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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 58

TRIBUNE COMPANY AND ROBERT RUTHERFORD McCORMICK, APPELLANTS

v.

THE UNITED STATES OF AMERICA, APPELLEE

Appeal From the District Court of the United States for the Southern District of New York

BRIEF FOR APPELLANTS TRIBUNE COMPANY AND ROBERT RUTHERFORD McCORMICK

OPINIONS BELOW

The opinion of the District Court is reported in 52 F. Supp. 362 (R. 2579); the dissent at page 375 (R. 2601).

JURISDICTION

The final judgment of the District Court was entered January 13, 1944 (R. 2634). The petition for appeal was filed in and granted by the District Court March 9, 1944 (R. 2660). Probable jurisdiction was noted by this Court May 8, 1944 (R. 2681).

Appellants invoke the jurisdiction of this Court under Section 2 of the Expediting Act of February 11, 1903, as

amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. § 29) and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. § 345).

STATEMENT

Proceedings Below. This is an equity proceeding under Section 4 of the Sherman Act against The Associated Press, its directors and the member newspaper owners represented by the individual directors. Appellant-defendant Tribune Company is a member of AP; appellant-defendant McCormick is an AP director and President of Tribune Company. All unnamed members of AP, about 1247 in number, are sued as a class.

The complaint alleges that AP and its members by adoption of by-laws imposing conditions on admission to membership in AP and by means of a contract between AP and a Canadian news agency under which AP is entitled to exclusive use of the latter's news reports have engaged in a combination and conspiracy in restraint of, and to monopolize, interstate commerce in news, information and intelligence, and have monopolized a part of such commerce in violation of Sections 1 and 2 of the Sherman Act.

A statutory-three-judge district court was constituted on plaintiff's expediting certificate (R. 156). Interrogatories and requests for admissions were served and answered (R. 158 to 954). Appellee filed a motion for summary judgment (R. 955). Affidavits in support of and in opposition to such motion were filed (R. 974 to 1970) and depositions were taken (R. 1980 to 2576). The court filed findings of fact and conclusions of law (R. 2606) and entered a final judgment granting in part the relief demanded by appellee (R. 2630).

The Associated Press and the Chicago Tribune. The court found that AP is a not-for-profit cooperative association of certain newspapers, incorporated in 1900 under the Membership Corporations Law of the State of New York. AP's purpose and function is the collection and interchange of information and intelligence for publication in the newspapers owned by AP's members (Facts 2, 3; R. 2606). It furnishes its members with news reports, news pictures and features (Fact 13; R. 2607). Of the three principal United States news agencies, AP, United Press Association (UP) and International News Service (INS), AP ranks in the forefront in public reputation and esteem (Fact 69; R. 2616). AP does not furnish any of its services to non-member newspapers; it has never held itself out to serve all newspapers or to admit all applicants to membership (Fact 8; R. 2607).

Appellant Chicago Tribune was founded in 1847. Of the major news services, the Tribune has throughout substantially all of the years of its existence printed in its principal editions only AP news reports. It is the only morning newspaper in Chicago which has been an AP member continuously since 1900 (Maxwell, R. 2011). Appellant was one of the leaders in the formation and growth of AP and its forerunners Western Associated Press and the Associated Press of Illinois. It was a charter member of AP and has been active in its affairs since 1900. Appellant has paid to AP since 1900 assessments aggregating approximately $1,735,000, and has rendered to AP services of great value. Appellant has not absorbed or in any manner acquired any other newspaper or any other newspaper's assets, except for some small and unimportant newspapers acquired prior to the Civil War (McCormick, R. 1310, 1314A).

AP has not unreasonably restricted competition or attempted to monopolize.* The court below wholly rejected all charges that AP is a monopoly or that the AP had attempted to monopolize commerce. AP does not monopolize or dominate access to the original sources of news (Law X; R. 2629). It does not prevent or hinder non-member newspapers from obtaining access to domestic and foreign happenings and events (Fact 27; R. 2609). AP does not monopolize or dominate the furnishing of news reports, news pictures or features to newspapers in the United States (Law IX; R. 2629). AP does not monopolize or dominate transmission facilities for the gathering or distribution of news reports, news pictures or features (Law XI; R. 2629). There is, therefore, no menace of monopoly in AP's structure or activities. There is no finding that the defendants have unduly or unreasonably restricted, hampered, impeded or restrained competition.

The court thus eliminated all questions of monopoly and improper competition but nevertheless held that certain AP by-laws are unlawful because the court considered them inimical to the general public interest (Op.; R. 2590 et seq.).

AP by-laws. The by-laws of AP perform dual functions: *First,* as required by the Membership Corporations Law of New York, they set up the corporate structure such as the officers, their election and duties; the directors, their num-

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*Throughout this brief we shall assume, according to the statement of Brandeis, J. (*Chicago Board of Trade* v. *U. S.*, 1918, 246 U. S. 231, 238), that "Every agreement concerning trade, every regulation of trade, restrains." The test of legality is not "whether it [the agreement] restrains competition," or restricts, hampers or impedes competition or trade; but whether it does so *unreasonably or unduly* under common law concepts. As said in *Apex Hosiery Co.* v. *Leader* (1940), 310 U. S. 469, 479:

> "* * * Certain classes of restraints were not outlawed when deemed reasonable, usually because they served to preserve or protect legitimate interests, previously existing, of one or more parties to the contract."

ber, selection and duties; the members, their meetings, selection, powers and duties; the bondholders and their vote; regular and associate memberships and amendments to the by-laws. *Second,* the by-laws of AP also constitute an identical contract between AP and each of its members, setting forth the entire obligations of AP in selling its news reports, news pictures and features to its customers (members) and the entire obligations of such customers to AP for such services. The contractual character of the by-laws is recognized by appellee, which said below: "A member of AP is in reality a 'customer' of AP"; and by the district court (Op.; R. 2588; Fact 7, Rec. 2607). Each member is required to sign the by-laws and to agree to fulfill their terms; and Article III, Sec. 5 provides " * * such signature shall establish the contract between such owner and this Corporation, the By-Laws of this Corporation and any amendments thereof constituting and being the terms and conditions of said contract * * *."

The main agreements of the parties with respect to the purchase and sale of AP's services embodied in the by-laws are as follows: Each customer-member agrees

1. He will take the news reports and publish them regularly, in whole or in part (Art. VIII, Sec. 3; R. 79) in a *bona fide* newspaper continuously issued (Art. XIII, Sec. 1; R. 85) in the specified city and field (morning, evening, Sunday), giving credit to AP (Art. VIII, Sec. 7; R. 80), and without any "coloring or other perversion" thereof (R. 1435-6).

2. He will pay for same, under uniform assessments levied by the directors, weekly in advance (Art. IX; R. 80).

3. He will not divulge the news which he obtains from the corporation to any non-members (Art. VIII, Sec. 6; R. 80), nor allow it to be disseminated in advance of publication to any non-member (Art. VIII, Sec. 5; R. 79).

4. He will furnish to AP all local news of spontaneous origin (Art. VIII, Sec. 4; R. 79) and he will not furnish such news to non-members (Art. VIII, Sec. 6; R. 80) (save in the case of associate members who are relieved of the duty of furnishing local spontaneous news exclusively to AP). This agreement of the customer-member was specifically held lawful in and of itself (Law, ¶ V.; R. 2628; Judgment ¶¶ III A, V; R. 2632); but was held unlawful only because it was conjoined with the unlawfulness held to inhere in the membership restrictions described below.

5. For breach of these agreements, AP services may be withheld from the customer-member and the contract terminated, which is to say, the member may be suspended or expelled (Articles X, XI; R. 81, 82).

AP in turn agrees in these by-laws with each customer-member substantially as follows:

1. To sell to him the world and local news gathered by AP by its own efforts and by exchange.

2. To sell such news solely to its own members. This contractual provision was specifically held licit in and of itself (Law III, R. 2628; Judgment ¶ II A., R. 2631; ¶ V., R. 2633); but was held illegal solely because it was conjoined with the proscribed membership restrictions described below.

3. Not to sell its services to a newspaper publisher unless such publisher becomes a member of AP under restrictions laid down in the by-laws. With one exception (acquisition of membership by purchase of a member newspaper), the court invalidated these membership restrictions as unlawful in and of themselves.

