.

The greatest competitors of the plaintiffs are mines located in the States of Ohio, West Virginia and Pennsylvania.

The average annual production of bituminous coal in Kentucky is approximately 35,000,000 tons, and of this total amount approximately four per cent is sold to customers in the State and the remainder thereof to customers living in other States.

The average annual production of bituminous coal in the State of Ohio is approximately 18,000,000 tons. Of this amount approximately 44 per cent is sold to customers in the State of Ohio, excluding coal sold and delivered to railroads for fuel in the State of Ohio, and approximately 18 per cent of this annual production is sold to such railroads.

The average annual production of bituminous coal in the State of Pennsylvania is approximately 80,000,000 tons, and of this amount, exclusive of the coal sold and delivered in that State to railroads for fuel, approximately 38 per cent is sold to customers within the State and approximately 12 per cent to railroads in the State for fuel.

The average annual production of bituminous coal in the State of West Virginia is approximately 90,000,000 tons, and exclusive of the coal sold and delivered to railroads in that State for fuel, approximately four per cent of the total annual production is sold to customers in that State and approximately seven per cent is sold and delivered in that State to railroads for fuel.

They state that substantially all the men employed by each of them in connection with their mining opera-

tions are employed in the production of coal, and have no duties whatever to perform in connection with the sale of the product after it is mined.

Wherefore, they pray as in their original bill.

Woodward, Dawson & Hobson,
Attorneys for Plaintiffs.

State of Kentucky, }
Jefferson County. }

The affiant, R. C. Tway, states that he is President of the plaintiff, R. C. Tway Coal Company, and that the statements of the foregoing amended bill are true.

R. C. Tway.

Subscribed and sworn to before me by R. C. Tway, this October 21, 1935.

My commission expires 23rd day of August, 1938.

Leo Roberts.

(Seal)

ORDER—Filed October 21, 1935.

This day came the plaintiffs and tendered and offered to file their amended bill, and the court being advised—

It Is Ordered that said amended bill be and the same is filed.

Elwood Hamilton,
Judge.

PETITION OF GATLIFF COAL COMPANY TO BE MADE A PARTY PLAINTIFF—Filed October 21, 1935.

Comes the petitioner, Gatliff Coal Company, and states that it is a corporation organized under the laws of the Commonwealth of Kentucky, and it is a citizen of that State, with its principal office and place of business at Williamsburg, Kentucky. As such corporation it is authorized to contract and to be contracted with, to sue and be sued in its corporate name aforesaid. It states that it is, as it is authorized to do by its charter, engaged in the mining and production of bituminous coal from its mines located in Whitley County, Kentucky, and in the sale of the coal so produced by it. It states that its coal is sold f. o. b. railroad cars at its mines in Whitley County, Kentucky, and that while the greater part of the coal thus sold is to customers living in States other than Kentucky, a substantial part of the coal so sold is consigned to customers living in the Commonwealth of Kentucky, and its business of selling coal is therefore both interstate and intrastate business. It states that its average total sale price at the mines of the coal produced and sold by it each calendar month is approximately $23,000, and that the average monthly tax or penalty which it is required to pay under the Act referred to in the bill herein for its refusal to accept and operate under the code provided for in the Act will amount to approximately $3,450, whereas the profit realized and realizable on the gross sale price of the coal produced and sold by it each month, over and above the cost of production under prudent and economical operation, is not over five per cent of such gross sale price.

It states that except as herein specifically set out, each and all of the allegations of the bill herein are applicable to it, and it adopts said allegations as fully as if set out herein.

It states that it has a common interest with the plaintiffs in the original bill in the constitutional questions involved therein, and in obtaining the relief sought by the original plaintiffs in their bill, and it therefore asks that it be made a party plaintiff to this action.

Woodward, Dawson & Hobson,
Attorneys for Plantiff.

Affidavit

State of Kentucky, }
Jefferson County. }

The affiant, Chas. I. Dawson, states that he is of counsel for Gatliff Coal Company, and that none of its officers are in this district to verify the foregoing petition. He states that from information received from that company he believes the foregoing statements are true.

Chas. I. Dawson.

Subscribed and sworn to before me by Chas. I. Dawson this Oct. 21, 1935.

My commission expires August 9, 1939.

Addie Brumfield,
Notary Public.

ORDER—Filed October 21, 1935.

This day came Gatliff Coal Company and tendered and offered to file its petition to be made a party plaintiff herein, which petition is ordered to be filed; and it appearing from same that said petitioner has an interest in common with the other plaintiffs in the controversy herein involved and in the relief sought; and it further appearing that the amount involved as to the said Gatliff Coal Company, exclusive of interest and costs, is in excess of Three Thousand Dollars ($3,000.00), and that to make it a party plaintiff will not interfere with the orderly progress of the case—

It Is Ordered that said Gatliff Coal Company be and it is hereby made a party plaintiff to this action.

Elwood Hamilton,
Judge.

MOTION—Filed October 21, 1935.

The plaintiffs move the court to strike from the defendant's answer all of Paragraph II thereof, for the reason that alleged facts therein set out are not sufficient either in law or in equity to constitute a defense to the cause of action set up in plaintiffs' bill.

Woodward, Dawson & Hobson,
Attorneys for Plaintiffs.

AMENDED BILL IN EQUITY—Filed November 1, 1935.

The plaintiffs, R. C. Tway Coal Company, Kentucky Cardinal Coal Corporation, Harlan-Wallins Coal Corporation, Creech Coal Company, Harlan Central Coal Company, Harlan Fuel Company, Crummies Coal Company, Three Point Coal Company, Clover Fork Coal Company, Harlan Collieries Company, High Splint Coal Company, Cornett-Lewis Coal Company, Kentucky King Coal Company, P. V. & K. Coal Company, Mary Helen Coal Corporation, Green-Silvers Coal Corporation, Pioneer Coal Company, Black Star Coal Company and Gatliff Coal Company, by leave of court amend their original and amended bills herein, and reaffirming each and all of the allegations of their original and first amended bills, by way of further amendment state that Subsection (e) of Part II of Section 4 of the Bituminous Coal Conservation Act in part provides:

> "(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."

Section 12 of the Act provides as follows:

"No coal may be delivered upon a contract made prior to the effective date of this Act at a price below the minimum price at the time of delivery upon such contract, as established pursuant to Part II of section 4 of this Act, and such contract shall be invalid and unenforceable: Provided, That this prohibition shall not apply (a) to a lawful and bona fide written contract entered into prior to October 2, 1933; nor (b) to a lawful and bona fide written contract entered into subsequent to that date and prior to May 27, 1935, at not less than the minimum price current as published under the Code of Fair Competition for the Bituminous Coal Industry, pursuant to the National Industrial Recovery Act, at the time of making of such contract; nor (c) to a lawful and bona fide written contract entered into on or after May 27, 1935, and prior to the date of the approval of this Act, at not less than the minimum price for current sale as published under said code of fair competition, as at May 27, 1935."

Plaintiffs state that each of them, with the exception of Kentucky King Coal Company, now has and had at the time the Bituminous Coal Conservation Act became effective, and at the time the code provided for by Section 4 of the Act was formulated and promulgated, written contracts with numerous customers made after October 2, 1933, for the sale of coal at prices below the minimum prices required by Section 4 to be fixed according to the formula therein set out, and below the minimum prices current as published under the Code of Fair Competition for the Bituminous Coal Industry pursuant to the National Industrial Recovery Act at the time such contracts were made, and below the minimum prices for the current sale of coal as published under said Code of Fair Competition as at May 27, 1935; and that the provisions of the said Act herein quoted undertake to render invalid and abrogate these contracts

should these plaintiffs accept the provisions of the code required to be formulated under Section 4 of the Act. They state that should they refuse to comply with said contracts according to their terms, they would each be subject to the payment of damages to the customers with whom they have such contracts, and to a multiplicity of suits for the recovery of such damages. They further state that the attempt of Congress, through the imposition of the so-called taxes provided by Sections 3 and 9 of the Act, to coerce acceptance of said code, and thereby the breach of such contracts, is an attempt to deprive them of their property rights in said contracts without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, and to impose upon them a liability for damages on account of such breach, which likewise, to the extent of such damages, will deprive them of their property without due process of law, in violation of the Fifth Amendment.

Wherefore, they pray as in their original bill, and for all other equitable relief.

Woodward, Dawson & Hobson,
Attorneys for Plaintiffs.

The affiant, J. B. Gatliff, states that he is President of the Gatliff Coal Co., and that the statements of the foregoing amended bill are true, as he verily believes.

J. B. Gatliff.

Subscribed and sworn to before me by J. B. Gatliff this 1st day of November, 1935.

Lilburn Phelps, Clerk.

ORDER—Filed November 1, 1935.

This cause came on to be heard and both parties appeared by counsel. The plaintiffs tendered an amended bill which is ordered to be filed. By agreement of parties, the amended bill is controverted of record and the first amended bill is likewise controverted. Then the plaintiffs tendered a motion for preliminary injunction which is ordered to be filed.

The case was argued as to the law by counsel for both sides. Then the plaintiffs introduced evidence in support of the motion for preliminary injunction. Stenographic notes of the testimony were taken by Clarence E. Walker, to be transcribed if required by the Court or by either party, his fees to be charged as costs and assessed as the Court may hereafter direct.

It is Ordered that the further hearing of this case be passed to November 11, 1935, at 9:00 o'clock A. M.

Elwood Hamilton,
Judge.

OBJECTION TO AND MOTION TO STRIKE EVIDENCE—Filed Nov. 11, 1935.

Comes the defendant, Selden R. Glenn, individually, and as Collector of Internal Revenue for the District of Kentucky, and not objecting to the form in which the evidence is presented, but expressly waiving any objection on account of the fact that the witnesses hereinafter referred to did not appear and testify under oath in open court, objects and excepts to the statements in behalf of the plaintiffs of the witnesses, D. B. Cornett, C. V. Bennett, T. B. Whitfield, B. W. Whitfield, W. J. Silvers, B. F. Reed, W. J. Cunningham, George Creech, R. C. Tway, W. H. Barthold, A. K. Robinson, Roy Carson and E. Guthrie, because the matters and facts alleged in said statements, as hereinafter referred to, are irrelevant

and immaterial; and the defendant expressly objects and excepts to the statements of said witnesses in so far as they attempt to show: (a) the conditions under which the respective plaintiffs will be required to operate under the said Act, either as members or non-members of the Code; (b) that the respective plaintiffs will not be able to operate under said Act and pay the required tax; (c) that the respective plaintiffs will be required to defend damage suits for breach of contract as a result of the operation of said Act; and in so far as said statements attempt to show any hardship upon the respective plaintiffs by reason of the provisions of said Act, and in so far as said statements express the opinions and conclusions of the respective witnesses, for the reason that said avowals in said statements are immaterial and irrelevant and can have no effect upon the constitutional questions here involved; and he moves the Court to strike the statements of each of said witnesses with respect to the matters hereinabove referred to as evidence, and permit them to remain in the record only as the avowals of the respective witnesses; and of this he prays the judgment of the Court.

Oldham Clarke,
John S. L. Yost,
Attorneys for Defendant.

OBJECTION TO AND MOTION TO STRIKE EVIDENCE—Filed Nov. 11, 1935.

Come the plaintiffs, R. C. Tway Coal Company, Kentucky Cardinal Coal Corporation, Harlan-Wallins Coal Corporation, Creech Coal Company, Harlan Central Coal Company, Harlan Fuel Company, Crummies Creek Coal Company, Three Point Coal Company, Clover Fork Coal Company, Harlan Collieries Company, High Splint Coal Company, Cornett-Lewis Coal Company, Kentucky King

Objection to and Motion to Strike Evidence

Coal Company, P V & K Coal Company, Mary Helen Coal Corporation, Green-Silvers Coal Corporation, Pioneer Coal Company, Black Star Coal Company and Gatliff Coal Company, and not objecting to the form in which the evidence is presented, but expressly waiving any objection on account of the fact that the witnesses hereinafter referred to did not appear and testify under oath in open court, object and except to the statements in behalf of the defendant of the witnesses, Frederick C. Tryon, Charles O'Neill, H. L. Findlay, George W. Reed, Fred S. McConnell, Philip Murray, F. E. Berquist and Homer L. Morris, because said statements in their entirety are irrelevant and immaterial; and the plaintiffs expressly object and except to the statements of said witnesses, in so far as they attempt to detail the economic situation in the Bituminous Coal Industry, and in so far as they attempt to deal with the relation of the production of coal to interstate commerce, and in so far as they attempt to deal with the necessity of the regulation by Congress of the Bituminous Coal Industry, and in so far as they express the opinion and conclusions of the respective witnesses, for the reason that said statements are immaterial and irrelevant and can have no effect upon the constitutional questions here involved; and they move the Court to strike the statement of each of said witnesses as evidence, and permit them to remain in the record only as the avowals of the respective witnesses; and of this they pray the judgment of the Court.

Woodward, Dawson & Hobson,
Attorneys for Plaintiffs.

ORDER—Filed Nov. 11, 1935.

Came the plaintiffs, by their counsel, Woodward Dawson & Hobson, and the defendant, by his counsel, Bunk Gardner, United States Attorney for the Western District of Kentucky, and Oldham Clarke, Assistant United States Attorney for the Western District of Kentucky, and John S. L. Yost, Special Assistant to the Attorney-General of the United States, and tendered and offered to file a stipulation of the evidence offered by each of the parties on the final hearing of this cause, which stipulation is ordered filed.

Thereupon came the defendant, by his counsel, and tendered and offered to file his objection to and motion to strike the evidence offered by the plaintiffs under said stipulation other than the evidence of Roy Carson for the reasons stated in said motion, which objection to and motion to strike said evidence is ordered filed, and the Court being advised, overrules said objection to said evidence and said motion to strike same. The court on its own motion strikes the evidence of Roy Carson as irrelevant and immaterial but said statement of said Carson will remain in the record as the avowal of the plaintiffs as to the testimony of said Carson. The defendant excepts to the ruling of the Court in overruling his objections to the evidence of the said witnesses, other than the said Carson, and in overruling his motion to strike same; and the plaintiffs except to the ruling of the Court in striking the evidence of said Roy Carson.

Then came the plaintiffs, by their counsel, and tendered and offered to file their objections to and motion to strike the evidence of the defendant referred to in said stipulation, which objection and motion to strike is ordered filed, and the Court being advised sustains said objection to said evidence and the motion to strike same, but orders that said evidence offered by the defendants shall remain in the record as avowals of the defendant as to what each of said witnesses would testify. The defendant excepts to this ruling of the Court sustaining said objection to said evidence and said motion to strike said evidence.

