Monopolies--Producers' Coal Sales Agency and the Sherman Act

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poses of county taxes the county is the governmental unit. In the
case of state taxes the state is the governmental unit, but the
county assessments are used as the basis on which such taxes are
levied. It is submitted that the rule of the principal case logically
bars discrimination in assessment for state taxation of property in
different counties. Difficulties of proof, however, are so
great as doubtless to explain why no application of the rule to
such a situation has been found on record.

—CHARLES H. HADEN.

MONOPOLIES — PRODUCERS’ COAL SALES AGENCY AND THE
SHERMAN ACT. — Appalachian Coals Incorporated was organized
as the combined and sole selling agency of seventy-three per cent
of all the active coal producers in what is known as the Appal-
achian Territory, lying in Virginia, West Virginia, Kentucky and
Tennessee. The purpose of the agency was to eliminate competi-
tive sales and wasteful and undesirable sales practice between its
members. The government sought to enjoin its formation and
operation as being a combination in restraint of interstate com-
merce and a monopoly in violation of sections one and two of the
Sherman Act. The District Court granted the injunction. The
Supreme Court of the United States, after full review of the
evidence, found that substantial competition would exist in the
coal market even if the agency operated; that the organization
would not reasonably restrain trade; and while retaining juris-
diction in the event the agency in operation did restrain inter-
state trade, reversed the district court. Appalachian Coals Inc.
v. United States. In construing the Sherman Act the courts at first interpreted
restraint of trade as covering any scheme reducing competition
between independent concerns, whether economically justifiable
or not. In 1911 the Supreme Court judicially legislated into the
act the rule of reason, taken from the common law on restraint of
trade. The principal case demonstrates clearly the elasticity lent
to the statute by judicially placing in it the rule of reason.

3 53 S. Ct. 471 (1933).
A little over twenty-five years ago the West Virginia Supreme Court of Appeals declared a strikingly similar sales agency illegal as a combination in restraint of trade at common law. Thus Appalachian Coals, for example, may, as to its intra-state business in West Virginia, be illegal, though the court might find that to be reasonable today which was an unreasonable restraint of trade twenty-five years ago.

In the principal case the court boldly assumed that the Sherman Act, "has a generality and adaptability comparable to that found to be desirable in constitutional provisions." It is true that constitutional provisions such as the due process clause have been invariably kept elastic and capable of absorbing the changing will of the people as expressed through legislative enactment. But it is a rather remarkable doctrine that attributes a like elasticity to a criminal statute based upon one of the express powers of Congress. The decision is clearly in line with the government's policy as to other economic groups such as that of the farmer and no doubt the public will has to a large extent changed since the enactment of the Anti-Trust laws. But does the present extremity of the coal industry justify the court in reflecting a trend away from the theory that rivalry is the life of trade in advance of legislative action?

It has been objected that indefinite language, especially in a criminal statute, is in effect a delegation of legislative power to the court and thus unconstitutional. A further objection is that indefiniteness violates the due process clause of the Constitution because it does not give the citizen a fixed guide by which he can reasonably ascertain when he is acting criminally. Has not the Court by the present application of the rule of reason read such uncertainty into a criminal statute as to give us a piece of unconstitutional judicial legislation?

—DONALD F. BLACK.

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7 CUTHBERT W. POUND AND ASSOCIATES, THE GROWTH OF AMERICAN ADMINISTRATIVE LAW (1923) 100, 115.
9 Freund, The Use of Indefinite Terms in Statutes (1921) 30 Yale L. J. 437.
10 Fall v. Sutter County, 21 Cal. 237 (1862); cited with approval in Hodges v. Public Service Commission, 110 W. Va. 649, 159 S. E. 834 (1931).