The whole judgment therefore is predicated on the holding that the by-law restrictions on admission to membership violate the Sherman Act: the cancellation of the exclusive provisions of the AP-Canadian Press contract (Facts 133-

139, R. 2625; Op. R. 2599; Law ¶ VII, R. 2629), the by-law agreement that members shall sell local spontaneous news solely to AP, the by-law agreement that AP shall not sell its services to non-members—all three were held licit standing alone and were held illicit only because conjoined with membership restrictions which, the court held, were unlawful.

The AP membership by-laws. The AP by-laws governing admissions to membership cover three situations:

First: AP agrees that it will continue to furnish its services to a member newspaper which has changed ownership (Art. II, Secs. 3, 4; R. 66, 67) unless the membership is suspended or terminated by expulsion; the purchaser of a member newspaper automatically becomes a member. This provision is untouched by the judgment.

Second: AP agrees that it will not furnish its services to an applicant newspaper publishing in a city and field in which there is no customer-member unless the applicant shall have been elected to membership by the majority of regular members voting at a membership meeting (Art. III, Sec. 1; R. 68), or by the Board of Directors if no meeting of the members is in session (Art. III, Sec. 3; R. 69). In practice, applications from such cities and fields are passed on by the Board of Directors. The judgment declares the provision illegal (Judgment ¶ IB; R. 2630), although the complaint did not attack it and the opinion treats it as innocent (Op., R. 2591, fol. 3158). We believe this may be an oversight.

Third: AP agrees that it will not sell its services to an applicant newspaper publishing in the city and field of a customer-member unless the applicant

(a) shall have been elected by the majority of reg-

> ular members voting at a membership meeting (Art. III, Sec. 1, supra), each member having one vote; and
>
> (b) shall pay to AP for the benefit of the member or members in the city and field a sum equal to 10% of the regular assessments in that field from October 1, 1900, to date of election (Art. III, Sec. 2a; R. 69); and
>
> (c) shall, upon request of the customer-member or members in the same city and field, require any exclusive news or news picture services enjoyed by him to be furnished to such members on the same terms as made available to him (Art. III, Sec. 2b; R. 69).

The customer-member or members in the field may waive the money payment in whole or in part (Art. III, Secs. 2 and 3) in which event the application is passed upon by the members or by the directors if no membership meeting is in session. Of course, the customer-member may likewise waive his right to share in applicant's exclusive news and newsphoto services.

The district court held that these contractual limitations on the right of AP to render its services to another publisher in the city and field of a customer-member, ancillary to the admittedly licit sale of AP service to the customer-member,

> enable the customer-member to impose or dispense with conditions upon the admission of the applicant—which these appellants admit; and
>
> enable the customer-members in passing upon such application to consider among other factors "the effect of admission upon the ability of such applicant to compete with members" in the same city and field (Law I, R. 2627; Judgment, ¶ I A, R. 2630)—which these appellants admit.

The court held these membership limitations in and of themselves to be unreasonable restraints of trade and hence violative of the Sherman Act—which we deny.

No other by-law agreements were held illegal in and of themselves. If these membership by-laws are valid, the whole judgment must fall. The court said (R. 2591):

> "As we have said, the crucial by-laws of AP are those which deal with the admission of members, for the fate of the others which the plaintiff challenges depends upon them. * * *"

The doctrine of ancillary restraints. Our Point I is this: When AP "admits an applicant to membership" it thereby concomitantly "agrees to sell its services to the applicant." Ancillary to the purchase and sale of products, it has always been held legal for the seller synchronously to restrict his freedom of action by agreeing not to sell the same in the restricted community of the purchaser for a limited space of time, save with the purchaser's consent—in the absence of monopoly or attempted monopoly or of a scheme to stifle competition, or unless the seller is a public utility or engaged in a public calling.

The customer-member of AP in the city and field of an applicant is legally entitled not only to impose or dispense with *some* conditions upon the applicant's admission but, under the doctrine of ancillary restraints, is legally entitled to contract with AP that the applicant shall not be admitted (i. e. served with AP news reports) *at all,* or shall not be served without his full consent. Not engaged in a "public" calling, AP may refuse to serve an applicant (i. e. may refuse to admit an applicant to membership) for any reason including competitive considerations in the field. AP may go further: it may protect its customer-members against competition from AP's product in their respective cities and fields by agreeing not to sell AP's product to an applicant therein, or not to do so save with the customer-member's consent.

The other news agencies: news reports are sold under exclusory contracts. A large part of the value of news reports, news pictures and features lies in their exclusiveness (Fact 29, R. 2609). It is the custom and practice in the industry to sell such services on an exclusive or semi-exclusive basis. UP sells its news reports to many newspapers under "asset value" contracts in which UP agrees it will not sell its service to a newspaper which is in competition with the existing purchaser, unless the applicant pays a stated amount to the existing purchaser (Fact 106; R. 2621). INS sells its news reports to many newspapers under similar asset value contracts and to other newspapers under express agreements not to sell to competing newspapers (Facts 108, 110; R. 2622). New York Times Syndicate, Chicago Tribune Press Service, New York Herald-Tribune Service, Chicago Daily News Foreign Service, North American Newspaper Alliance, Chicago Sun Syndicate, and other news agencies sell their news reports under agreements which expressly or impliedly prohibit the agencies from selling to competitors of the purchaser (James, New York Times, R. 2098; Maxwell, Chicago Tribune, R. 2022; Staton, New York Herald-Tribune, R. 2067-2072; Binder and Aldrich, Chicago Daily News, R. 1983, 1985, 1987; Wheeler, NANA, R. 2171; Chicago Sun, R. 804, 876). Newspapers generally employ correspondents and stringmen on the understanding they will report exclusively to their own newspaper in the community (James, R. 2087; Maxwell, R. 1994).

News picture services: likewise sold under exclusory contracts. NEA, affiliated with UP, sells its news photos transmitted by wire on an exclusive basis (Ferguson, R. 1562). INP, the affiliated wire news photo department of INS, sells exclusively to one newspaper in a locality (Connolly, R. 2129). Agencies which furnish news pictures in

matrix form (such as NEA, UFS, King Features, Central Press Association) sell on the same basis (R. 1962, 1264, 1464, 1467-9-73, 2384, 2130, 2135).

Feature syndicates: feature syndicates or agencies sell their news commentaries, cartoons, pictures, comic strips, fashions, health advice and all other newspaper features under exclusory restrictions. NEA, the oldest feature service in the country (1902), contracts to sell its services to only one newspaper in a city (Ferguson, R. 1564). UFS, a subsidiary of UP, also sells its features under exclusory contracts (Williams, R. 1464). King Features, Inc. (INS) does not sell the same feature to competitive newspapers in the same city (Connolly, R. 2170). Chicago Tribune-New York News Syndicate contracts to sell its services with the understanding that it will not sell the same features to competing newspapers (Slott, R. 2195, 2201). The New York Herald-Tribune, as an established practice, sells its features on an exclusive basis (Staton, R. 2068). Bell Syndicate, Inc., Associated Newspapers, Inc., Consolidated News Features, Inc. and North American Newspaper Alliance sell all of their features under contracts containing similar restrictive covenants (Wheeler, R. 2174, 2175, 2178, 2179). Chicago Sun Syndicate does the same (R. 804, 876).

Exclusiveness is synonymous with competition. The struggle for exclusiveness is the heart and core of competition in the news industry (McCormick, R. 1303-04). There is vigorous rivalry and competition between AP, UP and INS in the collection of news and the securing of newspaper subscribers and members (Williams, R. 1482). Each agency "puffs" its beats and scoops and claims superior news coverage (AP: R. 187, 223-234; UP: R. 1483, 1556A-1558H; NEA and Acme: R. 1562, 1569-1592; INS, King Features, Inc., and INP; R. 2123-6, 2128-9, 2134). Newspapers in their struggle with competitors for circulation

make exclusive arrangements with news, news picture and feature agencies and highly advertise and publicize them.

AP membership by-laws have increased competition in the agency field. The AP membership restrictions have contributed to the organization of competitive agencies and have fostered the growth of such agencies in the news, news picture and feature fields.