Thereupon came the parties, by their counsel, and tendered and offered to file a stipulation filing two typical written contracts executed for the sale of coal by plaintiffs after October 2, 1933, and prior to August 30, 1935, said contracts being explained in said stipulation and marked "A" and "B"; said contracts and stipulation to be considered by the Court as evidence in this

cause. The court being advised, it is ordered that said stipulation and contracts attached thereto be and the same are filed as a part of the record in this case.

It is further ordered by the Court that the plaintiffs' motion to strike paragraph 2 of the defendant's answer be and the same is overruled, to which ruling the plaintiffs except.

By the agreement of the parties, it is now ordered that this case be submitted for final decree.

Elwood Hamilton,
Judge.

OPINION—Filed Nov. 14, 1935.

The three above styled causes relate to the same subject matter and for that reason, this opinion is applicable to all of them, although they have not been consolidated for hearing.

The first suit is an action (Equity #996) instituted by nineteen corporations, all of them miners and producers of bituminous coal in the Eastern Kentucky coal field, and together they represent all the producers of any substantial size in that district except the producers of captive coal.

The plaintiffs state that Selden R. Glenn, defendant, is a citizen of the Commonwealth of Kentucky, residing in Louisville, Jefferson County, in the Western District of Kentucky, and the duly appointed, qualified and acting Collector of Internal Revenue for the District of Kentucky, and as such collects all taxes, assessments and levies made or attempted to be made by the United States which are collectible in Kentucky through the Internal Revenue Department.

This suit is one of a civil nature, arising under the Constitution and laws of the United States, and presents an actual controversy between each of the plaintiffs and

the defendant, and the amount involved exceeds Three Thousand Dollars.

The plaintiffs, after setting out the provisions of Public No. 402, 74th Congress, H. R. 9100, "An Act to Stabilize the Bituminous Coal Mining Industry," claim it is unconstitutional and void on the following grounds:

Section 4 of the Act requires the formulation by the National Bituminous Coal Commission, composed of five members appointed by the President, of a working agreement to be known as the "Bituminous Coal Code," such Code to deal with matters enumerated in Section 4 and to otherwise conform to the provisions and requirements of that section. The entire bituminous coal producing area of the United States, by Section 4, is divided into nine minimum price areas, and further into twenty-three producing districts, each area embracing one or more producing districts. Section 4 provides that the Code required to be 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 labor relations, by the Commission through a Bituminous Coal Labor Board of three members, appointed by the President of the United States by and with the advice and consent of the Senate. Each district board, subject to the supervision and approval of the Commission, is required to immediately establish minimum prices free on board transportation facilities at the mines for all kinds, qualities and sizes of coal produced in their respective jurisdictions, with full authority in establishing such minimum prices to make such classifications of coals and price variations as to mines and consuming market areas as it may deem necessary and proper.

It is further provided that in order to sustain stabilization of wages, working conditions and maximum hours of labor, such minimum prices shall be established so as to yield a return per net ton for each district in its minimum price area, equal as nearly as may be to the weighed average of the total costs per net ton to be determined according to the formula attempted to be set up in said section. The district boards are further required under the rules and regulations established by the Commission and subject to the supervision and approval of the Commission, to co-ordinate in common consuming market areas upon a fair competitive basis, the minimum

prices, and the rules and regulations established by them for their respective districts, and in affecting such coordination such district boards are required to take into account the factors set out and the rules attempted to be laid down in said Section.

Said Section 4 authorizes the Commission, whenever it deems necessary in order to protect the consumer of coal against unreasonably high prices, to fix maximum prices free on board transportation facilities for coal in any district, such maximum prices to be established in accordance with the formula therein attempted to be set out.

All contracts for the sale of coal below minimum or above maximum therefor approved and established by the Commission and in effect at the time of the making of the contract, are declared by such Section to be invalid and unenforceable, and after the date of the approval of the Act and until the minimum prices have been established as therein provided, producers accepting the Code are prohibited from making any contract for the sale of coal calling for delivery more than thirty days from the date of the contract, and code members are further prohibited, while the Act is in effect, from making any contract for the sale of coal calling for delivery after the expiration of the 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 such making.

Section 4 further provides that the Code prohibits its members from engaging in certain practices enumerated in said section as unfair methods of competition, many of which are for the purpose of compelling the producer to sell his coal to all persons similarly circumstanced at the same price.

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 through representatives of their own choosing and from requiring any employee, as a condition of employment, to join a company union and from prohibiting employees from selecting their own check weighmen 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.

Section 4 also provides that the Code formulated under its terms shall provide 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 Section 4 of the Act, 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.

Section 4 further provides that any Code member injured in his business or property by any other Code member, by reason of any breach thereof or the failure to do anything which is required by the Act or the Code formulated thereunder, may sue for damages on account thereof 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 and the costs of the suit, including a reasonable attorney's fee.

The plaintiffs state that the 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, and charge particularly that 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 regulations 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 all matters not within the competency of Congress under the Constitution of the United States, and their attempted regulation by Congress is violative of the due process clause of the Fifth Amendment to the Constitution, and of the reserved rights of the States and the people, secured to them by the Tenth Amendment. Plaintiffs also state that Section 4 is unconstitutional because it attempts to delegate legis-

lative power and that notwithstanding the lack of power of Congress to legislate on the subject required by Section 4 to be embraced in the Code to be formulated thereunder, it undertook through the pretended exercise of its taxing power under the Constitution to coerce all bituminous coal producers in the United States to submit to the Act, and particularly to the unconstitutional regulations and requirements under Section 4 and of the Code required to be formulated thereunder.

Section 5 of the Act provides that each producer of bituminous coal accepting membership in the Code shall execute and acknowledge such acceptance on a form prepared and supplied by the Commission, and further provides that the membership of any such producer in the Code, and his right to drawback on the taxes levied under Section 3 of the Act, subject to the right of review as provided in the Act, may be revoked by the Commission upon written complaint and hearing.

Each of the plaintiffs states it does not desire to accept the provisions of Section 4 of the Act, and of the Code, and has no intention of accepting same and of submitting itself to the jurisdiction of the Commission and the other agencies charged with the administration and enforcement of such Code, nor of operating under its provisions, but desires and intends to exercise its constitutional right to conduct its business of producing and selling bituminous coal, which is a private one and not affected with a public interest, free of the unconstitutional regulations and restrictions of said Act, particularly in Section 4, but by reason of Sections 3 and 9 they are and will be penalized for failure and refusal to accept and operate under the provisions of Section 4 and of the Code formulated thereunder, by the imposition of a penalty, denominated as a tax in the Act, equal to fifteen per cent of the sale price at the mine of the coal produced by each of them, whereas the producers who agree to operate under the provisions of Section 4 and of the Code are rewarded by a rebate and forgiveness of ninety per cent of the tax, or penalty, which they would otherwise be required to pay.

Plaintiffs state 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 of the Act, and of the Code 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 of Section 8, Article I of the Consti-

tution of the United States, but is an unconstitutional attempt by Congress under guise of taxation to punish those producers of bituminous coal who are unwilling to surreunder their constitutional right to conduct their business free of unconstitutional interference and regulation by Congress, and the attempted imposition of such penalty operates to deprive these plaintiffs of their property without due process of law.

Plaintiffs state that the average total sale value at the mines of coal produced and sold by each of them each calendar month, and the amount of penalty which the said Act attempts to impose upon them, in the guise of a tax, because of their refusal to surrender their right to conduct their business free of unconstitutional interference by the Government, is approximately as follows:

Name of Plaintiff	Average Total Sales Per Month	Monthly Penalty or Tax
R. C. Tway Coal Company..	$ 44,000	$ 6,600
Kentucky Cardinal Coal Corp.	20,000	3,000
Harlan-Wallins Coal Corp...	139,925	21,000
Creech Coal Company.....	63,000	9,500
Harlan Central Coal Company	18,000	2,700
Harlan Fuel Company.....	54,000	8,100
Crummies Creek Coal Company	68,000	10,000
Three Point Coal Company..	33,000	4,900
Clover Fork Coal Company..	14,000	2,100
Harlan Collieries Company..	38,000	4,800
High Splint Coal Company..	42,000	6,400
Cornett-Lewis Coal Company	42,000	6,300
Kentucky King Coal Company	7,000	1,100
P V & K Coal Company.....	9,416	1,400
Green-Silvers Coal Corp.....	14,761	2,200
Mary Helen Coal Corp.....	47,648	7,100

The plaintiffs state that the profit realized and realizable by each of them on the gross sale price of the coal produced by them each month over the cost of production, under prudent and economical operation, is not over five per cent, and such profit is not less than the profit realized by the producers generally in the field where plaintiffs' mines are located. They state it is, therefore, apparent that the penalty of fifteen per cent imposed on them by Sections 3 and 9 of the Act is far in excess of the profit

realized by each of them on the gross sale price of the coal produced each month, less the cost of producing same, and that if required to pay such penalty they would operate at a disastrous loss each month, which can be met only out of their capital and surplus, 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 of the Act and of the Code formulated thereunder, except to either close down their operations or else to operate at such monthly loss they will quickly be rendered insolvent and unable to operate, in either of which events the Act operates to destroy and confiscate their property and their investment therein. None of the plaintiffs, except the Crummies Creek Coal Company, Clover Fork Coal Company, and Harlan Collieries Company own the fee to the coal land upon which its operation is located and from which it is mining coal; but with these exceptions, are operating under a lease requiring them to pay a stipulated royalty per ton for each ton of coal mined and sold. It is also stipulated in their leases that in event the total coal mined in any one year is not sufficient at the fixed royalty rate to produce the minimum royalty fixed in their respective lease, then, in addition, the lessee must pay such further sum as is required to bring the total royalty or rental payments for the particular year involved up to the stipulated annual minimum royalty. The mining plant of each of the lessee plaintiffs is located upon land owned by its landlord, and under the terms of the lease under which it is operating, the landlord has a first lien upon all the improvements placed upon the premises by the lessee, and upon all mining equipment of any kind used in its operation, to secure the landlord in the payment of the stipulated royalty, and the lease under which each of the lessee plaintiffs is operating reserves to the landlord the right to forfeit the lease if the lessee remains in default in the payment of royalty beyond the time stipulated therein. They state that if they should close down their mines because of the imposition of this tax and their inability to operate because of it, they would still be at a heavy expense in the upkeep of their properties, and in particular in keeping same free from water. Each plaintiff states that substantially all of its capital and surplus is invested in its mine and equipment, and the only way it could possibly raise money with which to pay the penalties imposed, over a substantial period of time, is to sell its property, or if possible to mortgage same, which would ultimately lead

to a sacrifice under foreclosure, as it would have no earnings after paying such monthly penalties, out of which to satisfy such mortgage; and each of the lessee plaintiffs states it could only mortgage its plant and equipment with the consent of the landlord, subject to the prior lien of the landlord for unpaid royalties. Each plaintiff states it would be impossible to borrow money with which to pay such so-called taxes upon the security of its property for the further reason its operating statement would disclose it could not operate its mines and pay the monthly penalties exacted by the terms of the Act without sustaining a tremendous loss each month. Therefore, a statement which a careful lender of money would demand, would clearly disclose that the money loaned could only be recovered through a sale of the pledged property.

The plaintiffs state that while the so-called tax provision of the Act does not become effective until the first day of the third month following the date of the enactment of this Act, and the monthly payments required thereunder do not become due until the first business day of the second succeeding month, yet the Act imposes upon them such tremendous and unconscionable penalties for their refusal to operate under its terms, they cannot wait until the penalty or tax actually attaches, for the reason that should they do so, before their rights could be finally determined their property would be confiscated and destroyed through enforced payment while their rights were being determined. For this reason they directed their counsel to notify the Defendant, to whom, as Collector of Internal Revenue, they are required to pay the tax, that they regard the Act as unconstitutional and have no intention of accepting or agreeing to operate under the provisions of Section 4 thereof, or of the Code formulated thereunder, and to inquire of the Defendant what was his attitude with reference to its validity and his intention with reference to the collection of the so-called taxes imposed thereunder. They say that the defendant, Glenn, in response to such inquiry, stated that he regarded and intended to treat the Act as constitutional, and intended to demand of each of the plaintiffs the amount of taxes assessable under its provisions as they matured, and upon their failure or refusal to pay, he would, by proper procedure, subject their property to the payment of the so-called tax.

Plaintiffs state that because each month's payment exacted by Sections 3 and 9 of the Act will be far in

excess of the profits on each month's operation, and can only be paid by a sale of their capital assets, or through a pledge of same under such conditions as would ultimately result in a sale thereof, and because of the further fact that if they should pay such so-called taxes as they accrue, it is within the power of the Commissioner of Internal Revenue, through delay in acting upon the application for refund, to prevent any suits to recover such so-called taxes until after the expiration of six months after the payment thereof, and even if they should promptly apply for a refund of the first month's so-called taxes required by the Act to be paid, after same have been paid, and the Commissioner should promptly deny such application, a suit for the recovery thereof could not be filed and an authoritative adjudication of their rights determined until the latter part of 1936, their capital and surplus will have been consumed, their property sacrificed, and they will have been rendered practically bankrupt before they can recover in a refund action and so-called taxes exacted of them by the Act.

They say Congress has made no appropriation out of which and with which to pay any judgment for refund which may be ultimately secured by them, and it is therefore entirely uncertain when they would be reimbursed on account of the so-called taxes exacted of them by Sections 3 and 9 of the Act, even after they secure judgment for same. For all of these reasons they state that the provision of the Federal Statutes which authorizes a suit for the recovery of illegally collected taxes does not afford the plaintiff's in this case a full, complete and adequate remedy at law, and to compel them to resort to such remedy would operate to deprive them of their property without due process of law; but if they refuse to pay the illegal exactions imposed upon them by Sections 3 and 9 of the Act, unless protected by the exercise of the equity powers of this Court, 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 Ten Thousand Dollars, and the officers in charge of their business to a fine of not exceeding Ten Thousand Dollars or imprisonment for twelve months, or both such fine and imprisonment.

Plaintiffs pray that said Act be decreed and adjudged unconstitutional and that such relief as flows to them from so holding be granted.

The Defendant, in his answer, denied the material allegations of the petition, and in addition thereto affirmatively plead that bituminous coal is consumed in

every State in the Union in generating energy for the production of light, heat, and power, and that it is used to produce approximately forty-five per cent of the total energy consumed for such purposes in the United States.

