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# COAL MINING A PUBLIC UTILITY—A DIFFERENT VIEW

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THE writer has read with interest the article "Coal Mining a Public Utility," presented in October DICTA.

The disorganization of the industry described is real and a remedy is, no doubt, sorely needed. The writer, however, doubts the practicability of the remedy suggested. In the first place it is submitted that the language quoted from Chapter 46 of the Compiled Laws of 1921:

> "* * * and every corporation, or person now or hereafter declared by law to be affected with a public interest, and each thereof, is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the Commission and to the provisions of this Act."

contemplates not a judicial but a legislative declaration that the business is affected with a public interest, which at present is lacking.

Even if the legislature should pass an act declaring the business of coal mining to be affected with a public interest or by such an act attempt to place the business directly under the jurisdiction of the Utilities Commission, the constitutionality of such an act might well be doubted in view of Dorchy vs. Kansas, 264 U. S. 286, 68 L. Ed. 686, decided subsequent to "People vs. United Mine Workers" and in which it is held that the business of coal mining is not affected with a public interest and that any attempted regulation analogous to that proposed is violative of the Fourteenth Amendment to the Federal Constitution and therefore void. See also Charles Wolff Packing Company vs. Court of Industrial Relations, 262 U. S. 522, 67 L. Ed. 1103.

"People vs. United Mine Workers of America" was cited in the Dorchy case but its reasoning evidently was not approved. Indeed, while the case has not been overruled expressly, some doubt is cast upon the soundness of the decision

as a judicial precedent in People vs. Aladdin Theater, 96 Colo. 527, 530.

Indeed, it is to be questioned whether the gains that the industry is alleged to have made under the code were not more illusory than real if the entire industry be considered. The principal activity of the "Code Authority," at least in the northern Colorado coal field, revolved around an attempt to enforce a regulation adopted by that authority providing that all mines in the area charge a "differential," to-wit, an increased price on all coal that moved from the mines by truck or wagon over that charged for coal that moved from the mines by rail. This differential was first fixed at 75c per ton; more than the railroad freight from any mine in the district to Denver. My recollection is that it was afterward reduced to 50c per ton.

This regulation, unique in the history of merchandising, so far as the writer knows, while it was enforced bore heavily upon the mines which had no railroad facilities or which had theretofore catered to the trucking trade, and may have stifled a few small enterprises. Tonnage was diverted from such to the larger mining units which had railroad facilities, thus giving them a temporary prosperity. Those benefited have been vocal in praise of the regulation. Those injured have not been able to make themselves heard over the Hallelujah chorus. Whether the industry as a whole has benefited is questionable.

It is suggested that if the coal mining industry were under jurisdiction of the Utilities Commission, that body could prevent the opening of new mines by refusing "Certificates of Public Convenience or Necessity." Undoubtedly the opening of new mines when there are sufficient mines now in operation to supply the demand is a disorganizing element in the industry. On the other hand, for the state to tax the owners of undeveloped coal lands on their coal values, as is the practice, and at the same time forbid the owner to sell or use

the coal (in many cases the only value which the land has) would be a gross injustice and amount to confiscation.

Again, it is hardly consonant with justice to say to A, "You are forbidden to mine your land so that your neighbor B can mine his coal at a profit."

A man is ordinarily entitled to use his land for any use to which it may be adapted so long as he does not create a nuisance and on this point the words of Chief Justice Hughes in a case involving attempts to enforce the "proration" law of the State of Texas are at least significant:

> "The existence and nature of the complainants' rights are not open to question. Their ownership of the oil properties is undisputed. Their right to the enjoyment and use of these properties subject to reasonable regulations by the state in the exercise of its power to prevent unnecessary loss, destruction and waste, is protected by the due process clause of the Fourteenth Amendment." Sterling vs. Constantin, 287 U. S. 378, 77 L. Ed. 375.

To the writer it does not seem possible either to make existing coal mines subject to regulation as public utilities, or to shut off the opening of new mines without invading rights of the owners guaranteed by the Federal Constitution.

The Guffey bill has now been enacted into law. Its constitutionality may well be doubted. Its purpose is clearly *regulations* by the Federal Government of intrastate business and the writer doubts whether this can be effected by changing the emphasis from the "interstate commerce clause" to the "taxing power."

If the Guffey act is to accomplish its purpose, one thing is immediately apparent. The members of the industry must treat each other fairly. What disgusted the public with the codes was the tendency (early exhibited) for an organized majority of each industry to "racketeer" under the aegis of "Code Authority" at the expense of less influential members of the industry.

If that tendency is carried over into the "Little NRA" initiated under the Guffey act, not only will there be no stabilization but the condition created will be worse that the unrestricted competition that now exists.