(a) *Growth of other news agencies: compared with AP.* AP, UP and INS are comparable in size, scope of coverage and efficiency (Fact 36; R. 2610). AP was organized in 1900 with between 600 to 700 customer-members (R. 1907); in 1941 it had 1,247 customers, an increase of between 547 and 647 during a period of 41 years (Fact 4; R. 2606). UP was organized in 1907 with 369 subscribers (Fact 53; R. 2613); in 1941 it had 981 newspaper subscribers in the United States, an increase of 612 in 34 years (Fact 51; R. 2613). UP in addition obtained 391 foreign newspaper subscribers during such period. INS was organized in 1909; the record does not disclose the number of newspapers which INS originally served but in 1941 it had 338 newspaper subscribers in the United States (Fact 62; R. 2615).

News agencies in addition to UP and INS have been organized since AP's organization and at least twenty to thirty of these furnish "substantial" news reporting services (Fact 36; R. 2610). Of these agencies, New York Times Syndicate presently sells a fully adequate foreign and domestic news service (Meinholtz, R. 1613-4) and others such as Chicago Tribune Press Service, could quickly do so (McCormick, R. 1311; Maxwell, R. 2002).

The quantity of news sent by each agency is not set forth in the record except AP's basic news reports average approximately 1,000,000 words daily; UP's approximately 750,000 (Compl. Par. 51, R. 11; Williams, R. 1481); no

paper can use so much (McCormick, R. 1311). The complaint makes the following comparison of words sent to Chicago and to Washington, D. C.:

	Chicago		Washington	
	Morning	Evening	Morning	Evening
AP	273,000	246,000	276,000	
UP	264,000	126,000	208,000	

Whether AP's coverage is better than that of UP and INS is in genuine dispute (Op., R. 2585; Connolly, R. 2119 et seq.).

(b) *Growth of other news picture services: compared with AP.* UP's affiliates, NEA and Acme News Photo, Inc., INS' affiliated department, INP, and many other agencies serve newspapers (Ferguson, R. 1562; Connolly, R. 2129 et seq.). The quality of these services is disputed in the evidence (Op., p. 10; Ferguson, R. 1564, et seq.; Connolly, R. 2128, et seq.); particularly in the important wire photo field which AP did not enter until some time after Acme and INP. These appellants admitted below that AP affords "about equal coverage of news photos."

(c) *Growth of other feature services: may surpass AP's.* It is admitted that AP's feature service is inferior to many and that its denial to applicants effects no serious injury. Appellee in a brief filed in support of its motion for summary judgment in the court below stated: " * * * but the plaintiff does not contend that the restraints imposed by the denial of these services (features), as distinguished from AP news and news-picture services, are seriously injurious to competitors. The feature service of the Associated Press is one of its relatively minor undertakings * * * there are a number of other feature services in the United States (such as King Features Syndicate, Inc., NEA Service, Inc., United Features Syndicate, Inc., and Chicago

Tribune-New York Daily News Syndicate, Inc.), more or less available to newspapers denied AP membership, the features of which are as good or better as that of the Associated Press" (R. 972, fol. 1284).

AP's membership by-laws do not unduly restrain competition between newspapers. Some newspapers in large and small cities have obtained large circulations in proportion to the population of the area served by them (a) without utilizing AP service, (b) by utilizing UP service alone, and (c) by utilizing INS service alone (Facts 71, 73-83; R. 2616-2618). Such newspapers successfully compete with newspapers which are members of AP (Fact 72; R. 2616). Many newspapers prefer the foreign and financial news service of UP to the foreign and financial services of AP and some newspapers prefer the domestic news service of UP to the domestic news service of AP (Fact 73; R. 2616). There have been instances of members of AP surrendering their rights and taking UP service and vice versa (Fact 74; R. 2616). The record does not show that lack of AP's services has prevented any prospective newspaper from beginning publication nor caused any existing newspaper to cease publication.

The foregoing illuminates Finding 38 (R. 2611):

> "At the present time, access to the news reports of one or more of AP, UP or INS is essential to the successful conduct of any substantial newspaper serving the general reading public."

The Chicago Tribune has been successful for 80 years with AP alone. In less than a year the Chicago Sun with UP alone obtained the eleventh circulation in the country; and the eighth largest excluding tabloids (R. 935). The New York Journal at one time had the greatest afternoon circulation with INS alone (Fact 77, R. 2617; Connolly, R.

2123). The New York Daily News got the greatest circulation in the country without AP (Facts 75, R. 2616).

The Chicago Sun has not been unduly restrained. Marshall Field, owner of The Chicago Sun, and six of his editors executed affidavits in support of the motion for summary judgment to show that AP services were necessary to publication of the Sun because AP consistently beat UP on news and picture items. Editors of competing newspapers and UP officials and employees executed opposing affidavits. The most that can be said for the government is that the issue is genuinely disputed: were the evidence to be weighed, the issue would be decided for the defense.

Smucker, the Sun's Financial Editor, made affidavit that by use of AP service the Tribune consistently beat the Sun in financial news (R. 1251); Furlong, Financial Editor of the Tribune proved that these beats were not obtained by the Tribune from AP but were obtained by the Tribune through its own efforts (R. 1357). The Chicago Herald-American and the Chicago Journal of Commerce also obtained the same stories by their own efforts or from small agencies—not AP, UP or INS (Vanderpoel, R. 1366-7; Ayers, R. 1363-4). Smucker complains that the inferiority of UP's financial news forced the Sun to install a Dow-Jones ticker; as a matter of fact, every metropolitan paper carrying a financial page employs the Dow-Jones ticker (R. 1360); Ayers, Managing Editor of the Chicago Journal of Commerce, a financial newspaper, made a complete investigation of the financial news of AP and UP and, having concluded that UP's financial news was more accurate and comprehensive, subscribed to UP's financial in preference to AP's. The Journal of Commerce also used for many years New York Herald-Tribune financial service which it considered the equal of AP's. In January, 1942, the Herald-

Tribune took this away from the Journal and contracted to sell the service exclusively to the Sun (R. 1361-2).

Daffron, Telegraph Editor of the Sun, deposed that AP beat UP to the casualty list of the Boston Cocoanut Grove fire (R. 1010); but Turner of UP testified that at the very moment the Sun was kicking about the supposed delay the casualty list was running on UP printers—but some employee of the Sun had neglected to turn its printers on! (R. 1661). Maxwell shows that many of the beats of which Daffron complains were obtained by the Tribune's own correspondents and that other alleged AP beats of UP were not beats at all (Maxwell, R. 1324).

VonHartz, Sun Foreign Editor, complains that AP beat UP in certain foreign stories (R. 1020); but Johnson, General News Manager of UP, shows that UP furnished good coverage of substantially every item of which VonHartz complains (R. 1516).

Barry, Regional News Editor of the Sun, asserts AP gives better regional coverage than UP (R. 978); Lewis, UP regional news editor, testifies to the contrary and states Barry never complained about UP coverage but asked UP to cover Tribune stories obtained by the Tribune's own correspondents (R. 1661-3). Barry also complains that he is unable to engage correspondents in the middle-west because reporters on AP morning papers may not work for the Sun (Rec. 978); Maxwell shows that correspondents in the employ of evening papers are preferable because they are at work during the make-up of the first edition of a metropolitan morning paper (R. 1322). 90% of the Tribune's correspondents are employed by evening papers. The Sun employed and does employ a great many correspondents who work for AP newspapers in the middle-west (Rec. 1323).

Brown, Sports Editor of the Sun deposes that UP did not furnish adequate coverage for the Bowl and Big Ten Football Games in certain regional sports events (R. 982); Johnson deposes that UP's coverage was fully adequate (Rec. 1617). Ward, Sports Editor of the Tribune, testifies that a metropolitan newspaper cannot depend on either AP or UP alone for full coverage of sports events; that practically every one of the stories of which Brown complains were "filler" material which are not placed on the news wire until after the important stories are cleared, and that many of them were supplied by the Tribune's special correspondents (R. 1344).