It is further alleged that this use makes such coal indispensable to the economic life, health and comfort of the inhabitants of every State, and is vital to the national public welfare. It is stated that commercial deposits of bituminous coal within the United States are limited to twenty-three producing areas within twenty-six states, and seventy per cent of the total mined is in four states, and that eighty-five per cent of the total produced is consumed (a) in States other than the State in which it was mined, or (b) by railroads engaged in interstate commerce; and that over twenty per cent of the total annual production was used by interstate railroads for fuel. He further alleged that seventeen per cent of the total gross freight revenues was realized from the transportation of bituminous coal.

The Defendant then states that in view of the importance of bituminous coal as a source of energy for industrial and domestic purposes, and in view of the necessity of transporting it across state lines to reach the majority of the users, it is of particular importance to the national public welfare that the distribution and marketing of bituminous coal in interstate commerce be not subjected to interruptions, dislocations, burdens or restraints. For many years the distribution and marketing of such coal has been subject (a) to sudden unforseeable, recurrent and prolonged interruptions and stoppages in the shipment in interstate commerce; (b) to sudden, recurrent and extremely wide fluctuations in the price of such coal to the consuming public, resulting in hardship and inconvenience to it in states other than the state of production,and tending directly and substantially to restrict and control the movement of coal in interstate commerce; (c) to unfair and demoralized methods of competition throughout the industry which operate directly and substantially to burden and restrain interstate commerce in such coal. These burdens, restraints and interruptions have operated with the effect to injure a multitude of the consumers of such coal throughout the country and cause a substantial waste of the coal resources of the nation and the bankruptcy of many coal producers, and widespread unemployment in the industry. These conditions have resulted in serious and widespread reigns of disorder and violence requir-

ing resort by public authorities and private parties directly concerned therewith to the State and Federal Courts of law and equity, and necessitating the use of State militia and of Federal troops to quell disorders. It is then alleged that the Congresses of the United States since the year 1918, made or caused to be made twelve fact-finding investigations into the conditions under which bituminous coal is produced, distributed and marketed throughout the United States; and from the facts disclosed through these investigations that it is evident that the present burdens and restraints upon and interruptions to interstate commerce in bituminous coal are primarily and directly due to an abnormal and destructive competitive rivalry for markets between the several producing areas and between the producing units in the areas, and that such unbridled competition has resulted in a reduction of the mine realization price of such coal to a level frequently below the average cost of production thereof, and that sixty per cent of the cost of producing such coal is attributable to labor going directly into its production, and that such labor cost is the principal element that is subject to appreciable adjustment, and as a direct result of such competition, wages in the bituminous coal industry have been progressively forced down to a point below subsistence levels; and that numerous controversies over wages have resulted in strikes and lockouts, and in the interruption, cessation and dislocation of production and distribution, all of which was directly attributable to price and wage reductions, and because of the refusal of employers to bargain collectively relative thereto and to desist from various unfair labor practices. It is then alleged that in order to remove or control the aforesaid direct and substantial burdens upon the interruptions to interstate commerce in bituminous coal, it is necessary that competition between the various producing areas of such coal in the consuming markets of the several states be regulated by the elimination of unfair competitive marketing practices, by the fixing between fair and reasonable limits of the price at which said coal may be distributed in consuming markets and further by stabilizing and equalizing as between producing areas and between the producing units in the area, the wages and hours of labor of employees, and by otherwise eliminating the causes of strikes and lockouts.

It is then alleged that all of the plaintiffs are engaged in the business of producing bituminous coal for distribution and sale in interstate commerce, and in the con-

duct of such business are subject to Federal regulation to the extent and in the manner provided by the Code in Section 4 of the said Bituminous Coal Conservation Act.

It is then alleged that the Bituminous Coal Conservation Act of 1935 exempts the plaintiffs from ninety per cent of the tax imposed by said Act if they file an acceptance of the Code to be formulated under said Act, and they would be thus exempted so long as they remain members of the Code, and if their membership were revoked, such revocation would be subject to judicial review before becoming effective. It is further alleged that the acceptance of the Code would not preclude or estop any acceptor from contesting the constitutionality of any Code provision, or its invalidity as applied to him.

It is then alleged that the acceptance of the Code to avoid the payment of ninety per cent of the tax by any or all of the plaintiffs would not affect any of their constitutional rights, and any or all of the plaintiffs could after the acceptance of said Act protect all their rights by complete administrative or judicial remedy.

It is then alleged that the payment of ten per cent of the tax as provided under the bill, or the acceptance of the Code as provided under the Act, would not cause the plaintiffs, or any of them, any injury, irreparable or otherwise.

It is then alleged that the plaintiffs have voluntarily and arbitrarily refused to file their acceptance of the Code referred to, and under such circumstances none of them, are entitled to the relief prayed for in their petition.

It is then alleged that the Bill of Complaint of the plaintiffs is premature, since no tax is yet in effect.

It is then alleged that the Court is without jurisdiction to grant the relief prayed for in the original petition because it seeks an injunction to restrain the collection of a tax, which is prohibited under Section 3224 of the Revised Statutes of the United States, U. S. C. A. Title 26, Section 154.

The second suit is an action (Equity ♯997) instituted by C. H. Clark, a citizen of the Commonwealth of Kentucky, residing at Louisville in the Western District, a stockholder and a member of the Board of Directors of the defendant corporation, the R. C. Tway Coal Company. This defendant is one of the plaintiffs in Action ♯996. It is alleged in the Bill that it is engaged in the business of mining and producing bituminous coal from its mines located in Harlan County, Kentucky, and selling the coal so produced. Its affairs are conducted by a

Board of Directors elected by the stockholders. R. C. Tway and L. A. Shafer are made parties defendant, and it is stated that each of them is a stockholder and director, and together with the plaintiff constitute the Board of Directors of the defendant corporation.

It is alleged that the suit is in Equity, is of a civil nature, arising under the Constitution and laws of the United States, and involves the validity, construction, application and enforcement of the Act of Congress approved August 30, 1935, known as the "Bituminous Coal Conservation Act of 1935." The collusiveness of the action is denied, and it is alleged that the matter in controversy exceeds the sum of Three Thousand Dollars.

It is further alleged that the Act referred to recognizes and declares 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, and that the general welfare of the nation requires that the bituminous coal industry shall be regulated as provided in the Act referred to in the petition, and that the production of such coal and its distribution directly bear upon and directly effect interstate commerce.

The plaintiff then sets out the provisions of the Act in detail, including the provision or the imposition of a monthly tax of fifteen per cent of the sale price at the mine when removed therefrom; if the defendant fails to accept the Code referred to in the Act. He then sets out that the Congress has the constitutional power to provide for all the things directed to be done in the regulation of the bituminous coal business as provided in the Act.

The plaintiff then alleges that notwithstanding the validity of the regulatory Act, that the majority of the Board of Directors of the corporate defendant, prior to September 10, 1935, over his protest and contrary to his wishes, concluded that the Act of Congress referred to was unconstitutional and that the defendant would not comply with any of its terms, and immediately after the action of said Board of Directors, he requested the Board in writing to reconsider its action, to accept the provisions of the Act, sign the Code as provided, and in response to his demand the Board of Directors of the corporation held a special meeting, and at said meeting, over his protest, reaffirmed their former action and spread on the minutes of the meeting a resolution to not comply with any provisions of said Act because of its unconstitutionality.

Plaintiff then states that a special meeting of the stockholders of the corporate defendant was held, and he appealed to them to accept the provisions of the Act referred to, and over his protest the stockholders of the corporate defendant, excluding himself, unanimously voted to not accept the provisions of said Act or any part thereof, and by resolution duly spread on the minutes of the meeting so declared.

Plaintiff states that by reason of the corporate defendant refusing to accept the provisions of the Bituminous Coal Code that it subjects itself to a tax of fifteen per cent on the sale price of the coal mined and produced by it, as provided by Section 3 of the Act, and that the profit realized by the corporate defendant for many years past and at the present time, and as he believes, in the future, will not be in excess of five per cent of the sale price of the coal mined and sold, and that the tax of fifteen per cent imposed upon the corporate defendant for its failure to accept the Code will have to be paid out of its capital assets, which will result in a disastrous loss to the company and ultimately lead to its bankruptcy and the entire loss and destruction of the value of plaintiff's stock in the corporate defendant.

He further states that under the provisions of the Act, the corporate defendant is subject to a fine not exceeding Ten Thousand Dollars for each failure to report and pay the taxes provided in said Act, and the imposition of fines on the corporate defendant will also deplete the assets of said defendant, which would reduce the value of the stockholders' shares in said company,

Plaintiff states that in view of the facts alleged in the petition, it is the duty of the corporate defendant, in the proper performance of its corporate functions, to accept and operate under all the provisions of the Bituminous Coal Code, and that it is the duty of the individual defendants, Tway and Shafer, to join with the plaintiff, as Directors of the corporate defendant to cause it to accept the said Code and operate under its provisions, and that their failure to do so will work irreparable damage and injury to the corporate defendant, and to the plaintiff and stockholders, and that he is without remedy, except in this Court sitting as a Court of Equity.

Plaintiff asks the Court to adjudge that it is the duty of the corporate defendant, and its officers and directors, to accept the provisions of the Act of Congress, approved August 30, 1935, known as the "Bituminous Coal Conservation Act," and use its equity powers to compel the

corporate defendant and its officers to take all steps necessary to comply with said Act.

The plaintiff invited the District Attorney for the Western District of Kentucky to appear in the proceeding instituted by him, and aid and assist him and his attorneys in sustaining the constitutionality of the Act referred to in the petition, and the District Attorney filed a brief amicus curiae.

The plaintiff and defendants filed a stipulation in the action, in which it was stipulated and agreed that if the matters dealt with in Section 4 of the Bituminous Coal Code and the provisions set out in Paragraph 3 of said section were matters within the competency of Congress under the Constitution, and if Congress had the power to impose the fifteen per cent tax on the producers who refuse to accept and operate under the Code provided under Section 4 and to exempt producers accepting the provisions of the Code from payment of ninety per cent of such tax, it would be an abuse of the corporate functions of the company and of the powers vested in the Directors to conduct the affairs of the corporation, to refuse to accept said Code and operate thereunder because of the additional burden of taxation on the corporation.

It was stipulated that the plaintiff was authorized to invite the Department of Justice of the United States, and the United States Attorney for the Western District of Kentucky to appear and defend the constitutionality of the Bituminous Coal Conservation Act of 1935, but this consent was not to be construed as an agreement that the invited parties should control the progress of the action or unduly delay its decision by the Court.

A supplemental stipulation was filed, in which the parties stipulated that bituminous coal was used in generating energy for light, heat and power in all parts of the United States, and that substantially forty-five per cent of the total energy used in the United States was produced from the use of such coal.

It was further stipulated that eighty-six per cent of such coal was transported in interstate commerce from the place of production to destination by rail, and that only fourteen per cent of such coal was consumed in the State where produced. It was also stipulated that eighteen per cent of the gross freight revenues of the railroads engaged in interstate commerce was realized from the transportation of bituminous coal, and that approximately twenty per cent of the total annual pro-

duction of bituminous coal in the United States was used for fuel by railroads engaged in interstate commerce.

It was further stipulated that approximately 450,000 men were employed in the United States in the mining of bituminous coal, and that approximately sixty per cent of the cost of producing such coal was represented by wages paid to them.

It was further stipulated that the United States District Attorney for the Western District of Kentucky had been invited to appear in said cause and present any additional facts which he deemed pertinent to a decision of said cause, but that said Attorney had not offered or produced any evidence.

The defendants, after admitting the right of the plaintiff to maintain this action, moved its dismissal 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, insofar 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 exer-

cise 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 to 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."

Equity No. 808 is a petition filed by John N. Backall and Sterling S. Lanier, Jr., this Court's receivers appointed in the case of Baltimore Trust Company v. Norton Coal Mining Company, engaged in the business of operating coal properties in the Western Kentucky coal field, and in producing and marketing bituminous coal. The petitioners, after setting out their operating losses and the impossibility of paying a tax of fifteen per cent on the sale price per ton on the coal mined, alleged substantially the same facts as stated by the plaintiff in Action No. 996, and in defendants' answer in that same action, and further said they were unable to decide what course of action they should pursue under said facts and their unwillingness to assume responsibility for a decision, and requested the Court to advise them as to whether or not they should ignore said Act or comply with its provisions.

All of these actions have been submitted to the Court for final decision.

Opinion

The parties to Actions No. 996 and No. 997 have filed stipulations of fact and introduced oral testimony concerning factual matters considered by the Congress in passing the Legislation which it is now claimed is unconstitutional. Their reason for seeking the aid of testimony in passing on the Congressional power to legislate on this subject is said to be supported by the opinion of the Supreme Court in Borden's Company v. Baldwin, 293 U. S. 194, 213. An examination of this case shows that the matter before the Court was the validity of a Statute of the State of New York, referred to as the "New York Milk Control Law" of April 10, 1933, authorizing the Milk Control Board to fix minimum prices for sales of fluid milk in bottles by milk dealers to stores in a city of more than one million inhabitants, establishing a differential of one cent a quart in favor of dealers not having a well advertised trade name.

The Court in that case said that where a legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and findings, and the Supreme Court sent the case back to the lower Court for a final hearing upon pleadings and proof, with directions that the facts should be found and conclusions of law stated as required by Equity Rule 70½.

This case turned on the administration of the Act in the construction that the Milk Control Board had placed on the phrase "well advertised trade name," and its application to the appellant. It did not involve, except indirectly, the constitutionality of the Act under which the Milk Control Board made its classification.

I have followed the wishes of counsel in putting into the record factual matters as far as it is concerned, but in writing this opinion I have assumed that this Court is without power to hear evidence or find facts upon the constitutionality of the Congressional Act here in question.

Where a proceeding directly attacks an Act of Congress, as unconstitutional as contradistinguished from constitutional rights being invaded by the administration of the Act, it seems to me a Court would be treading on dangerous ground to attempt to go into a factual field in determining its constitutionality. The effect of evidence in such proceeding is, of course, a collateral attack upon the legislative inquiry, judgment and declaration (that is to impeach it).

The Congress has already investigated the facts as a basis for its action. If its findings may be impeached by the testimony of opinion witnesses, the Act might be found to be constitutional in one case and unconstitutional in another, depending on the testimony. As many conclusions might be reached as to constitutionality as there might be Judges, or upon such facts as ingenuity might suggest as matters of opinion or actual facts in evidence.

