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## 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.

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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 Appalachian Territory, lying in Virginia, West Virginia, Kentucky and Tennessee. The purpose of the agency was to eliminate competitive 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 commerce and a monopoly in violation of sections one and two of the Sherman Act.<sup>1</sup> The District Court granted the injunction.<sup>2</sup> 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 jurisdiction in the event the agency in operation did restrain interstate trade, reversed the district court. *Appalachian Coals Inc. v. United States*.<sup>3</sup>

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.<sup>4</sup> In 1911 the Supreme Court judicially legislated into the act the rule of reason, taken from the common law on restraint of trade.<sup>5</sup> The principal case demonstrates clearly the elasticity lent to the statute by judicially placing in it the rule of reason.

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<sup>1</sup> 26 Stat. 209, 15 U. S. C. A. §§ 1, 2 (1926).

<sup>2</sup> 1 Fed. Supp. 339 (1932).

<sup>3</sup> 53 S. Ct. 471 (1933).

<sup>4</sup> *United States v. Freight Association*, 166 U. S. 290, 17 S. Ct. 540 (1897); *United States v. Joint Traffic Association*, 171 U. S. 505, 19 S. Ct. 25 (1898).

<sup>5</sup> *Standard Oil Co. v. United States*, 221 U. S. 1, 31 S. Ct. 502 (1911); *United States v. American Tobacco Co.*, 221 U. S. 106, 31 S. Ct. 632 (1911).

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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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?<sup>10</sup>

—DONALD F. BLACK.

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<sup>6</sup> *Pocahontas Coke Co. v. Powhatan Coal and Coke Co.*, 60 W. Va. 508, 56 S. E. 264 (1906). See also *Slaughter v. Thatcher Coal & Coke Co.*, 55 W. Va. 642, 47 S. E. 247 (1904).

<sup>7</sup> CUTHBERT W. POUND AND ASSOCIATES, *THE GROWTH OF AMERICAN ADMINISTRATIVE LAW* (1923) 100, 115.

<sup>8</sup> Aigler, *Legislation in Vague Terms* (1923) 21 MICH. L. REV. 331.

<sup>9</sup> Freund, *The Use of Indefinite Terms in Statutes* (1921) 30 YALE L. J. 437.

<sup>10</sup> *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).