Mautner, Photo Editor of the Sun has three complaints (R. 1190). First, that the Sun at the start could not obtain the photo service of AP or Acme; yet until six months after the Tribune had waived its exclusive rights to Acme, Acme was unable to close a deal with the Sun (R. 1566). Second, Mautner complains Acme's pictures are not as good as AP's because it was beat on 32 pictures; Ferguson, Acme's manager, states that 13 of these pictures were sent to the Sun on the date given in Mautner's affidavit, or the day before, and that the remaining 19 were of no news importance. Ferguson also testifies that Acme pictures covering the same subject matter as many of the 32 pictures were sent to the Sun from two days to two weeks before the dates complained of. The Sun used none of them (R. 1566-7). Third, Mautner says AP's by-laws prevents Acme from obtaining pictures from AP members; but AP by-laws contain no such provision and Acme has had no difficulty in obtaining pictures from AP members (R. 1568).

Field claims that lack of AP required him to hire Washington correspondents, foreign correspondents, regional correspondents, additional photo services and other facilities (R. 1014); yet no metropolitan newspaper can eliminate the maintenance of its Washington bureau, its foreign cor-

respondents, its local correspondents or its supplementary press services by employing AP, UP, INS or all of them together. The cost of the major services, any or all of them, is an entirely negligible part of a metropolitan newspaper's total expenditure for news coverage (R. 2042, 2084 et seq., 2484-5).

The Tribune's Opposition to the Sun's Application. The Tribune was opposed to Field's election to AP membership for many reasons but chiefly because it believed the value of AP's news in the Chicago morning field was principally due to the Tribune's exclusive use and promotion thereof over a period of eighty years and to the Tribune's contributions to AP in money and services; and because it believed it was entitled to the exclusive use of AP news reports as much as it was entitled to the exclusive use of its own plant equipment and news gathering facilities (McCormick, R. 1312).

SPECIFICATIONS OF ASSIGNED ERRORS

All of the errors assigned (R. 2647) will be argued except Assignment No. 34 (R. 2659).

SUMMARY OF ARGUMENT

The Index contains a paginated summary and outline of the argument.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN HOLDING THAT THE MEMBERSHIP BY-LAWS OF AP VIOLATE THE SHERMAN ACT.

A. The doctrine of ancillary restraints.

In the absence of any question of monopolization or of a scheme to lessen competition, a large producer of news reports, news pictures and features may sell the same to its customers and ancillary thereto agree not to sell such services to any other person in the closely limited territory of the customer; or it may agree not to do so unless the customer consents. This principle is controlling because the agreement of AP is much narrower; AP retains the right to sell to an applicant in the city and field of a customer-member without the customer-member's consent under certain restrictions.

The doctrine of ancillary restraints of trade at common law as incorporated into the Sherman Act envisages the protection of the purchaser in the enjoyment or resale of that which he has purchased against competition of the product for a reasonable length of time in his community. His enjoyment is assured by the agreement of the seller not to sell the product to others in that territory, or, which is the same, not to sell therein save with the purchaser's consent. The reasonableness and hence the legality of such ancillary agreements as an over-all enhancement of competition has been judicially recognized from the early common law to the present time; in the earliest Sherman Act cases to the most recent ones; in legislative trends; in every species of industry. In no case have such ancillary restraints been outlawed—until this case.

This Court has frequently recognized the doctrine. It was probably first enunciated in a Sherman Act case by Peckham, J., in the *Freight Association* case (1897), 166 U. S. 290, 328, as well as by White, J., p. 346 et seq., in his dissent which later became the law. Afterwards it was clarified by Judge Taft in the *Addyston* opinion (1898), 85 Fed. 271, aff'd. (1899), 175 U. S. 211, and again by White, C. J., in the *Standard Oil* case (1911), 221 U. S. 1. The last case is *U. S.* v. *Bausch & Lomb* (1943), 321 U. S. 707; 45 F. Supp. 387.

A generic case is *United States* v. *International Harvester Co.* (1927), 274 U. S. 693, in which this Court considered whether a consent decree had restored competition in the industry. Harvester had sewed up several dealers in each community under "exclusive" contracts for each of its lines thus limiting the outlets available to its competitors (704, 705, 706). The consent decree specifically limited Harvester to a single dealer in a town for all of its lines, thus releasing outlets for other producers. This Court found that sales to an exclusive dealer had enhanced competition in the farm machinery industry—although Harvester occupied 64% of the industry, much more than AP occupies in the news agency field. It appeared that Ford tractors were sold under similar "exclusive" restrictions.

The validity of exclusive sales arrangements has been crystallized in Section 516 of the Restatement of the Law on Contracts wherein instances of lawful, reasonable restraints are enumerated, including the following:

> "§516. *Instances of Reasonable Restraints.* The following bargains do not impose unreasonable restraint of trade unless effecting, or forming part of a plan to effect, a monopoly:
>
> "(a) A bargain by the transferor of property or of a business not to compete with the buyer in such a way

as to injure the value of the property or business sold;

* * * * * *

"(e) A bargain to deal exclusively with another."

Many lower federal courts and state courts have expressly held that a seller's agreement to sell exclusively to a purchaser in a particular field is not a violation of the common law, the Sherman Act or the applicable state antitrust statute; a list of these decisions is set forth in *Appendix A.* In a very large number of other cases such agreements have been before courts on various issues and in none of these was the validity of the restraint questioned or considered; a list of some of these cases is set forth in *Appendix B.* They include decisions of most of the lower federal courts and of courts of many of the states in the United States, *Appendix C.* The agreements in these cases cover every kind of industry; those manufacturing or producing necessities such as food, clothing, heat, pharmaceuticals, agricultural machines and building materials, industries manufacturing automobiles, their tires and parts, radios and phonographs, washing machines and refrigerators, and industries producing luxuries, such as candy, cosmetics, soft drinks, beer and whiskey. We have found no opposing cases.

Further, the agreement for exclusive dealing, such as the one here under consideration, is analogous to the familiar covenant by the vendor of a business not to compete. In this field courts have held such covenants on the part of newspaper publishers to be valid. *Richardson* v. *Webster-Richardson Pub. Co.* (Texas, 1932), 46 S.W. (2d) 384; *McAuliffe* v. *Vaughan* (1911), 135 Ga. 852, 70 S. E. 322; *Vandiver* v. *Robertson* (1907), 125 Mo. App. 307, 102 S.W. 659; *Andrews* v. *Kingsbury,* 112 Ill. App. 518 (Illinois, 1904); *Mapes* v. *Metcalf* (1901), 10 N.D. 601; 88 N.W. 713; *The Age Publishing Co.* v. *The Times Co.,* 4 Ohio App. 13, 1914;

Beal v. *Chase,* 1875, 31 Mich. 490. See also *Morse Twist Drill & Machine Co.* v. *Morse* (1869), 103 Mass. 73, 77.

The same reasons which have impelled courts universally to hold valid such ancillary restrictive covenants sustain the validity of AP's membership restrictions. These restrictions are no broader than necessary to protect the main object of the agreement of which they are a part; they are reasonably limited in time and space. Exclusive dealing is firmly imbedded in the history of the industry and has been at all times the natural, normal restriction imposed on sales of news, news-pictures and features. It is not a new and abnormal device designed to interfere with the established interplay of competitive forces, as in *Interstate Circuit* v. *U. S.* (1939), 306 U. S. 208 where price-fixing and boycott were also involved.

The main purpose of AP's by-laws has been, and is now, to further the objective of a cooperative association for the collection of news and for the sale of that news to the cooperative members for publication in their respective newspapers. That concededly is a wholly lawful purpose. The ancillary covenant contained in the membership by-laws which partially restrains AP from selling its news reports to a competitor of a customer-member except with the latter's consent, is only sufficiently broad to further and protect that main purpose. Without that covenant, AP never would have been formed. Without it, AP would not have been able to produce and market its product. This is true of UP, of INS and of all the myriad news, picture and feature services.

The entire news industry is conducted on the sound principle that exclusivity is the heart and core of competition in the industry. This principle is given practical and almost universal application in every phase of the industry

by news, news-picture and feature agencies, large and small; by the largest metropolitan newspapers to the smallest country newspapers; by all employees from the editor to the stringman; by the members of AP, the subscribers of UP and INS and other news agencies, by Marshall Field, who sells his news, his features and his weekly Magazine Parade, with an ancillary covenant not to sell same to any competitor of his customer and who buys on an exclusive basis.