The Courts, so long as they recognize the doctrine of separation of Governmental powers, which is fundamental under our system, will not attempt to exercise the power of another branch. Judges will be careful to observe the ideal expressed by the letter and spirit of the Constitution to avoid encroachment upon other departments, and will be quick to sustain each in the exercise of its legitimate function, and so the rule prevails that every inquiry into the validity of a legislative act is approached with the presumption that the Congress observed the Constitution, and when the validity of an act depends upon the existence of certain facts, the legislative determination will be conclusive on the Courts, unless the contrary is shown by facts which the Court may judicially notice. If it cannot be made to appear that a law is in conflict with the Constitution by argument deduced from the language of the law itself, or from matters of which the Court can take judicial notice, then the Act must stand. Soon Hing v. Crowley, 113 U. S. 703, 711; Minnesota v. Barber, 136 U. S. 320; New Orleans v. Warner, 175 U. S. 416; Angle v. Chicago, etc., Railway Co., 151 U. S. 27.

The following fact finding investigations into the conditions under which bituminous coal is produced, distributed and marketed throughout the United States have been held or authorized by Congress:

Hearings before the Committee on Manufactures of the Senate on Shortage of Coal (65th Cong., 2nd Sess., 1918);

Hearings before the Committee on Interstate Commerce of the Senate on Increased Price of Coal (66th Cong., 1st Sess., 1919, 1920, 1921);

Hearings before the Committee on Reconstruction and Production of the Senate on Coal and Transportation (66th Cong., 3rd Sess., 1920, 1921);

Hearings before the Committee on Education and Labor of the Senate on Conditions in the West Virginia Coal Fields (67th Cong., 1st Sess., 1921, 1922);

Hearings before the Committee on Labor of the House of Representatives on Labor Conditions in the Coal Industry (67th Cong., 2nd Sess., 1922);

Report of the United States Coal Commission pursuant to the Act of September 22, 1922, published in 1925;

Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on Coal Legislation (69th Cong., 1st Sess., 1926);

Hearings before the Committee on Interstate Commerce of the Senate on Conditions in the Coal Fields of Pennsylvania, West Virginia and Ohio (70th Cong., 1st Sess., 1928);

Hearings before the Committee on Interstate Commerce of the Senate on Proposed Bituminous Coal Legislation (70th Cong., 2nd Sess., 1929);

Hearings before the Committee on Mines and Mining of the Senate on the Creation of Bituminous Coal Commission (72nd Cong., 1st Sess., 1932);

Hearings before the Committee on Interstate Commerce of the Senate on Stabilization of the Bituminous Coal Mining Industry (74th Cong., 1st Sess., 1935);

Hearings before the Committee on Ways and Means of the House of Representatives on Stabilization of the Bituminous Coal Mining Industry (74th Cong., 1st Sess., 1935).

All of the ultimate facts shown in these reports are presumed to have been considered by the Congress before the passage of the Act in question, and this Court may consider them as well as all other facts of which it may take judicial notice in passing on the validity of this Act. Board of Trade v. Olsen, 262 U. S. 1, 43.

Based on these reports and matters of common knowledge, the following facts were before the Congress at the time of the passage of the Act here involved:

More important than winds and water for the production of power and of heat is coal mining of all kinds. Mechanical transportation, manufacturing, and domestic heating all largely depend upon coal. Water power and oil have in a recent age relieved somewhat the burden upon coal, but it still is, and will long continue to be, the principal source of energy in the United States. It is the most valuable mineral in all the world. It is, with oil, one of the twins of Black Gold. The utili-

zation of coal awaited the development of the steam engine, but when James Watt developed the latter, it, together with coal, brought on an industrial revolution which changed the course of history and the life of mankind.

Coal not only heats our homes and public buildings, provides power for railroads and steamships, and keeps alive the great furnaces that transform iron ore into pig iron, but it enters into every-day living in many ways, for coke, gas, ammonia, and tar are all derived from coal, and they in turn have derivitives that are now considered indispensable to modern civilization. Sixty-three valuable chemical by-products are obtained from coal. This mineral is an indispensable requisite to our continued progress.

The production of bituminous coal by States, in millions of tons per annum, is approximately as follows: Pennsylvania 140, West Virginia 124, Illinois 68, Kentucky 54, Ohio 29, Indiana 22, Alabama 22, Virginia 12. Twenty other states produce bituminous coal in small quantities, but the eight States above mentioned produce the major part. All of the States of the Union use bituminous coal in large quantities, and it is the principal article in freight tonnage moved by interstate railroads. It is the largest single source of gross freight revenue to these roads, and is also the principal source of power.

The paramount importance of the bituminous coal mining industry in the economic and social life of this country cannot be denied. With the exception of agriculture, it employs more men than any other single industry in the United States. It is the foundation of our iron and steel, shipbuilding, and engineering trades, and, indeed, of our whole industrial life.

The industry has a human as well as a technical side. The risk and uncertainties of mining, the importance of the industry, and the national welfare combine to make the life of the miner a matter of public concern.

From the days of the Molly Maguires in 1875, to the present time, the Bituminous Industry has been the theater of unrest which constantly gives rise to stoppages of work in the industry and occasionally develops into labor disputes on a national scale. The announcement of strikes is sometimes made long in advance of the contemplated event, and large sums of working capital of railroads engaged in interstate commerce, and manufacturers producing products entering into such commerce are invested in reserve supplies of coal, and the

storage thereof displaces other necessary appliances and utensils used by the carrier, and the product of the manufacturer, and in addition adds to the burden of both the carrier and the manufacturer by the use of unnecessary capital.

The miners seek to make a wage scale applying to producing coal areas in more than one State, and the scale of wages in one State affects the production and movement of coal in another State with a different wage scale.

Mining is recognized as one of the most hazardous occupations of man, and it has exacted its toll in thousands of deaths and many more injuries in comparatively few years. New methods of extraction, and the use of labor saving appliances have greatly increased the output in tons per man. Most of the coal reserves of the United States in production are located where mining is the only gainful occupation, and when slack work comes, those thrown out of employment can find no other occupation in which subsistence may be had. The high number per thousand of population on the relief rolls in the mining areas of the United States compared with the other sections of the country is impressive testimony of the vital interest the Government has in the rehabilitation and stabilization of the coal industry.

No other industry in the United States has had the prolonged intimate and painstaking study of its conditions as the Bituminous Coal Industry. The Fuel Production Committee of 1917, The Fuel Administrator from 1917 to 1919, the Bituminous Coal Commission of 1921, The Federal Fact Finding Commission, not to mention the various Congressional and State Legislative Committees, have all examined the ills of the mining industry and fully reported on them. The average earnings of the miner have been in constant decline since 1922, and generally have not been sufficient to maintain him and his family above the recognized line of subsistence. For more than ten years this industry has been in chaos. There have been misunderstandings without number between the operator and the miner. No other industry has caused so much public anxiety, and the disorders in it have vitally affected the interstate steam transportation system of the country and its repercussions have been felt in other industries.

The operators and owners of mines, shortly after the close of the War, fell upon hard times and profits practically vanished. It was not possible to lower freight

rates affiecting the industry. The only place where the cost of production could be decreased was in wages, and thus came a period, which still continues, of lower standards of living for the miners, and the loss of an economic wage.

The business of coal mining, that is to say bringing coal from the seam to the surface and preparing it for sale by screening or washing, is not carried on in isolation from other businesses. It is usually sold to be transported in interstate commerce before mining is commenced, and the production thereof is closely associated with its utilization in other industries not only using it for the production of power, but also its by-products in the manufacture of many articles that are absolutely essential to the comfort and convenience of the American people.

The production of bituminous coal was greatly expanded during the period of the late war, and at the conclusion of peace, the mining area had been increased far beyond the needs of consumers, and capital invested in the business became frozen. The difficulties of the industry were further increased by the substitution of oil, natural gas and water power for the production of energy. Bankruptcies of concerns engaged in the business have clogged the Court dockets, and it has been a prolific source of equity receiverships. Reorganizations authorized under the amended bankruptcy acts have been of no substantial benefit to the coal industry. The Norton Coal Company, heretofore referred to in this opinion, has been in receivership in this Court for an undue period, and it is impossible to find a purchaser for its properties at any substantial price, although at one time it was a highly profitable concern and now owns a large acreage of bituminous coal readily accessible for mining. The unfavorable condition in the coal industry, due to over-production and over-capitalization, has led to many unfair trade practices. An illustration of some of them is what is usually referred to as "distress coal," which is the production of different sizes of coal for which there is no market in order to obtain a marketable size. Because of a lack of storage facilities at the mines, the distress coal is placed on cars at the producers' tracks, which become so congested that production must be stopped or cars moved, which is done by sending the unsold cars to billing points on consignment, which depresses the price of other coal at the point of consigned destination. Often distress coal is not marketable at any price after being shipped

on consignment. Demurrage charges accumulate on standing cars, and interstate transportation facilities are thrown out of movable use. "Pyramiding" of coal is another unfair trade practice, which occurs when a producer authorizes several persons to sell the same coal, and they in turn offer it to other dealers, which causes the coal to compete with itself in the market, resulting in abnormal and destructive competition.

Other unfair trade practices could be cited, but these are sufficient to illustrate the point.

The bituminous coal fields of the United States in production are widely separated. The greater part of them are in the Eastern and Middle States. The West Coast must depend for its supply on long stretches of interstate or water transportation.

It may be said that if the supply of bituminous coal were suddenly cut off, many manufacturing plants would shut down, trains stop, and steamships be helpless.

It is claimed by the defendant in Action No. 996, that it is premature because the tax or penalty which the plaintiffs claim they will be required to pay is not assessable or due until January, 1936, and on the further ground that before the defendant, as Collector, has any authority to collect these taxes or penalties, they must first be assessed by the Commissioner of Internal Revenue.

While the taxes are not payable until January, 1936, they are determined on a basis of coal mined after November 1, 1935, and prudent business management would require each of the plaintiffs to begin maintaining a reserve for the taxes as they accrue. The sums due would enter into the cost of coal produced, and if the Act here in question is constitutional and the plaintiffs resist it and refuse to comply with its terms, each would add the tax to the cost of coal produced if a market could be found with the addition.

It is provided in Section 7 of the Act that all the provisions of the law, including penalties and refunds relating to the collection and disposition of internal revenue taxes, shall in so far as applicable and not inconsistent, be applied to taxes imposed under the Act.

R. S. 3164, U. S. C. A. 26, Section 26, provides it shall be the duty of every Collector of Internal Revenue having knowledge of any wilful violation of any law of the United States relating to the Revenue, within thirty days of the coming into possession of such knowledge to file with the District Attorney of the District in which any fine, penalty or forfeiture may be incurred, a statement

of all the facts and circumstances of the case within his knowledge.

Under the provisions of R. S. 838, U. S. C. A. 28, Section 486, it is made the duty of the District Attorney to collect the fine or penalty reported to him by the Collector. Various other provisions of the Internal Revenue Law, unnecessary to cite here, require the Collector to diligently inquire into all tax delinquencies and take prompt action to assess and collect all taxes found to be due and unpaid in his district.

A court of equity acts before injury is done. All that is necessary to determine is the impending damage. This action is not premature. Pierce v. Society of Sisters, 268 U. S. 510; Hill v. Wallace, 259 U. S. 44; Nashville C. & St. L. Railway Co. v. Wallace, 288 U. S. 251; Vicksburg Waterworks Company v. Vicksburg, 185 U. S. 65; United States v. Murphy, 264 F. 843; Ex Parte Young, 209 U. S. 123; City Bank Farmers Trust Company v. Schnader, 291 U. S. 24.

It is also contended by the defendant that Section 3224 of the Revised Statutes, U. S. C. A. 26, Section 154, prevents this Court from issuing an injunction against the defendant, although all the facts alleged in plaintiffs' petition are true. It is provided in this Section that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any Court. It has been many times decided that this statute is inapplicable if extraordinary circumstances exist bringing the case within the acknowledged head of equity jurisdiction, and it is prohibitive of this proceeding unless such extraordinary circumstances have been shown.

The plaintiffs have introduced evidence as to each of them sustaining the allegations of the petition that they are wholly unable to continue in business if compelled to pay fifteen per cent of the sale price per ton on all the coal produced and mined by them. The defendant responds to this contention by pointing out that the payment of one and one-half per cent of the sale price per ton on coal mined would be no burden, and the plaintiffs admit this sum in taxes could be borne by each of them without hardship, but insist that they, and each of them, are entitled to have the constitutionality of the Act involved determined by the Courts of the land before being compelled to accept its terms.

It was the undoubted purpose of the Congress in providing for the fifteen per cent per ton tax to use it as a weapon to force persons within the terms of the Act to accept its provisions, and thereafter afford them the

remedy of contesting the matter in Court. It, therefore, comes to the question of whether or not the plaintiffs would lose any substantial rights by accepting the Code. If any one of them would lose either money or a substantial property right by the payment of the tax of one and one-half per cent and acceptance of the Code, then Section 3224 R. S. is not applicable under the principle laid down in Hill v. Wallace, supra; and the plaintiffs would be entitled to the relief, as decreed in the case of Miller v. Nut Margarine Company, 284 U. S. 498.

As heretofore pointed out, the only provision for refund of taxes under this Act is by reference to other provisions of the law for the refundment of Internal Revenue taxes. Four different statutory provisions are found for refundment, as follows: 26 U. S. C. A. 149, R. S. 3220; 26 U. S. C. A. 1065, 43 Stat. 1115; 26 U. S. C. A. 1120, 44 Stat. 84; 7 U. S. C. A. 615, 48 Stat. 973. These sections have varying periods of limitation, and one of them provides that the taxpayer shall show satisfactory evidence that he has not passed the tax on to the consumer. It will thus be seen there is an uncertainty in the law as to what particular refunding statute the plaintiffs should follow in making application for refund.

It is provided in Section 3 of the Act here in question, "no producer shall by reason of his acceptance of the Code provided for in Section 4, or the drawback of taxes provided in Section 3 of this Act, be precluded or estopped from contesting the constitutionality of any provision of said Code or its validity as applicable to such producer." It will be noted that this provision of the Statute provides only the waiver specifically to the Code provisions of the Act and no others. It is not as broad provision of waiver of estoppel by the Government as would seem without close examination.

If a producer accepts the Act until the constitutionality of the Code provisions are settled in Court, he is subjected to its provisions as to prices, wage scale, and prohibited from following certain trade practices which otherwise might not be unlawful. From these things he might sustain a substantial loss for which no recovery is provided in the Act.

It would be a senseless sort of procedure to say that he could accept the provisions of the Act, and simultaneously therewith file suit in Court to test its constitutionality. R. S. 3224 is not applicable to this suit.

This section should not be extended by implication. The Courts are better equipped to construe acts of the

Congress than administrative officers. The Judge is identified, and trained in construing statutes. His hearings are conducted in public, and his judgment is determined by the impartial application of principles which are known and established. All persons to the controversy are fully and fairly heard. In other words, the decision of a Court is in every important respect sharply contrasted with administrative conclusions, however benevolent the executive administrator may be.

Prompt judicial determination of the constitutionality of an Act leads to its quick acceptance by those to whom applicable. Delay of determination through administrative process makes uncertain the rights of the citizen and difficult administration of the law.

The District Attorney and the Attorney-General's office filed a brief amicus curiae in Action #997, and insisted that this Court had no jurisdiction because there was no case or controversy between the parties, and further the constitutionality of the Act could not be properly decided due to the lack of evidence.

As was heretofore pointed out in the statement of the case, it was alleged in the petition that the action was not collusive. The District Attorney and the Attorney-General were invited to come into the case and tender any evidence germane to the question. This invitation was declined. Lack of good faith on the part of litigants to a law suit cannot be raised by an amicus curiae. If the record fails to show collusion between the parties, such friend of the Court must take the record as he finds it.

The District Attorney and the Collector of Internal Revenue were proper, but not necessary, parties to this action. The Court would have permitted either of them to become parties had they so desired, and as such, of course, they could have produced any evidence showing collusiveness to oust the Court of jurisdiction that they wished, and it was their duty to have raised the question in that form rather than by collateral interjection.

There is nothing in the record to show collusion. The Court is not ready to assume that any officer of a company coming under the provisions of the Act here in question would not wish to comply with its terms. According to the public press, many of the producers of bituminous coal, in fact the majority of them, have accepted this Act.

There is also nothing to show that the plaintiff, C. H. Clark, is not prosecuting his action in good faith. This Court has jurisdiction of the action. Re Reisenberg, 208

U. S. 90; Hill v. Wallace, 259 U. S. 544; Brushaber v. Union Pacific R. Co., 240 U. S. 1; Pollock v. Farmers Loan & Trust Co., 157 U. S. 429; Smith v. Kansas City Title & Trust Co., 259 U. S. 180; Cotting v. Godard, 183 U. S. 79; Dodge v. Woolsey, 18 How. 331; Dickerman v. Northern Trust Company, 176 U. S. 181; Harris v. Brown, 6 F. (2) 922; Black & White Taxicab & Transfer Company v. Brown & Yellow Taxicab & Transfer Company, 276 U. S. 518; Blair v. Chicago, 201 U. S. 400; May Hosiery Mills v. United States District Court, 64 F. (2) 450.

As we have heretofore pointed out, we do not believe the Court is authorized to receive evidence to aid it in determining the constitutionality of the Act involved, and for that reason the second point raised by the amicus curiae is without merit. Action #997 presents both a cause of action and a justifiable controversy.

In view of the conclusions I have heretofore expressed, it now becomes my duty to pass on the constitutionality of the Act. Its opponents attack it broadly on the following grounds:

1. Because it violates the due process clause of the Fifth Amendment to the Constitution, and the reserve rights of the States and the people under the Tenth Amendment.

2. Because it confers legislative power on the National Bituminous Coal Commission and other agencies created by the Act.

There are two approaches to the determination of the constitutionality of a statute. One is to measure it by the decisions of the Supreme Court on acts somewhat similar to the one under consideration; and the other, to directly test it by the provisions of the Constitution, regardless of any decisions of the Supreme Court. The latter course should be pursued first in every case, because each act involves a different subject matter from any previous one. In Schechter v. United States, 295 U. S. 546, the Court said:

> "In determining how far the Federal Government may go in controlling intra-state transactions upon the ground they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as the individual cases arise, but the distinction is clear in principle."

Unless this distinction is kept in mind, the consideration of the decisions of the Supreme Court will only lead to confusion.

Many acts involving interstate commerce are somewhat similar to the Bituminous Conservation Act, but the relationship is only fragmentary. The Supreme Court has been careful to state, in many cases, that its decision is only applicable to the particular act under consideration. The Court is committed to the doctrine that the Constitution is a live and vital instrument, and is not static. It speaks of the age when written, more than a hundred years ago. The Court expounds it in the language of its own age, holding fast to the old words and powers, but expounding them to keep pace with the expansion of our country, its citizens, its enterprises and industries, and our rapidly growing civilization.

The Act here in question is not to be tested by the Court's decision on some previous act, which was identical with a part of this one. The whole is the sum of all the parts, but the affinity of the parts is not the affinity of the whole. Many illustrations of this are found in chemistry. Cotton and nitric acid, widely used commodities, separately are not dangerous, but when joined to form gun cotton, a deadly explosive is produced. Glycerine, a part of almost every soap used in every household, is a harmless product. Nitric acid, when used alone, is harmless, but when combined with glycerine produces nitro-glycerine, a powerful, deadly force. So it is in the business and economic world. Things standing alone do not affect the happiness or welfare of the people, but when combined produce political and social disaster. Keeping this principle in mind, the mining of coal alone may not affect interstate commerce, but combined with the work of the miner, the transportation and marketing thereof may become interstate commerce in its entirety.

The Constitution of the United States stands alone, and decisions of the Courts interpreting it do not alter it. In testing any Act of Congress by the terms of that instrument, a sensible and logical thing to do is to immediately go to the language of the document and to measure the Act in question by the basic rules of interpretation and not the decisions of the Supreme Court on some similar, but not related, Act to the one in question.

After this is done, then the decisions of the Court on similar acts will be helpful in testing the conclusion reached from the first investigation.

Opinion

The Constitution of the United States was ordained among other purposes to promote the general welfare, and one of the methods for so doing, as provided in Section 8, was to regulate commerce with foreign nations and among the several States, and with the Indian Tribes, and in order to make certain that this could be done, it empowered the Congress to make all laws which should be necessary and proper for carrying into execution the power specifically conferred, and all others vested by the Constitution in the Government of the United States, or any Department or officer thereof.

The most helpful rule for interpreting the Constitution is to look to the history of the times and examine the state of things existing when it was formed, and adopted. In applying this rule, we may look to conditions at the time of its adoption, the general spirit of the times, and the prevailing sentiment among the people. In doing this, reference may be made to historical facts and prior well-known practices and usages. Legal Tender Cases, 12 Wall. 47; Gibbons v. Ogden, 9 Wheat. 1; Rhode Island v. Massachusetts, 12 Pet. 657; Slaughterhouse Cases, 16 Wall. 36; Maxwell v. Dow, 176 U. S. 581.

The first effort of our people, after winning the War of Independence, to have a united government was by Articles of Confederation adopted in 1777. After ten years of government under this instrument, it was found that if the great purposes for which independence was sought were to survive and the nation grow, the States must surrender to a central government certain powers they had, and in response to the people's demand, the Constitution of the United States was adopted in 1787.

It is clear from a consideration of the history of the times, the adoption of the Constitution, and the objects to be accomplished, that the people of the States intended to surrender all the rights they had to promote the general welfare that could not be done by the States acting independently. If this broad purpose is kept in mind, dictionary definitions of words will be less potent in interpreting the Constitution, and there will be less case matching when Courts are called on to perform this duty.

The Congress should first determine if the act proposed is in the interest of the public welfare; second, can the States acting independently accomplish the result; third, if not, should the Central Government take action; and, fourth, search the Constitution for authority to carry into statutory form the demand of the people for Governmental action. If State action is impotent,

Federal action is imperative if public necessities demand.

The facts, as heretofore shown, clearly prove that the States acting alone are unable to rehabilitate the Bituminous Coal Mining Industry as it affects the people generally, the capital invested in the business, and the wage earner employed therein. Joint action of the States is imperative. The Congress should exercise whatever power it has, and if possible, the Courts should avoid constitutional barriers thereto.

Disordered commerce among the States contributed largely to the fall of the original Confederacy. It was soon found it was idle and visionary to suppose that the Government of the United States could continue to exist if the States retained the power to regulate commerce among them.

Washington, before the Convention met to adopt the Constitution, referring to the necessity of power to regulate commerce being lodged in the Central Government, said:

> "If the States individually attempt to regulate commerce, an abortion, or a many-headed monster would be the issue. If we consider ourselves, or wish to be considered by others, as a united people, why not adopt the measures which are characteristic of it and support the honor and dignity of one? If we are afraid to trust one another under qualified powers, there is an end of the union."—Rives' Madison, p. 60.

The Constitution is an enumeration of powers and contains no definitions. The defining is left to the Congress, and if its definition is without basis in fact, the Courts may negatively disregard the Congressional definition.

It does no violence to the Constitution to say the power to regulate commerce among the States gives Congress the power to regulate that which regulates interstate commerce.

If a mass of things directly affect interstate commerce, it would seem within the realm of reason that Congress could take hold of any part of the mass when it began to move to the union of the whole.

When the coal operator contracts his coal in advance of production, to be transported in interstate commerce, and the miner begins to dig the coal and lift it to the surface of the earth, there to be put in the car on the loading tracks and a part of it to be used to move the locomotive that carries the coal, it would seem reasonable

that under the power to regulate commerce the Congress would have power to legislate concerning the industry at the beginning of the movement that was to continue uninterrupted until ultimate delivery to a consumer or purchaser. Unless this be so, Congressional power to regulate commerce is confined exclusively to the vehicle that moves the product.

With these general observations, we now turn to the decisions of the Supreme Court as to what so affects interstate commerce as to authorize legislative action.

In Stafford v. Wallace, 258 U. S. 495, the Court said:

> "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it."

In Chicago Board of Trade v. Olsen, 262 U. S. 1, the Court said:

> "In the act we are considering, Congress has expressly declared that transactions and prices of grain in dealing in futures are susceptible to speculation, manipulation, and control which are detrimental to the producer and consumer and persons handling grain in interstate commerce and render regulation imperative for the protection of such commerce and the national public interest therein."

Compare, Hill v. Wallace, 259 U. S. 44; Coronado Coal Co. v. United Mine Workers, 268 U. S. 295; United Mine Workers v. Red Jacket Consolidated Coal & Coke Co., 18 F. (2d) 839, (C. C. A. 4th); Southern Railway Co. v. United States, 222 U. S. 20; Second Employers' Liability Cases, 223 U. S. 1; Swift & Company v. United States, 196 U. S. 375; Tagg Bros. & Moorhead v. United States, 280 U. S. 420; Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 9; In Re Debs, 158 U. S. 591.

The cases relied on by the defendant in Action #997, and cited on pages 12 to 15 of the brief, would seem from some expressions therein to support defendant's contention that the regulatory Act here involved does not find support in the commerce clause of the Constitution, but the laws discussed in these opinions were entirely different from the one here involved, and the principles announced by the Court in each of them only fragments of what we have here to decide.

The Congress found, as a fact, in Section 1 of the Act here involved, that the production of bituminous coal and its distribution bear upon and directly affect interstate commerce and render regulation thereof necessary for its protection. Notwithstanding this solemn declaration by the Congress, the opponents of the Act insist that the Court should strike it down.

The three pillars of constitutional government standing and recognized by the people of the United States, are the separation of powers, and when any one of the three invade the field of the other, there is an undermining of the very foundation of our system of Government, and if persisted in, we will be destroyed.

As I have heretofore pointed out, there have been twelve investigations of the condition of the Bituminous Coal Industry and its effect on interstate commerce, and the general welfare since 1922. It cannot be said that the Congress did not investigate fully on the subject before its declarations were made. It is a delicate task for the Judiciary to interfere with the Legislative, and I know of no superior avenues of information it has that are not open to the Congress.

Judges are usually occupied with matters specifically brought to their attention, and it could hardly be said they have the current knowledge of the movement of the commerce stream that the Congress of the United States has, and certainly the Courts have no power to make a widespread investigation of things that affect interstate commerce. What affects interstate commerce is a question of fact. Commerce is a moving stream, rising, falling and changing its course with the progress of civilization, and what affects it in one generation may not in another.

The Congress has the power within its field to find facts and define terms as well as the Courts. In passing on the constitutionality of an Act, the Court does not sit as a reviewer of the facts before Congress that prompted it to take legislative action, and when it has found and declared what the facts are and defined what the thing is, and legislated on the subject, the Court in undertaking to overthrow the Act is arrogating to itself the powers of a branch of the Government which it does not have. The facts of which the Court may take judicial notice, and the ultimate facts as shown in the hearings before the Congress are some evidence of its declaration that the Bituminous Coal Industry as now conducted affects interstate commerce, and this being true, the Court is without power to substitute a different judgment

for that of Congress regardless of its opinion as to the wisdom of the legislation.

The opponents of the Act content themselves with citing definitions found in Court opinions defining interstate commerce, but none of the Acts involved in the cases were similar to the one here under consideration, and to that extent citations are of no value to me in passing on this question.

In the case of Block v. Hirsh, 256 U. S. 135, the Court said:

> "No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one may not be held conclusive by the Courts. * * * But a declaration by a legislature concerning public conditions that, by necessity and duty, it must know, is entitled at least to great respect."

In the case of Radice v. New York, 264 U. S. 294, the Court said:

> "Where the constitutional validity of a Statute depends upon the existence of facts, Courts must be cautious about reaching a conclusion respecting them, contrary to that reached by the Legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the Judge to set up his opinion in respect to it against the opinion of the law-maker."

Compare: Holden v. Hardy, 169 U. S. 366; Miller v. Oregon, 208 U. S. 412.

It is also claimed by the opponents of the Act that it is an attempt on the part of the Congress to exercise power reserved to the States. Of course, if it is the proper regulation of interstate commerce, then the States have no rights in the matter; and if the Act covers a joint field, a part of which the Federal Government could exercise, and a part the States, under such circumstances the Federal power becomes supreme. The point was made by counsel in Action #996, on oral argument, that a part of the plaintiffs business was intra-state and the act covered both coal mined for State consumption and that for use outside of the State.

The plaintiffs each conduct a single business. There is no separation of the intra from the interstate, and if the Congress were prohibited from legislating on the subject

on this account, neither State nor Federal authority could legislate on it, because by so doing each would invade the field of the other. Under such circumstances the right of the Federal Government becomes paramount, and as long as the plaintiffs do not separate their business as to the two sovereigns the Central Government can legislate on the whole subject.

Improved methods of transportation and communication or close association of communities have somewhat wiped out State lines whenever we come to consider political science as applied to Government. State isolation no longer exists regardless of legislation. The people of States now compete with each other where formerly only communities did. Nationally advertised products are so widely used throughout the country that States have no longer, by legislation, the power to regulate industries, however earnest their purpose.

To say that the production of products distributed on a national scale can be effectively controlled by the States is both constitutionally and economically absurd. To deny power in such a field to the national government is tantamount to saying there shall be no legislation concerning them.