AP's membership restrictions have increased competition. The evidence clearly shows that AP's restrictive covenants have resulted in an over-all enhancement of competition in the industry. By its very nature the restraint has prevented AP from becoming the sole occupant, or almost the sole occupant, of the news agency field. The restraint, as the district court found, has contributed to the formation of competitive news, news picture and feature agencies, the growth of some of which has exceeded the rate of AP's growth. This has resulted in a field of intense actual and potential competition.

The record shows that the AP membership by-laws have not unduly restrained the trade of newspapers other than AP members. The record is replete with examples of newspapers large, medium-sized and small, which have been and are successfully published by use of services other than AP's. Many of such newspapers have been and are more successful than AP papers published in the same city and field. Many of such newspapers believe other services are, in whole or in part, preferable to AP's. The record contains no evidence that through failure to obtain AP service any prospective newspaper failed to be published or any existing newspaper ceased publication. In fact, the record contains no evidence that any newspaper has been or

would be unduly affected by failure to obtain AP services except for the affidavits of the publisher and employees of The Chicago Sun, the truth of which is disputed.

Particularly applicable to these facts is *National Broadcasting Company* v. *Federal Communications Commission,* (1943) 319 U. S. 190, in which radio chains were specifically allowed to make "exclusivity" contracts with outlet stations wherein the chain was affirmatively permitted to agree not to furnish any other station in the community with any program accepted by the regular outlet. Networks were allowed to bind themselves not to furnish an accepted program to another station serving substantially the same area; but were forbidden to bind themselves not to furnish a given program to another station in the same area if the regular outlet should refuse it on "first call." Several observations are pertinent:

First: The restraint was ancillary to the sale of network programs to outlets and was not unlike the sale of news reports to newspapers.

Second: The validity of the FCC regulations was dependent on the "public interest" (319 U. S. at pp. 198, 199, 205, 215) which in turn depended in part on the reasonableness of this ancillary restraint. The public interest demanded the widest possible dissemination of network programs.

Third: The geographical limitation was not as narrow as the geographical limitation here—newspapers in the same "field" (By-laws, Sec. 2 of Art. II, i.e., morning, evening or Sunday) in the same city as compared to outlets serving "substantially the same" area.

Fourth: "First call" cannot be allowed in the news agency industry because of time and mechanical considerations. Furthermore, the stations in the FCC case were not contractually obligated to broadcast any network program offered them by a chain; while here, the members are affirmatively obligated by Section 3 of Article VII of the by-laws to "publish the news reg-

ularly in whole or in part in the newspaper named in the Certificate of Membership." AP is vitally interested in this requirement that its customers in the field shall not allow AP news reports to be hidden under a bushel.

Fifth: It can fairly be said that NBC had greater "indispensability" in the chain broadcasting field than AP in the news agency field.

Sixth: Each station knew that every other station was under the same contractual obligations.* The practice was open.

Seventh: Mutual Broadcasting System, a "joint enterprise of independent units," (similar to the co-operative character of AP) was permitted by the FCC regulation to enter into the same restrictive covenants as NBC, CBS and the Blue Network (corporations for profit, similar to UP, INS, etc.).

The commission necessarily held the regulation not to violate the Sherman Act; it was empowered to make regulations in the public interest "not inconsistent with law," including the anti-trust laws. It was specifically required to consider "the public interest." We submit this case is decisive of the present one.

B. News Agencies Are Not Engaged in a Public Calling Required by Law to Serve All Comers Equally: They May Agree to Serve Only One Customer in a Field.

If AP could be required by appropriate proceedings to serve all comers indiscriminately (as inn-keepers, common

*AP has no separate service contracts with its members. AP by-laws, Art. III, Sec. 5 (R. 70), provide that the member's signature to the by-laws "shall establish the contract between such owner and this corporation, the by-laws of this corporation and any amendments thereto constituting and being the terms and conditions of said contract." Each member does not agree with every other member in any respect. It is obvious, of course, that each member knows of the identity of the contract between AP and every other member.

carriers, etc.), then AP could not legally agree not to furnish its news dispatches to the competitor of a member. In fact, AP's refusal, even in the absence of an agreement, to serve anyone would be contrary to its legal obligation. Hence we must establish that AP is not engaged in a public calling.*

News agencies such as AP, UP, INS, Reuters and the numerous others are not engaged in a calling which historically or on common law principles require indiscriminate service to all comers. The so-called "public" callings are limited to public carriers, inn-keepers, and those operating under public grants (e. g. strict public utilities), and probably grist mills, cotton gins, public markets and toll roads and bridges. News agencies are not analogous to any of them.

For more than fifty years, the courts and the United States Department of Justice have sustained the membership restrictions here involved; have held that cooperative news agencies generally and AP in particular may furnish their product to whom they will and protect it by the usual and customary ancillary restraints.

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*The status of news agencies as public or private is material on other points. Appellee now maintains that the by-laws of AP must not exclude any applicant who is the sole owner of a newspaper, who will file proof of his city and field, and who will agree to abide by lawful by-laws (Mo. Sum. Jdmt. R. 956; Compl., R. 36);—which is to say AP must furnish its news to all newspapers on equal terms; it maintains this position on its cross-appeal (Assignment of Errors 3, R. 2667). The district court ruled that AP must bar no one for competitive motives, that AP and its memberships are public, not private, property; that the members may not "enjoy the fruits of their foresight, industry and sagacity" (R. 2594, fol. 3126), are "bound to admit all on equal terms" (R. 2599, fol. 3166), are to be "only a collective effort of the calling as a whole" (R. 2600, fol. 3168) and are to be compelled "to make their dispatches accessible to others" (idem). The private status of AP is therefore doubly in issue.

Matthews v. *AP* (1893), 136 N. Y. 333, 32 N. E. 981, involved by-laws of the old Associated Press of the State of New York, a New York membership corporation. The by-laws contained not only the membership restrictions but also the "enemy" clause whereby a member could be expelled if he should subscribe to any other news agency declared an enemy. Matthews secured an injunction below, forbidding Associated Press (N. Y.) to refuse to furnish its service to him, although he had contracted with an enemy agency. The Court of Appeals reversed, holding that the enemy clause was not an unreasonable restraint of trade and that Matthews was not entitled to service. In so doing the Court necessarily held that the Associated Press of the State of New York, quite similar to the present AP, was not under obligation to serve all indifferently; that it might agree to serve but one customer in a city; that the customer might agree not to purchase an "enemy" service. In another New York case, *Dunlap's Cable News Company* v. *Stone* (1891), 15 N. Y. Supp. 2, the specific issue was raised and it was specifically held that The Associated Press of the State of New York was a private, not a public, corporation and not required to serve all.

The *Matthews* case was discussed at length and approved by White, J., dissenting in *U. S.* v. *Freight Association* (1897), 166 U. S. 290, 348. His dissent, it is generally conceded, became the law after *U. S.* v. *Standard Oil.* It was also cited with approval by Judge Taft in the *Addyston* case, 85 Fed. 271, 282.

The only authority to the contrary is *Inter-Ocean Publishing* v. *Associated Press* (Ill.) (1900), 184 Ill. 438, 56 N. E. 822, which has been thoroughly discredited in later decisions. That case involved exactly the same state of facts as the *Matthews* case. The defendant AP was an Illinois business corporation, predecessor of the present AP.

AP (Ill.) enjoyed the right of eminent domain under its charter but had not exercised that right. The Supreme Court of Illinois engaged in *obiter dictum* to the effect that AP (Ill.) had devoted its business to the public interest and was therefore obligated even without legislative fiat to serve all indiscriminately. The court, holding the "enemy" clause illegal, need only have said that AP (Ill.) was not justified in withdrawing its service from the Inter-Ocean: that the Inter-Ocean could disregard that unlawful clause. Shortly thereafter AP (Ill.) sold all of its assets to the present AP and ceased transacting business.