We based our treatment on the Indians on Rosseau's principle "That no greater quantity should be occupied than is necessary for the subsistence of the occupiers." 8 Wheat. 543. The reverse of this doctrine is just as applicable to the States and when they fail or are unable to perform a public duty, the doctrine of States Rights should not be a barrier to the Federal Government rendering an essential service to the human race. The rights of every State, of every man and of every race must be limited, as all social liberty must be, by the co-equal rights of other States, and of other men brought into Government association with them.

Several States of the Union are great producers of bituminous coal, and in those States coal is to them what wheat is to the State of North Dakota. In the case of Lemke v. Farmers Grain Company, 258 U. S. 50, the court had before it an act of the State of North Dakota, referred to as the "North Dakota Grain Grading and Inspection Act," which was attacked on the ground that it regulated business engaged in interstate commerce, and for that reason was in conflict with the Federal Constitution. The Court, in holding it was and that the State had no power to legislate concerning it, said:

"That such course of dealing constitutes interstate commerce, there can be no question. This court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogther so in principle. Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282. In that case the facts disclose that a company organized in Tennessee and carrying on business there, went into Kentucky and, through an agent there, bought wheat for shipment to the company's mill in Tennessee. The state court held that the transaction was merely a purchase of wheat in Kentucky, and made the Tennessee company amenable to the regulatory statutes of the State. This court rejected the conclusion of the state court, and held that the buying, no less than the selling, of grain under such circumstances was a part of interstate commerce, committed to national control by the Federal Constitution. Applying the principle of that decision, and the previous decisions of this court cited in the opinion, the complainant's course of dealing in the buying of grain, which it purchased and sold under the circumstances as herein disclosed, was interstate commerce. Being such, the State could not regulate the business by a statute which had the effect to control and burden interstate commerce."

Compare: Foster Packing Company v. Hydel, 278 U. S. 1; Texas & Pacific Railway Company v. United States (Shreveport Case) 234 U. S. 342; Simpson, et al., v. Shepard (Minnesota Rate Case) 230 U. S. 352.

Section 1 of the Act declares that the mining of bituminous coal and its distribution by the producers thereof in and throughout the United States are affected by a national public interest. Notwithstanding this declaration, the opponents of the Bill claim it is not true and that the Court is compelled to so decide. What I have heretofore said concerning the declaration in the Bill as to interstate commerce is equally applicable here, and this Court is without power to overthrow the findings of the Congress, because there is substantial basis for them. Even if the Court had power to determine the question for itself, there is a firm basis for the conclusion that bituminous coal is affected with a public interest. I will not again repeat the facts heretofore set out which show this to be true.

The great number of persons employed in the in-

dustry, its dangers and the wide use of its product have been a matter of concern to both the States and the Federal Government from the very beginning of mining in the United States. Living in communities apart from other people, the miners have acquired characteristics and terminology peculiar to themselves. The nature of their work in the silence and dark of the mines conduces to rumination. The long hours and arduous work have been preventive of leisure. Mining has always attracted the sympathy of the people to those who work underground. Any person who has read Wade's History of the Middle and Working Classes of England can but feel a deep interest in those people who go down into the bowels of the earth and bring out of it the fuel for most of the power that drives our industrial machines and provides heat that keeps us warm.

The miners' silent occupation, living apart, causes him to think of his hard lot and use every power at his command to improve his condition. Because of this, the industry has been one of frequent controversy between employer and employee. In recent years the highest officials of the United States, including the President have had to use their influence and power to avoid a nation-wide strike in the bituminous coal fields. These controversies have led to murders and disorders of all kinds. Every public official, including Federal Judges, in States where this industry is carried on, knows of these recurring disorders. To say it is not affected with the public interest is simply to ignore the facts.

The loss of life, the maimed and crippled, one of the prices of conducting the business, has been the subject of legislation in every State where it is carried on. The poverty that pervades the coal field due to disorderly production and marketing, awakens the sympathy of all who live in the midst of it. The public burden of maintaining the miner who is out of employment, and his family, is one that affects every taxpayer in every community where the industry is carried on, and under present conditions this is a burden on the Government of the United States, because it now must contribute to the maintenance of the unemployed miner and his family.

Not only the economic, but the political future of the United States is greatly concerned with the condition of the mining industry. No people ever feel the want of work or the pinch of poverty for a long time without reaching out violent hands against their political institutions believing they may find in the change some relief from their distress.

The area of unlimited expansion on every side in the United States, a period where any one could reach out and obtain the desired goods provided for us by the hand that laid the foundations of the Earth, is drawing to a close. No one would believe or could conceive that the Founding Fathers, when they closed the book and put on the last page thereof, "The Constitution of the United States," did not place power in the Federal Government to conserve its natural resources. The mineral wealth stored in the earth can be used only once, and when the oil is pumped out, coal is the only remaining source of power except water.

From the sea, the mine, the forest, and the soil must be gathered everything that can sustain the life of man. From these must be conditioned forever, so far as we know, man's progress and his continued existence on earth. Our supply of bituminous coal is not inexhaustible. The use of it and its by-products becomes more important daily in our lives. We are rapidly exhausting the more accessible deposits of the mineral, and the future of mining means diminishing returns and higher prices.

Certainly no man would have the temerity to say that the Federal Government, because of lack of power, must idly stand by and see its forests cut down, its soil impoverished, and its minerals exhausted, resulting in destitute cities and an impoverished countryside. It may, likewise, be said that the framers of the Constitution did not intend for the Government to wait until its natural resources were practically exhausted before taking any steps to conserve them. The Supreme Court in Appalachian Coals, Inc., v. United States, 288 U. S. 344, 372, said:

> "When industry is grievously hurt, when concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry."

In the case of Holden v. Hardy, supra, the Supreme Court had before it an Act of the Legislature of the State of Utah, which undertook to regulate the period of employment of workmen in all underground mines and smelters or other institutions for the reduction or refinement of ores. It was claimed that the Act was violative of the Fourteenth Amendment. The Court in the opinion reviewed generally the public laws enacted by the various States in reference to the control and regulation of min-

ing and sustained the Act. It has since that decision sustained other State legislation on the subject, notably Booth v. Indiana, 237 U. S. 396; Plymouth Coal Company v. Pennsylvania, 232 U. S. 540; Consolidated Coal Co. v. Illinois, 185 U. S. 207; Knoxville Iron Co. v. Harbison, 183 U. S. 21.

The mining of coal has been as much regulated by public law as the milk industry in the State of New York, and in the case of Nebbia v. New York, 291 U. S. 502, the Supreme Court held that the milk industry in that State, having been subjected to previous regulation, could be further regulated by a law of the State of New York controlling the sale price and distribution thereof. The Court said:

> "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling may be conditioned. Regulation of a business to prevent waste of the state's resources may be justified. And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency.
>
> "Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another, by giving trade inducements to purchasers, and by other forms of price discrimination. The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guarantees. Moreover, the state or a municipality may itself enter into business in competition with private proprietors, and thus effectively although indirectly control the price charged by them."

The Supreme Court of Kansas, in the case of State, ex rel. Hopkins v. Howat, 109 Kan. 376, 198 Pac. 686, 25 A. L. R. 1210, 1242, well expressed why mining of coal is affected with a public interest, and said:

"The legislature was of the opinion the industries specified in Section 3 of the Act of 1920 are affected with a public interest, and so declared. The declaration did not make them so. Whether they are or not depends on their relation to public interest. Without presenting the facts, of which the court takes judicial knowledge, concerning the peculiar relation the product of the Kansas coal mines bears to the state's fuel supply, and without discussing further the peculiar conditions under which production is accomplished, the court concludes the business of producing coal bears an intimate relation to the public peace, good order, health, and welfare; that such business is affected with a public interest; and that such business may be regulated, to the end that reasonable continuity and efficiency of production may be maintained."

Coal being a national wasting asset of the United States, it is in the nation's interest that it should be used and worked to the best advantage. Under the power of Congress to levy taxes for the general welfare, it could, if deemed necessary, levy taxes and make appropriations out of same to acquire all bituminous coal properties from the present owners and nationalize them for the public good. It would be a lopsided system of Government that lacked the power to regulate an industry, but had the power to acquire it outright for the public good.

Having decided that the production, sale and distribution of coal affects interstate commerce, and that it is affected with a public interest, it now becomes necessary to decide whether the questioned Act violates the Fifth Amendment.

The provisions of the Act are pointed out in the part of this opinion where the substance of the pleadings is stated. It primarily is intended to control wages, prices, production and distribution. However, in view of the fact that the interstate commerce clause of the Constitution is applicable, and the coal industry is affected with a public interest, the Congress has the power to make reasonable regulations or laws relating to wages, production and marketing.

The prevention of price cutting in the sale of bituminous coal in interstate commerce below the average minimum cost of production in the several districts is a matter on which the Congress has the power to legislate. See Nebbia v. New York, supra; Lemke v. Farmers Grain Company, supra; Flanagan v. Federal Coal Com-

pany, 267 U. S. 222; Local 167 v. United States, 291 U. S. 295.

It also has the power to provide for the regulation of wages and hours. Wilson v. New, 243 U. S. 332; Block v. Hirsch, 256 U. S. 157.

The administrative provisions of the Act do not delegate legislative power. In Panama Refining Co. v. Ryan, 293 U. S. 388, the Court said:

> "Applying that principle, authorizations given by Congress to selected instrumentalities for the purpose of ascertaining the existence of facts to which legislation is directed, have constantly been sustained. Moreover, the Congress may not only give such authorizations to determine specific facts but may establish primary standards, devolving upon others the duty to carry out the declared legislative policy, that is, as Chief Justice Marshall expressed it, 'to fill up the details' under the general provisions made by the legislature."

Judicial review of all administrative orders and decisions is accorded under Section 6(B) of the Act. There is no denial of judicial process and the exercise of arbitrary power is not lodged in any person charged with the administration of the Act.

The tax provisions of the Act are not an unconstitutional exercise of the taxing power. Taxation has been used for many purposes other than the raising of revenue since the Constitution was adopted. But for the power lodged in Congress to levy taxes, there is a reasonable probability that for a long time only eleven States of the Union would have accepted the Constitution.

The power to levy a tax on imports was applied to two recalcitrant states to compel their acceptance of the Constitution, which they promptly did after this imposition.

There is only one exception and two qualifications to the taxing power of the Congress. It cannot tax exports, and direct taxes must be imposed by the rule of apportionment, and indirect by the rule of uniformity.

It has the power to tax for the purpose of regulation, McCray v. United States, 195 U. S. 27; Alaska Fish Company v. Smith, 255 U. S. 49.

There is a further limitation by the rule of construction on the taxing power of Congress, which is fully recognized. It cannot be used for the purpose of promoting, retarding or destroying a business within the ex-

clusive province of the States, and if the tax provided in this Act were solely for the purpose of regulating or controlling the Bituminous Coal Industry, and it was purely intra-state business, it would be an unconstitutional use of the taxing power by the Congress; but as it is a business affecting interstate commerce, the Congress has the power to levy the taxes solely for the purpose of regulating and controlling the industry. To the extent of one and one-half per cent on the sale price per ton the tax is uniform as to all of those within the class, and the classification fair and equitable. Thirteen and one-half per cent of the sale price per ton is a penalty, although called a tax. Hammer v. Dagenhart, 247 U. S. 251; Bailey v. Drexel Furniture Co., 259 U. S. 20.

It is the duty of the Courts to hold fast to the separation of powers under our system of Government. The delicate duty of the Judicial Department to hold an Act enacted by the Congress void because in conflict with the Constitution should never be exercised unless the Judge feels a clear and strong conviction of their incompatability beyond a reasonable doubt. No Judge should ever by his conduct in passing on the constitutionality of an Act subject the Judiciary to the criticism that it was exercising legislative power or the power of the executive to veto.

In considering the future of the States of the Union, we must keep in mind the powers of Government they can efficiently exercise. Modern technology has broken down barriers of space and time. Nation-wide organizations of every large industry in the United States; nation-wide advertisements of products over the radio, the construction of nation-wide highways, the development of the airplane, a rapid system of transportation and communication, have made the States helpless in controlling and regulating commerce. If we cling to the doctrine of States Rights in the matter of commerce as it existed in the early days of the Republic, a palsied hand holds the power and decay will set in in our Nation before its time. If commerce is to be regulated and controlled for the public welfare in this country, it must be by the National Government, because the States lack the power to make effective their own regulations.

I direct that a judgment be drawn dismissing the petition in Action No. 996, R. C. Tway Coal Company v. Glenn, Collector; and the prayer of the petition be granted in Action No. 997, Clark v. Tway Coal Company; and that an order be drawn in Action No. 808, Baltimore Trust Company v. Norton Coal Company, directing the receivers to comply with the Act.

However, in view of the serious contention made in this case by the opponents of the Act as to its constitutionality, I believe the enforcement of the Court's judgmene in Actions No. 996 and No. 997 should be postponed pending an appeal of the decision to the Circuit Court of Appeals and the Supreme Court, on condition that all the plaintiffs in Action No. 996 pay to the Clerk of this Court monthly one and one-half per cent of the sale price per ton for all coal mined and produced by each of them, and in addition thereto one per cent of the sum paid in each month for the payment of Clerk's fees. On failure to pay any one of the installments at due date, this stay will be set aside.

Elwood Hamilton,
Judge.

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FINDING OF FACTS—Entered November 14, 1935.

Pursuant to Equity Rule 70½, the Court makes the following finding of ultimate facts:

1. Each of the plaintiffs named in the original bill is a corporation organized as alleged in the bill, and the plaintiffs, Pioneer Coal Company, Black Star Coal Company and Gatliff Coal Company, are corporations organized as alleged in their respective petitions to be made parties plaintiff. Each of the plaintiffs was, at the date of the filing of the bill herein and prior thereto, and now is, engaged in the business of mining bituminous coal at its respective mine, as alleged in the bill.

2. This cause involves a controversy between each of the plaintiffs and the defendant arising under the Constitution and laws of the United States, and the amount in controversy as to each of the plaintiffs is in excess of $3,000, exclusive of interest and costs, and the plaintiffs have a common interest in the constitutional questions involved and in obtaining the relief sought.

3. With the exception of the plaintiffs, Crummies Creek Coal Company, Clover Fork Coal Company and Harlan Collieries Company, each of the plaintiffs operates under a lease, requiring the payment of a stipulated royalty per ton for each ton of coal mined, with a minimum annual royalty, irrespective of the amount of coal mined. The mining plant of each of the lessee plaintiffs is located upon land owned by the landlord, who has a first lien upon all the improvements placed upon the premises by the lessee and upon all mining equipment used in its operation to secure him in the payment of the stipulated royalty. The lease of each of the lessee plaintiffs is the standard form of lease in general use in Harlan County, Kentucky, in the leasing of coal lands for the production of coal, and prohibits the mortgaging of the lease or the improvements thereon without the written consent of the landlord. Said leases further reserve to the landlord the right, at his option, to forfeit the lease for non-payment of stipulated royalty, or upon the institution of receivership, foreclosure or bankruptcy proceedings.

4. The entire capital and surplus of each of the plaintiffs is invested in its plant, equipment and necessary working capital.

5. All sales of coal made by each of the plaintiffs are f. o. b. railroad cars at the mine, with the exception of an inconsequential amount which is shipped to pre-

pay stations, and all sales are made on from thirty to sixty days' time.

6. The plaintiffs, respectively, sell approximately the following percentages of their total production to customers in Kentucky: R. C. Tway Coal Company, twenty-five per cent; Green-Silvers Coal Corporation, four per cent; Black Star Coal Company, four per cent; Pioneer Coal Company, four per cent; Crummies Creek Coal Company, two per cent; Creech Coal Company, four per cent; P. V. & K. Coal Company, two per cent; Cornett-Lewis oal Company, fifteen per cent; Harlan Fuel Company, two per cent; Harlan Central Coal Company, four per cent; Clover Fork Coal Company, two per cent; Harlan Collieries Company, two per cent; Harlan-Wallins Coal Company, five per cent; Three Point Coal Company, eight and six-tenths per cent; Mary Helen Coal Corporation, fourteen per cent; Gatliff Coal Company, one per cent; High Splint Coal Company, one per cent. The remainder of their total production is sold to customers living in other States. Approximately fourteen per cent of all the bituminous coal produced in the United States is sold in the State in which it is mined, and approximately eighty-six per cent in States other than the State in which it is mined.

7. The average net profits of each of the plaintiffs each month do not exceed two per cent of the gross sale price f. o. b. railroad cars at the mine of the coal sold by it each month, with the exception of Harlan Collieries Company and R. C. Tway Coal Company, whose net profits each month, respectively, do not exceed five per cent of the gross sale price f. o. b. railroad cars at the mine of the coal sold by each of them each month; and Harlan Fuel Company and Clover Fork Coal Company, whose net profits each month do not exceed four per cent of such gross sale price of the coal sold by each of them each month. Bituminous coal producers in the Southern Appalachian Bituminous Coal District, which includes Harlan and Bell Counties, do not make as much on an average as five per cent net profit upon the gross sales of coal sold by them each month.

8. All of the men employed by each of the plaintiffs with the exception of a small office force, not exceeding in the case of any plaintiff six men, are engaged exclusively in the mining of coal, with no duties whatever to perform with reference to the sale of coal. The duties of the office force of each plaintiff consist in part in keeping the books and records of the Company with reference to the production of coal, and in part in keep-

ing the books and records in connection with sales of coal.

9. The working capital necessary for each of the plaintiffs to have on hand each month to pay operating costs is as follows: Cornett-Lewis Coal Company, $60,000; Creech Coal Company, $70,000; Harlan Collieries Company, $45,000; Black Star oal Company, $70,000; Pioneer Coal Company, $35,000; Green-Silvers oal Corporation, $25,000; R. C. Tway Coal Company, $60,000; P. V. K. Coal Company, $18,000; Harlan Fuel Company, $60,000; Harlan Central Coal Company, $25,000; Clover Fork Coal Company, $25,000; Harlan-Wallins Coal Corporation, $200,000; Three Point Coal Company, from $25,000 to $40,000; Mary Helen Coal Corporation, from $50,000 to $60,000; Gatliff Coal Company, $25,000. The record does not show the amount of working capital the other plaintiffs are required to have on hand each month, but the Court finds from the entire record they are required to have a sufficient sum on hand to pay the operating costs necessarily incurred in a month's operation.

10. If any of the plaintiffs should undertake to operate and pay the fifteen per cent penalty imposed by Sections 3 and 9 of the Act for failure to accept the Code provided for in the Act, they could only do so at a heavy loss each month, which could only be paid out of capital assets, all of which are invested in the plant, equipment and necessary working capital of the respective plaintiffs, and the Court finds that it is doubtful if any of the plaintiffs on their own credit, in the face of such losses each month, could borrow the money with which to pay the penalty imposed by Sections 3 and 9.

11. If the plaintiffs should close down their respective mines, in order to avoid payment of the tax, such closing would result in a heavy monthly loss to each of them, which would necessarily be incurred in the upkeep of the mine, the payment of overhead and fixed charges, and to close down for any length of time would result in the loss and disorganization of the working force of each of the plaintiffs and in the loss of their customers, and would probably subject them to liability for damage suits on account of breach of outstanding contracts for the sale and delivery of coal.

12. The average gross sale price f. o. b. railroad cars at the mine of the coal sold by each of the plaintiffs each month is as follows: Cornett-Lewis Coal Company, $55,000; Green-Silvers Coal Corporation, $15,000; Kentucky King Coal Company, $7,000; R. C. Tway Coal Company, $44,000; Harlan Fuel Company, $54,000; Kentucky Car-

dinal Coal Corporation, $20,000; P. V. & K. Coal Company, $10,000; Harlan Central Coal Company, $18,000; Clover Fork Coal Company, $14,000; Crummies Creek Coal Company, $70,000; Black Star Coal Company, $65,000; Pioneer Coal Company, $25,000; Harlan Collieries Company, $38,000; Creech Coal Company, $65,000; Harlan-Wallins Coal Corporation, from $175,000 to $200,000; Three Point Coal Company, $29,000; Mary Helen Coal Corporation, $50,000; Gatliff Coal Company, $22,000; High Splint Coal Company, $50,000.

13. Each of the plaintiffs now has outstanding bona fide written contracts for the sale of coal made after October 2, 1933, and prior to May 27, 1935, for the sale of coal at prices below what must be the minimum prices required to be fixed under the Code, provided the factors required by the Act to be taken into consideration in fixing such minimum price are taken into consideration, and provided there is no reduction in the present scale of wages, and the prices fixed in said contracts are also below the minimum price current as published under the Code of Fair Competition for the Bituminous Coal Industry, pursuant to the National Industrial Recovery Act at the time of the making of such contracts. Each of the plaintiffs also has outstanding bona fide written contracts made after May 27, 1935, and prior to the approval of the Bituminous Coal Conservation Act on August 30, 1935, for the sale of coal at prices below the minimum price for current sale of coal as published under said Code of Fair Competition as at May 27, 1935, and below the minimum prices required in the Act to be fixed, provided such minimum prices are fixed in accordance with the formula therein contained and there is no reduction in the wage scale. The prices fixed in these contracts are below the cost of production, but same were for the sale of nut and slack or slack. Other sizes of coal sold and being sold by the plaintiffs are sold at a profit, so that on their total production the plaintiffs are realizing the percentages of net profit on the gross sale price of their coal as stated in Paragraph 7 of these findings. Exhibit "A," filed with the stipulation in this case, is typical of the contracts above referred to, entered into by the Harlan-Wallins Coal Corporation, Green-Silvers Coal Corporation and P. V. K. Coal Company, and Exhibit "B," filed with such stipulation, is typical of such contracts entered into by the other plaintiffs.

14. The defendant is the regularly appointed, qualified and acting Collector of Internal Revenue for the

District of Kentucky, and he intends to treat the Bituminous Coal Conservation Act, including Sections 3 and 9 thereof, as constitutional, and, in the manner provided by law, to enforce collection from the plaintiffs and each of them of the taxes or penalties imposed by said sections if they should continue their mining operations without accepting the provisions of the Code provided for by said Bituminous Coal Conservation Act of 1935.

To each of the foregoing findings of fact the defendant excepts.

Elwood Hamilton,
U. S. District Judge.

DECREE—Entered November 14, 1935.

This cause coming on for final hearing, and having been submitted on the pleadings and on the evidence, and the Court being fully advised, and for the reasons stated in the opinion filed herein—

It Is Ordered, Adjudged and Decreed:

1. That under the allegations of the bill as amended and the evidence, Section 3224 of Revised States (Section 1543, Title 26 U. S. C. A., 1935 Compilation) is inapplicable, and this Court has jurisdiction of this cause.

2. The jurisdictional amount as to each of the plaintiffs exists, and this cause involves a controversy between the plaintiffs and the defendant arising under the Constitution and laws of the United States.

3. The action is not one against the United States and is not premature, and the plaintiffs have a common interest in the constitutional questions involved and in obtaining the relief herein sought.

4. 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.

5. 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 said Code, are not revenue provisions, but 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; and said Sections 3 and 9 do not deprive the plaintiffs of their property without due process of law, in violation of the Fifth Amendment, nor do they violate the rights reserved to the respective States and to the people under the Tenth Amendment to the Constitution of the United States.

6. The plaintiffs are not entitled to the relief sought in their bill as amended, and the action is dismissed at the cost of the plaintiffs.

The plaintiffs having announced in open court that they desire and intend to appeal from this decree to the United States Circuit Court of Appeals for the Sixth Circuit, and having asked that they be granted a stay against the enforcement of said penalties imposed by Sections 3 and 9 of the Act during the pendency of said appeal,—

It Is Therefore Ordered that pending final determination of such appeal the defendant be and he is enjoined from collecting or attempting to collect from the plaintiffs, or any of them, fifteen per cent of the gross sale price at the mine of the coal sold by each of them during that time; but this stay is granted upon the express provision that on or before the tenth day of December, 1935, and on or before the tenth day of each succeeding month thereafter during the pendency of said appeal, the plaintiffs shall pay to the Clerk of this court a sum equal to one and one-half per cent of the gross sale price at the mine of the coal sold by each of them during the previous month, beginning with the month of November, 1935, said sums to be held by the Clerk of this court pending the final outcome of this litigation and subject to the further orders of this Court. In addition thereto, at the time they make each such payment they shall pay to the Clerk a sum equal to one per cent thereof, to cover the Clerk's fees for receiving and paying out money, as provided by law.

The plaintiffs except to so much of the decree as holds that the Act is a valid exercise of the power of

Congress to regulate interstate commerce, and is not violative of the Fifth and Tenth Amendments to the Constitution of the United States; as holds that the Act does not improperly delegate legislative power; as holds the Act a valid exercise of the power of Congress to impose penalties, as provided in Sections 3 and 9 of the Act, for the purpose of coercing compliance with the regulations of the Act under the commerce clause of the Constitution; as holds that Sections 3 and 9 of the Act do not deprive the plaintiffs of their property without due process of law, in violation of the Fifth Amendment; and they also except to so much of the decree as denies the relief sought and dismisses the bill as amneded at the cost of the plaintiffs.

The defendant excepts to so much of the decree as holds Section 3224 of Revised Statutes inapplicable; as holds that the action is not premature; as holds the action is not one against the United States; as holds the jurisdictional amount is involved, and as stays the collection of the fifteen per cent tax imposed by Sections 3 and 9 of the Act pending final determination of the appeal.

Elwood Hamilton,
U. S. District Judge.

STIPULATION.

It Is Stipulated by and between the parties to this action that the attached statements of D. B. Cornett, C. V. Bennett, T. B. Whitfield, B. W. Whitfield, W. J. Silvers, B. F. Reed, W. J. Cunningham, George Creech, R. C. Tway, W. H. Barthold, Roy Carson, O. K. Robinson and E. Guthrie shall be received and considered by the Court as evidence in behalf of the plaintiffs on the trial of this cause, to the same extent and in the same manner as if the witnesses were present in person and testifying under oath to the matters therein stated, subject to the right of the defendant to object and except to

such statements for want of relevancy and materiality.

It Is Further Stipulated that the testimony of Raymond H. Cornett, B. F. Gross, S. J. Dickinson, J. B. Gatliff and Thomas E. Mahan, heard in this cause in open court on November 1, 1935, and which has been transcribed into seventy-five pages of typewritten matter, with the certificate of Clarence E. Walker attached thereto, shall be treated as evidence in behalf of the plaintiffs on this, the final hearing, of this cause, subject to the rulings of the Court, as shown by said transcript.

It Is Further Stipulated that the attached statements of Frederick C. Tryon, Charles O'Neill, H. L. Findlay, George W. Reed, Fred S. McConnell, Philip Murray, F. E. Berquist, and Homer L. Morris, together with the charts and tables referred to and identified in said statements attached hereto, shall be received and treated by the Court as the testimony of said named parties, to the same extent and in the same manner as if they were present in person and testifying under oath to the matters embraced in their respective statements, the plaintiff reserving the right to except to said statements for want of relevancy or materiality.

Woodward, Dawson & Hobson,
Attorneys for Plaintiffs.
Oldham Clarke,
John S. L. Yost,
Attorneys for Defendants.

NOTE—The above mentioned statements and testimony are incorporated in the statement of evidence. The above mentioned charts and tables are transmitted to the U. S. Circuit Court of Appeals without being copied, pursuant to the court's order of November 22, 1935.

STIPULATION.

It Is Stipulated by the plaintiffs, by and through their counsel, Woodward, Dawson & Hobson, and the defendant, by and through his counsel, Oldham Clarke, Assistant United States Attorney for the Western Dis-

trict of Kentucky, and John S. L. Yost, Special Assistant to the Attorney General, that the contract filed herewith as Exhibit "A" between Hickman Williams & Company and Southern Extract Company, and accepted by Harlan-Wallins Coal Corporation, dated June 24, 1935, is typical of the contracts made by the plaintiffs, Harlan-Wallins Coal Corporation, Green-Silvers Coal Corporation and P. V. & K. Coal Company, after October 2, 1933, and prior to August 30, 1935, referred to in the evidence in this case; and it is further stipulated that the contract filed herewith as Exhibit "B" between the Kearns Coal Company of Cincinnati and Ogelbay, Norton & Company, as Agent for the American Radiator Company, approved and accepted by the Harlan Collieries Company, dated April 29, 1935, is typical of the contracts referred to in the evidence and made by all of the plaintiffs other than Harlan-Wallins Coal Corporation, P. V. & K. Coal Company and Green-Silvers Coal Corporation, after October 2, 1933, and prior to August 30, 1935.

Woodward, Dawson & Hobson,
Attorneys for Plaintiffs.
Oldham Clarke,
John S. L. Yost,
Attorneys for Defendant.

NOTE—The above mentioned contracts are transmitted to the U. S. Circuit Court of Appeals without being copied, pursuant to the court's order of November 22, 1935.

STATEMENT OF EVIDENCE—Filed Nov. 23, 1935.