In so far as the public utility dictum is concerned, the Inter-Ocean case has almost without exception been disapproved or set at naught. *News Publishing Company* v. *Associated Press* (1914), 190 Ill. App. 77; Judge Julian Mack in *People ex rel* v. *Associated Press* and *People ex rel* v. *Same,* Illinois Circuit Court, Nos. 223744, 223745, op. July 9, 1907; *People* v. *Cemetery Co.* (1913), 258 Ill. 36, 101 N. E. 219; *Bowles Live Stock Co.* v. *Chicago Live Stock Exchange* (1926), 243 Ill. App. 71; *In re Louis Wohl* (1931), 50 Fed. (2d) 254; *Journal of Commerce* v. *Tribune Co.* (1922), 286 Fed. 111, 113.

The leading case is *State ex rel. Star Publishing Co.* v. *Associated Press* (1900), 159 Mo. 410, 60 S. W. 91. An original application for mandamus to require AP (Ill.) to furnish the Star its services on equal terms was denied after a lengthy review of the *Matthews, Inter-Ocean* and other cases. The quasi-public utility obiter of the *Inter-Ocean* case would have been without any foundation at all, it is there said, except for the grant of power of eminent domain. The case holds that news agencies, like all other producers, may lawfully agree to serve but one customer in a designated area.

In 1915 the Attorney General of the United States flatly held that AP's membership by-laws were valid under the Sherman Act. On February 4, 1914, James T. Beck, counsel for the New York Sun, filed a presentment in the office of the Attorney General of the United States and with the Judiciary Committee of both houses of Congress. Testimony had previously been submitted (Statement of Noyes, Senate Document Vol. 20, 63rd Congress, 1st Session 1913). In 1914 AP was more nearly in sole occupancy of the news-agency field than at present. On March 12, 1915, Thomas Watt Gregory, Attorney General, rendered an opinion on that presentment in which he stated:

> "Assuming that the kind of service in which The Associated Press is engaged is interstate commerce (a question not free from doubt), I am nevertheless of the opinion that it is no violation of the Anti-trust Act for a group of newspapers to form an association to collect and distribute news for their common benefit, and to that end to agree to furnish the news collected by them only to each other or to the Association; provided that no attempt is made to prevent the members from purchasing or otherwise obtaining news from rival agencies.* And if that is true the corollary must be true, namely, that newspapers desiring to form and maintain such an organization may determine who shall be and who shall not be their associates.
>
> This, of course, is not to say that such an association might not develop into an unlawful monopoly. The facts adduced, however, in my opinion, do not show that that has happened in the case of The Associated Press." (Underscoring ours.)

This opinion not only sustains the membership restrictions but also necessarily treats news agencies as private enterprises.

*This proviso refers to the "enemy" clause, since eliminated.

This Court has inveterately resisted extension of the common calling doctrine to callings other than the historical ones even where the legislature has acted. In *Terminal Taxicab Co.* v. *District of Columbia* (1916), 241 U. S. 252 this Court held that a motor livery service furnishing automobiles on order was not included in the Act of Congress relating to common carriers. In *Michigan Public Utilities Commission* v. *Duke* (1925), 266 U. S. 570, 577, the Court in a unanimous decision held that "it is beyond the power of the state by legislative fiat to convey property used exclusively in the business of a private carrier into a public utility, * * *." Similar are *Frost Trucking Co.* v. *Railroad Commission* (1926), 271 U. S. 583, *Smith* v. *Cahoon* (1931), 283 U. S. 553, *Stephenson* v. *Binford* (1932), 287 U. S. 251, all holding that a private contract trucker may be regulated but may not be required to serve all indiscriminately. See also *Weems Steamboat* v. *Peoples Steamboat Co.* (1909), 214 U. S. 345, holding that a wharfinger is not required to serve all when there is no statute.

The district court has by necessary implication overruled all the foregoing authorities.

The district court in its opinion (R. 2599) refers to *United States* v. *St. Louis Terminal Railroad* (1912), 224 U. S. 383, and *United States* v. *Great Lakes Towing Co.* (1913), 208 Fed. 733, (1914) 217 Fed. 656, appeal dismissed 245 U. S. 675. The cases are not apposite; for the company involved in each of them was obligated by general law to serve all equally. See also distinctions made in Judge Swan's dissent (R. 2605).

C. AP and the defendants are not engaged in a boycott.

The district court holds that whenever defendants in a Sherman Act case have engaged in a boycott, the reason-

ableness of the restraints is tested by the benefit to the combination weighed against the benefits or detriments to the public or general interest (Op. fol. 3155 et seq.; R. 2589). The district court treated this case as one of boycott: it invalidated the membership restrictions, not because they unduly affected production, raised prices, limited production, tended towards monopoly or improperly affected trade and commerce, but solely because they were, in the court's opinion, violative of the "paramount" public interest in the complete accessibility of news reports.

Disregarding for the moment whether considerations other than effects on trade, commerce, competition, prices and production may be weighed even in a boycott case, which we doubt, we here show that the defendants have not engaged in a boycott.

The district court, after stating the facts, briefly pointed out that AP's by-laws are agreements between it and its members; that the agreements restrain trade in some degree; that the trade restrained is interstate commerce, that the reasonableness of the restraints must be taken "in the sense that the common law understood that word" (Op., R. 2588), and straightway proceeded to cite Restatement of the Law of Torts (§ 765, Vol. IV) which has to do, not with ancillary restraints of trade, but with boycotts; §765 is headed: "Concerted Refusal to Deal." The Court's ensuing discussion does not concern agreements between buyers and sellers for mutual protection in respect of the product bought and sold; it concerns combinations of manuturers, producers and even wholesalers and retailers to constrain others to conform to a "certain course of conduct" under penalty of exclusion from the industry.

Typical of such boycotts is the *Fashion Guild* case (1941), 312 U. S. 457 (Op., R. 2589, fol. 3156; R. 2590, fol. 3156; R. 2594), where manufacturers, designers, dyers, con-

verters, retailers and other elements [including printers of silk and rayon (supplemental opinion, 312 U. S. 668)] banded together to boycott piraters of designs. Its avowed purpose was to drive such piraters from the trade and it was powerful enough to do so. Present also were many predatory acts and violations of Section 3 of the Clayton Act. The distinguishing features are:

> First, here the defendants cannot drive other news agencies or any newspapers from the industry. They have not sought to do so.
>
> Second, no coercion is here involved. There is no attempt to constrain anybody to a "certain course of conduct," thereby usurping legislative functions.
>
> Third, the *Guild* case did not involve agreements by the sellers of women's dresses not to sell same to the competitors of the purchasers: the only ancillary restraint involved was the agreement of the purchaser not to handle or deal in the wares of sellers' competitors in violation of Section 3 of the Clayton Act.

Also typical is *Montague* v. *Lowry* (1904), 193 U. S. 38 (Op.; R. 2589), where all the dealers in tiles in California agreed with all of the American manufacturers of tiles not to sell (save at a 50% price increase) to any dealer who would not join the association. Plaintiffs could not join because "they did not carry at all times stock of the value of $3,000" as required by the by-laws and also because they were antagonistic to certain members. Plaintiffs were unable to get any tiles to carry on their business; they were to be driven from the industry. This was much more than an exclusive territorial agreement between a manufacturer and his local dealers.

To the same effect are the other boycott cases in the opinion: *American Medical Association* v. *U. S.* (1943), 317 U. S. 519, dealt with a boycott designed to coerce Group Health from doing that which it had a right to do. *Binderup*

v. *Pathe* (1923), 263 U. S. 291, was the boycott by manufacturers and distributors of an exhibitor of films and totally unrelated to any primary transaction. *Eastern States Lumber Association* v. *U. S.* (1914), 234 U. S. 600, was a boycott of a great number of elements of the industry to force lumber wholesalers not to deal at retail; to the same effect is *Grenada Lumber Co.* v. *Mississippi* (1910), 217 U. S. 433. *Anderson* v. *Ship Owners Association* (1926), 272 U. S. 359, was a boycott by ship owners of all seamen who would not conform to certain standards. *Paramount Famous Lasky* v. *U. S.* (1930), 282 U. S. 30, and *U. S.* v. *First National Pictures* (1930), 282 U. S. 44, consider a distributor's ability to lease films only in accordance with a set standard contract containing objectionable provisions.*

The instant case does not involve boycott. The defendants do not attempt to coerce any one to do anything. They do not have the intent to exclude anyone from the news agency field or from the newspaper field; nor have they power to exclude any one.

If the membership restrictions here constitute a boycott, then too International Harvester and its exclusive dealers were engaging in a boycott against all other dealers; Mutual Broadcasting Company and its exclusive outlets were engaging in a boycott against non-affiliated outlets; all feature syndicates join with their customers in a boycott against competitors of customers; all exclusory dealing arrangements are boycotts; all such ancillary restraints are boycotts; every news agency in the country, large and small, runs a boycott; Raymond Company, its officers, directors and stockholders were boycotting the Stores Com-

*Of course, the cases cited by the district court (R. 2590, fol. 3157) involving trade associations which fix prices admittedly have nothing to do with the present ancillary restraint.

pany in *Federal Trade Commission* v. *Raymond Company* (1924), 263 U. S. 565, yet the court said at page 573:

> "* * * Likewise a wholesale dealer has the right to stop dealing with a manufacturer 'for reasons sufficient to himself.' And he may do so because he thinks such manufacturer is undermining his trade by selling either to a competing wholesaler or to a retailer competing with his own customers. Such other wholesaler or retailer has the reciprocal right to stop dealing with the manufacturer. This each may do, in the exercise of free competition, leaving it to the manufacturer to determine which customer, in the exercise of his own judgment, he desires to retain.
>
> A different case would of course be presented if the Raymond Company had combined and agreed with other wholesale dealers that none would trade with any manufacturer who sold to other wholesale dealers competing with themselves, or to retail dealers competing with their customers."

Had AP, UP, INS and others agreed among themselves not to furnish news dispatches to X, Y and Z, then there would be a boycott. But when AP agrees with its customer-members to protect its customer-members in the enjoyment of that which they have purchased from AP, the boycott element is absent.

In its motion for summary judgment, the plaintiff said (R. 965, fol. 1274):

> "Defendants, by boycott, exclude from the services of The Associated Press newspapers which compete with individual members of the combination."

This is stretching the meaning of boycott beyond the breaking point. By this definition, International Harvester and an exclusive dealer, by boycott, exclude all other dealers in the world from the Harvester line in a limited territory for a proper space of time. The very purpose of the ancillary

restraint is to give the exclusive dealer in the limited territory for a proper space of time a monopoly of Harvester lines and to exclude all others from it. By this definition, every ancillary restraint, being an agreement to exclude, is a boycott.

D. The public interest is aided, not injured, by the ancillary restraints here involved.

We believe the restraints in this case, whether they be labelled ancillary restraints or a combination to boycott, should have been held reasonable and licit when the district court was unable to find that the defendants had unreasonably restrained trade, taking into consideration "the effects on the competitive system and on purchasers and consumers" with which the Sherman Act is concerned (*Apex Hosiery* case (1940), 310 U. S. 469, 497-8).

We respectfully submit that so far as the Sherman Act is concerned the public interest is aided whenever it is shown that the restraints are ancillary to a main contract of purchase and sale, that the restraints are designed to protect the purchaser in the enjoyment of that which he has purchased, and that there is no monopolization, attempts to monopolize, no restriction or suppression of competition in the market, or fixing of prices, or division of marketing territories, or apportionment of customers, or restriction of production, or other practices which tend to raise prices or "otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market" (idem). These are the considerations and the only considerations of public interest that apply in a Sherman Act case.

But the district court, admitting in effect that these restraints are reasonable by ordinary standards and that they

would be lawful in any other industry, proceeded to lay down a novel test for this one industry alone. The paramount public interest is "the dissemination of news from as many different sources and with as many different facets and colors as is possible" (R. 2595). These restraints, it is held, restrict such dissemination of news and are therefore against the public paramount interest and void. Let us examine this "paramount public interest" test.

In the first place, the test is illogically confined to the news dispatches of AP, UP and INS. The court itself states: "* * * to deprive a paper of the benefit of *any service of first rating* is to deprive the reading public of means of information which it should have; it is only by cross lights from varying directions that full illumination can be secured" (R. 2595, Fol. 3163). A "service of first rating" includes any agency which offers sufficiently comprehensive domestic and foreign news reports for the successful publishing of a newspaper,—found by the court to be only AP, UP and INS (Findings 36, 37, 38; R. 2610). To deprive a paper of the benefit of any service of second rating is presumably not objectionable e.g., services such as the New York Times Service, Transradio, Tribune Press Service and the "twenty to thirty other news agencies which furnish substantial news reporting service." If the test is "*full* illumination", there is no logic in excluding these secondary services from the duty imposed upon AP, UP and INS.

The real test therefore is not "full illumination" but whether a news agency "is of first rating" on the one hand or only "substantial" on the other. This seems to be recognized by the District Court in its opinion (R. 2596); but it declined to lay down any definitive rule. Such a distinction is unknown to the law: the law is concerned with the distinction between monopolies and non-monopolies, be-

tween reasonable restraints and unreasonable ones. Whenever the New York Times Service or the Tribune Press Service or the twenty or thirty others increase the comprehensiveness of their reports so that a newspaper can successfully be published without access to any other news service, they then become services of the "first rating" and with AP, UP and INS become essential to the publication of a newspaper.

Hence the district court actually imposes hardships on those which render the most efficient service. The classification is unreasonable and illogical.

In the second place, the immediate effect of the judgment will unquestionably be to increase the size, prestige and membership of AP. The size of AP would have been greater in the past if it had not restricted its membership and its size will increase in the immediate future under the judgment (R. 1307). The court admits this possibility:

> "* * * The argument appears to be that if all be allowed to join AP, it may become the only news service, and get a monopoly by driving out all others. That is perhaps a possibility, though it seems to us an exceedingly remote one; but even if it became an actuality, no public injury could result. * * * If other services were incidentally driven out, that would not be an actionable wrong (R. 2600)."

The court's justification for compelling AP to travel the road to monopoly—under an anti-monopoly statute—completely begs the whole question. A news agency, whose business is adversely affected by the decision, or which is "driven out" of the competitive arena by loss of customers flocking to AP would have no cause of action against AP; the injury would be caused by the judgment, not by AP. The real danger which will face AP if it becomes a monopoly by the decree of the court is the probability—in fact, the certainty—that as a monopoly it will be subjected to

complete regulation by the state. However created, monopolies must and will be regimented, regulated and controlled by the state. This is proven by history from the days of the Stationers Company to the fate of industry under modern dictators. "A monopoly of all those interested in an activity is no monopoly at all, for no one is excluded and the essence of monopoly is exclusion" (Op. R. 2600) is a half-truth valid only if one adds "ex hypothesi, however, the monopoly will be treated as a public utility and be regulated as to the reasonableness of its rates, the fitness of its services, and its adherence to public convenience and necessity." The monopolistic news agency, unenlivened by competition, will become stodgy and inert thus affording less illumination than as a free competitive enterprise.

And when the court says "no public injury could result" if all others are driven out of the news agency industry, it completely forsakes the "full illumination" theory. The public will be deprived of the illumination theretofore afforded by those driven out.

In the third place, the judgment will stop all further growth of the twenty to thirty smaller "substantial" news agencies serving the American press; none of them will be willing to become "essential" to the publication of a newspaper and thereby subjected to the obligation of serving all. All news agencies were formed by newspaper owners for the purpose primarily of obtaining exclusive news reports for their publications. AP members intended "to enjoy the fruits of their foresight, industry and sagacity" and not to share those fruits with competitors. E. W. Scripps organized UP to obtain for his newspapers the exclusive news reports of three small existing agencies. Hearst founded INS to serve his newspapers. The twenty to thirty smaller but "substantial" news agencies existing today were organized solely to obtain for their newspaper owners exclusive news dispatches and to sell such news

outside their owner's circulation territory. These agencies presently perform a very valuable function for the American press. Their news reports are preferred by many newspapers to the corresponding AP, UP or INS reports. These agencies also furnish valuable news reports supplementary to the reports of the three major agencies. Some of these smaller agencies have grown to great size in a relatively short period. The New York Times and Chicago Tribune Service together spend almost as much for the collection of news as AP. Some of them could singly or in combination readily give comprehensive world-wide news coverage. The decision eliminates this potential competition and the consequent "fuller dissemination". Certainly no newspaper will risk selling its news reports to non-competitive newspapers if as a result it may become liable to the duty of selling such news to its competitors.