Be It Remembered: That on the trial of this case there appeared for the plaintiffs as counsel Chas. I. Dawson and A. Shelby Winstead, and for the defendant Bunk Gardner, United States Attorney for the Western District of Kentucky, Oldham Clarke, Assistant United States Attorney for the Western District of Kentucky, and Carl McFarland and John S. L. Yost, Special Assistants to the Attorney General; and thereupon the plaintiffs introduced the following evidence:

RAYMOND H. CORNETT.

Direct examination by Chas. I. Dawson.

My name is Raymond H. Cornett. I am assistant Treasurer of the Harlan-Wallins Coal Corporation, a corporation organized under the laws of the State of Delaware, which is engaged in the mining of coal in Harlan County, Kentucky, and has been so engaged since Septemper, 1924. At this point counsel for the defendant conceded that each of the plaintiffs is a corporation, organized as alleged in the pleadings. The company operates under a leasehold, which provides for a royalty of ten cents per ton, with a haulage charge of one or two cents a ton, making a total of eleven or twelve cents per ton, with a minimum royalty of $39,300 per year. The company's capital and surplus is invested in the plant and equipment, which includes as capital investment the development work inside the mine. The company sells the coal produced by it on the open market, and the average monthly sales f. o. b. railroad cars at the mine amount to from $175,000 to $200,000. The coal is sold on thirty and sixty days' time, and in some instances on ninety days' time, and the working capital necessary to have on hand each month in order to operate the mine is around $200,000. The company has no available resources out of which to pay the fifteen per cent tax imposed by the Act, except its capital and surplus invested in its mining property and working capital. The company could not operate and pay the tax imposed by the Act each month for more than one or two months. The plant would become involved and the losses would run the mine down and the company would have to sell out. The monthly tax which it would be required to pay if it did not operate under the Code would be over $22,000. The company could not pay this tax and continue to operate.

Mr. Yost: The courts have held that ability to pay a tax is not a proper criterion, and this is not proper testimony and I object to it. That is not an element that is recognized by the courts in determining whether or not a hardship exists under Section 3224.

Judge Dawson: I don't understand that the courts have held any such thing. The courts have held that hardship can be taken into consideration, and I am proposing to show that if they have to pay this tax, they will have to stop operating.

The Court: I will let this go in now and consider it in my judgment.

For the year ending June 30, 1935, the company made a profit of 1.66 per cent on the gross sale price of the coal sold by it. The company could not pay the fifteen per cent out of profits.

Mr. Yost: I don't want to interrupt constantly. Does my objection continue to hold good?

The Court: You don't have to make that objection any more, but if you want to object to any new matter you will have to do so.

The equipment of the company is located on the leasehold, and the landlord has a lien on all the equipment to protect him in his royalty. The lease under which the company operates is the standard form, providing for forefeiture in case of bankruptcy or foreclosure proceedings, and the company has no power to lease its property without the consent of the landlord. Doubt if the company could operate in defiance of the Code and raise the money to pay the tax, and doubt if any bank would lend the company the money, because the operating statement would show a steady loss each month. Could possibly operate two months without curtailing working capital. When the first payment of tax became due, company would have to stop operation. Company has a million dollar mortgage bond issue against its property. Any money borrowed on the property would have to come after the landlord's lien. All the coal produced is sold f. o. b. railroad cars at the mine except an occasional shipment to a prepay station, and about five per cent of the total production is sold to customers in Kentucky and the remainder to customers out of Kentucky. Company employs about nine hundred men in the actual mining of coal, whose duties are concerned solely with the production of coal. The monthly pay roll amounts to about $110,000, and the wages of the laborers are paid twice a month in accordance with the State law. Company has some written contracts made after October 2, 1933, and before the enactment of the National Bituminous Coal Conservation Act, in which the price at which the coal was sold is less than the minimum price provided in the Act, if the factors of cost set up in the Act are applied in fixing the minimum price. Company has possibly a hundred such contracts, and they cover about half of the total tonnage. Company has written contracts made after Oc-

tober 2, 1933, and prior to the enactment of the law on August 30, 1935, in which the price of the coal sold is less than the minimum price current as published under the Code of Fair Competition for the Bituminous Coal Industry pursuant to the National Industrial Recovery Act at the time the contracts were made.

Mr. Yost: That is objected to.

The Court: The contract will be the best evidence. If you insist on it, the objection will be sustained.

Judge Dawson: Have you the contract?

A. No, sir.
Q. Do you know what you are selling your coal at?
A. Yes, sir.
Q. You have direct charge of the sale?
A. Yes, sir.
Q. Did you make those contracts?
A. Yes, sir. We have a sales agency.
Q. And you have personal knowledge of those contracts?
A. Yes, sir.

Judge Dawson: If he knows it, I think he ought to be allowed to state it.

The Court: What is the ground of your objection?

Mr. Yost: I think the contract should be offered in evidence.

Judge Dawson: It would take two or three days to get those contracts.

The Court: Are they all in the same form?

The Witness: Yes, sir.

The Court: You could put one of those in.

Judge Dawson: But they were different prices.

A. Yes, for the different grades.
Q. But you have contracts at prices less than those fixed in the Code of Fair Competition for the Bituminous Coal Industry?
A. Yes, sir.

The Court: Make up one and submit it as a sample and let that be marked "Plaintiffs' Exhibit No. 1."

The company has written contracts entered into after October 2, 1933, and prior to the enactment of this law

Raymond H. Cornett

in 1935, in which the prices are less than the minimum prices current as published under the Code of Fair Competition pursuant to the National Industrial Recovery Act at the time of making such contracts.

The Court: Let a sample of that be filed as "Plaintiffs' Exhibit No. 2."

If the company should close down its mine rather than comply with the Code, it would still have to pay a minimum royalty amounting to about $3,000 per month; would have to keep the water out of the mine, keep the entries all cleaned out, have to meet the interest charges on the company's indebtedness, would have to take care of the property on the outside, and it would probably be depreciating in value all the time. The organization of the men for the purpose of producing coal is of value, and these men would leave, which would result in a loss of house rentals. The net profit of 1.66 per cent on the gross sales of coal mined by the company does not take into consideration the fifteen per cent tax imposed by the Act, nor any part of it, but does take into consideration all other taxes, including the landlord's taxes on the property leased, which the company is required to pay.

Cross-examined by Mr. Yost.

The company has no working agreement with its men as to wage price now obtaining. With a monthly pay roll of $110,000, the tax imposed by the Act, amounting to about $22,000 per month, from a mathematical standpoint could be taken care of by cutting employees' wages approximately twenty-two per cent.

Judge Dawson: I object to that.

The Court: I will let it go in. Both sides put in all you want, although I think very little of this is competent.

Some of the men get $5.26 for seven hours' work. Machine men get ten cents a ton and loaders get sixty cents a ton. The wages depend upon what a man does. Mathematically speaking, a reduction of twenty-two per cent in the wage scale would take care of the fifteen per cent tax, but that does not necessarily mean that the company could cut the wages. The men might not work. The company pays the standard wage scale that was formulated in Washington.

Raymond H. Cornett

The Court: Would it be possible for you do get men to work if you had a different and less wage scale?

A. We don't think so.

When I said a moment ago that our written contracts for sales of coal violated the minimum prices to be paid under the Act, I did not compute what the minimum price would be under the Act. I assume that the minimum price will be considerably higher because of the raise in the wage scale. My reason is that there has been a flat cost of $1.65 and there has been a wage increase since. We have contracts at less than $1.65. $1.65 is not the price fixed in the Act, but it is bound to be more under your weighted average. What I have in mind is not the provisions referred to in the Act with reference to minimum prices, but that we have contracts at a less price than the cost now. We have contracts below cost on slack coal and below the cost figured according to the Act. I have no idea what the price under the Act will be.

Mr. McFarland: How do you compute these various items—labor, supplies, power, taxes insurance, workmen's compensation, royalties, depreciation, etc.—how do you know but what they are way below the average?

A. They may be.

Q.—If they are below the averages, how can you reach your conclusion?

A. I don't think I understand your question.

Q. I don't mean to embarrass you, but here are several points that have to be considered in arriving at the total cost. You say this Act will fix the prices which will be such that they will be higher than the prices of your contracts—is that right?

A. Yes, sir.

Judge Dawson: Have you any written contracts executed for the sale of coal after October 2, 1933, and before the effective date of this law, August 30, 1935, at a price less than the minimum price provided in this Code, if the formula in that Act is followed in fixing the total cost?

A. If I understand the formula to be the actual cost of production, we have.

Mr. McFarland: You answered the question that if it is to be the actual cost: What about your average cost?

A. I have no way of knowing our average cost.

Mr. McFarland: Then I move to strike out his testimony on that point.

The Court: Let me see if I can help. How do you determine what the cost of your product is to be under this section of the Act that Judge Dawson has called your attention to?

A. The cost of these items laid down in the last sentence of the fourth paragraph under Part II,—I am assuming that the price will not be less than the total of those items.

The Court: How do you know what those items are in your business?

A. I know what they have been heretofore. Now we have just had an increase and I don't know what will be the cost under that increase.

The Court: And you mean the price at which you are now selling your coal is less than the cost of production?

A. We have contracts out at less than the cost of production.

The Court: And you are selling the coal under those contracts at less than it cost you to produce?

A. Yes, sir.

The Court: And you mean that under the law you will have to raise your selling price up to the cost of production—is that right?

Judge Dawson: I think I can straighten that out. In addition to the cost you are now incurring in the production of your coal under the formula for fixing minimum prices, there has been another item included, namely, the taxes imposed by this Act?

A. Yes, sir.

Q. And you know that your costs will be higher than they now are?

A. Yes, sir.

Q. And your minimum price will be higher than your costs unless you reduce your wages?

A. Yes, sir.

The Court: All you take into consideration is the fifteen per cent?

A. Yes, sir.

The Court: You increased cost by reason of the fifteen per cent?

A. Yes, sir.

Mr. McFarland: That will be subject to the Act.

Judge Dawson: Yes, but he would have to raise one and one-half per cent in any event.

The Court: The inquiry is whether by the payment of the fifteen per cent his business will be destroyed in a little while.

Judge Dawson. This amended pleading filed today says that even those contracts made after October 2, 1933, and before the effective date of this law, August 30, 1935, is less than this minimum price and is less than the price under the provisions set out in Section 12 of the Act. We are showing here not only that his price is now less, but that if he makes his price according to the formula, then his contracts will be still more under the cost of production.

The Court: He did not make it very clear to me, but the best I can tell is that the Code provides that no coal shall be sold at less than the cost of production.

Judge Dawson: It provides for a minimum price which shall not be less than the minimum price of production arrived at under Part II of section 4.

The Court: He says that when he adds the fifteen per cent to his cost, it will be a higher cost than the price which he receives for the coal now under contract.

Judge Dawson: He also says that the price under these contracts is less than the price in Section 12, and he would have to shut down, and that if he doesn't operate his mine will run down.

Mr. McFarland: I want to know what the price will be under the Code.

A. I don't know what the price will be.

I don't know what it will be when they correlate the prices between the different price areas. They have not tried to collect any taxes from my company yet. No one has sent our company any blanks on which to put down the figures for the tax. No one has asked us to do anything under the Act so far. I know what the Code prices were that were in effect after October 2, 1933, and prior to May 27, 1935, and I knew what they were in relation to the prices fixed in our written contracts, and the prices fixed in those contracts were below the Code prices and they were below the Code prices that were current as at May 27, 1935; and assuming that the Government takes into consideration in fixing the minimum prices all the elements of cost set up in Section 4 and there is no reduction in wages, the prices in these contracts would be below the minimum prices fixed in the Act. I have seen the publication sent out by the Code authorities that they expect to enforce the Code against all those who do not comply with its provisions. I got a request to sign an acceptance of the Code, but I did not sign it. I have seen in the last few days a statement by some officer of the Bituminous Coal Commission that he proposes to cancel the contract with every person or concern that has a contract with the Government if they don't buy from producers who work under the Code. I don't know why our company does not join the Code. I am Assistant-Treasurer—not a director. I do not attend directors' meetings and know nothing whatever of the directors' actions, except I was instructed that we would not join the Code. I don't know why they refused to sign the Code. I seriously doubt, if we should cut wages enough to make up either the thirteen and one-half per cent on the selling price of the coal or fifteen per cent on the selling price of the coal each month, we would have any men remaining at work. If we kept in business we would have to reduce the price of labor and if we could not reduce it we would just have to quit unless the reduction affected the whole field. The plaintiffs constitute the greater part of the Harlan field —If the Act should he held valid, and because of our failure to accept the Code we were required to pay the taxes from November 1, 1935, to January 1, 1936, they would close down our company.

B. F. GROSS.

I am Secretary and Treasurer of Three Point Coal Company, which is a corporation organized under the laws of the State of Kentucky and operating a coal mine in Harlan County, Kentucky. The company operates under a leasehold under the standard lease prevalent in that section of the country. Our royalty is seventeen and three-fourths cents per ton, with a minimum royalty whether we operate or not. The lease has the usual forfeiture provisions. The improvements which we have placed on the property, including houses and things of that sort, are a part of the leasehold. Our capital and surplus is invested in the plant, equipment and working capital. The plant and equipment, includes entries, shafts and working places in the mines, and the equipment consists of means for hauling the coal, digging the coal, and the tipple and miners' houses and things of that sort. We sell our coal on thirty and sixty days' time f. o. b. railroad cars at the mines. The minimum annual royalty is $10,000. The landlord has a first lien on all of our equipment, and the company can not mortgage the property without his consent. The company has no mortgage indebtedness and no assets except its capital and surplus, invested in its plant, equipment and working capital. The working capital necessary for a month's operation is from $25,000 to $40,000. Our miners are paid twice a month, as required by State law. 8.6 per cent of our coal in 1934 was sold to customers within the State of Kentucky, the balance to customers in other States. Our monthly sales amount to around $29,000. In 1929 we had a net profit of 5.5 per cent on gross sales. In 1930 we lost 2.9 per cent. In 1931 we lost 6.06 per cent. In 1932 we lost 19.1 per cent. In 1933 we lost 4.2 per cent. In 1934 we had a gain of 3.7 per cent, and in the first nine months of 1935 we showed a loss of .86 per cent, all these figures being upon the gross sale price f. o. b. mines of the coal sold. Our company could not disregard the Code and pay the tax and continue to operate. Its resources out of which it could pay the tax would enable it to operate for only a short length of time—probably four or five months. The company would have an average loss of $4360 a month on account of the tax, which would be just that much drain upon the capital which would be dissipated. After the first three or four months we would have to use the working capital with which to pay the tax, and after that we could not raise the money. The company could not stand such a strain. At the time the law was passed and approved, on August 30, 1935, the company