Fourth, the actual effect on the "paramount public interest" depends, of course, on the enforcement of the principles of the judgment against other news agencies and the scope of such principles. The immediate effect is certain, as stated above: it will result in prompt expansion of the membership of AP (McCormick, R. 1307-8). If the decree shall be construed to apply to all agencies, large and small, then the immediate effect mentioned would probably become permanent. If, however, the decree shall be construed to apply only to AP, or if in actual operation it shall be applied only to AP, and if UP and INS shall be permitted to continue to sell their news reports on an exclusive basis, the decree might ultimately be the deathknell of AP. It seems certain that many of the metropolitan members of AP which pay by far the greatest part of AP's assessments will not continue to pay such assessments if they can obtain exclusive news reports from UP and INS. If the decree shall be enforced only against the present three major news-agencies but not against the small agencies, then the decree may

well result in the disintegration of the present three major news agencies. In such event it is reasonable to assume that newspapers in their search for exclusiveness will utilize new or existing smaller news agencies, or combinations of such agencies, and will leave to the large agencies, if they continue to exist at all, only the ordinary handout type of news. The destruction of AP, UP and INS will not make for "full dissemination".

The court plainly erred in deciding on the record that invalidation of the restraints would assure, or aid, "the dissemination of news from as many different sources and with as many different facets and colors as is possible." There is little, if anything, in the record to justify such a conclusion;—there is a genuine denial by the defendants. Complete evidence of the effect of such a decree on competitive news agencies and on newspapers throughout the United States is essential to a proper determination of that issue. Much of this evidence would necessarily be the opinion of experts in the newspaper industry; conflicting opinion evidence cannot properly be resolved on motion for summary judgment (*Sartor* v. *Arkansas Natural Gas Co.* (1944), 321 U. S. 620).

Relevant and necessary would be evidence of the actual effect of the restraints in the past on the formation and growth of competitive agencies, together with the best expert opinion on the abolition of such restraints in the future. The charge of monopoly has been levelled at AP in the past because it accepted so many applications. Equally important is the effect of the decree on newspapers. Are AP's assessments so much less than the charge for competitive services that newspapers will flock to AP as a matter of economy? To what extent can the medium-sized and small newspapers—the great bulk of the American Press—afford the luxury of more than one major

news service? If they cannot afford more than one and the decree affects only AP, is it not a reasonable assumption they will take AP and forsake UP and INS? If the decree applies equally to AP, UP and INS, will it not result in the failure of all of them? Evidence on these and many other obvious points is essential to a determination of this issue.

Finally, although the effect of the judgment on the "full dissemination" of news reports depends to a degree on the diligence of the prosecuting officers in proceeding against the component parts of the industry, nevertheless the principles announced in the judgment will be in a large measure self-executing. These ancillary exclusory dealing covenants will be unreasonable restraints of trade in this industry and will therefore be void,—such is the basic principle. No court will enforce such covenants. The contracts of which the covenants are a part will be held void and unenforcible; the exclusory dealing contracts between AP, UP, INS and the twenty or thirty "substantial" news agencies on the one hand and their customers on the other will be outside the pale of the law. The same will certainly be true in the news picture field under this judgment and perhaps in the feature field.

E. The Congress, after full consideration of the public interest, refused to prohibit these ancillary restraints: the judgment usurps legislative functions.

Congress was squarely presented with the problem of outlawing exclusive sales arrangements at the time of the passage of the Clayton Act (1914). It then refused after a thorough investigation to enact as part of the bill a provision which would have made it unlawful for the owner of natural resources to refuse arbitrarily to sell such products to a responsible person who applied to purchase them. Congress recognized that the right of a seller to

choose his customers was the "legitimate and customary practice that the business world has recognized and followed for centuries." The proposed limited provision was rejected because it "would project us into a field of legislation at once untried, complicated and dangerous." Congress reaffirmed that right by providing "that nothing herein contained [Sec. 2 forbidding price discrimination] shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." In 1936, Congress, after another thorough investigation, by means of the Robinson-Patman Act amended the price discrimination provisions of Section 2 of the Clayton Act. In so doing, however, Congress advisedly and deliberately included the proviso last quoted. Reference to the legislative history of these acts, Appendix D, clearly shows that Congress has refused to interfere with the right to sell exclusively to one purchaser in a community except to the extent that the practice constitutes a scheme to monopolize (The Sherman Act) or a means of evading the statute forbidding price discrimination (The Clayton Act).

The judgment in this case outlawing the right of a producer to enter into exclusive sales arrangements contravenes the intention of Congress as expressed in these acts. The judgment is the more dangerous because it is not based on thorough investigation, it is not definitive in scope and it is not certain in application. The scope, impact and effect of the judgment, not only on the news industry but on all industry, will only be determined "gradually by successive judicial decisions" which the courts are ill equipped to do, as stated by Judge Swan.

The entire industry is sailing an uncharted sea under this judgment. Contempt proceedings and new civil or criminal proceedings overhang every course of action. The

enforcibility of contracts is doubtful. Such a basic change should be effected only under a comprehensive enactment after thorough legislative investigation; it should not be made by the courts in any event and obviously not on motion for summary judgment when there can be no decision of disputed issues.

II.

THE DISTRICT COURT ERRED IN GRANTING THE INJUNCTIVE RELIEF SET FORTH IN JUDGMENT PARAGRAPHS I B, II B, III B AND IV B.

A. The injunctive relief granted by the district court contravenes the Conclusions of Law; the Judgment is self-contradictory.

Assuming arguendo that the Sherman Act was violated as was held in Judgment Paragraphs I A, II A, III A and IV A, nevertheless some of the injunctive relief is completely unwarranted and in contravention of the Conclusions of Law and of the court's opinion.

First: Judgment I B cancels Sections 1 to 3 of Article III of the by-laws and perpetually enjoins the defendants from agreeing to observe them and from promulgating any new or amended by-laws having a like purpose or effect. Section 3 of Article III (R. 69):

> "Applicants for membership may also be elected by the Board of Directors, when no meeting of the members of the Corporation is in session, in a field in a city where there is no existing membership at the time the application is filed. The Board of Directors may also elect applicants for membership, when no meeting of the members of the Corporation is in session, in a field in a city where there are one

> or more existing memberships at the time the application is filed, provided that such member or members in such field and city shall have waived the payment, in whole or in part, of the moneys payable to them as provided in Section 2 of this Article." (Underscoring ours.)

The first sentence of Section 3, entirely severable from the second sentence, relates only to the election of applicants in a city and field where there is no existing membership. The sole ground of complaint against the membership restrictions relates to election of members in fields and cities where there are existing memberships.

There is no holding of unlawfulness which warranted the court in cancelling and enjoining the first sentence of Section 3. The opinion recognizes the validity of this first sentence of Section 3 when it says (R. 2591):

> "* * * They give power to the directors to admit an applicant without condition of any sort and without the consent of any of the members, whenever he is publishing a paper in a 'field' in a city in which there are no existing members: that is, in cases where the applicant is not competing with members directly, and does not propose to do so. So far the plaintiff does not object, for while it is true that such an applicant may still remotely compete, that competition may be disregarded, as the defendants themselves disregard it."

This by-law method of admitting applicants who are not in the fields of members is not held unlawful by any Conclusion of Law. The proviso of Judgment Paragraph I B sets forth what new membership restrictions may legally be adopted by AP and it would allow the readoption of the first sentence of Section 3. Consonantly with that proviso, the first sentence of Section 3 does not give power to

members in the same city and field "to impose or dispense with any conditions upon the admission" of the applicant,—Section 3 is only operative when there are no members in applicant's field. There is no need for an affirmative declaration "that the effect of admission upon the ability of such applicant to compete with members in the same city and field shall not be taken into consideration in passing upon his application,"—there are no members in the city and field of one applying under the first sentence of Section 3.

The cancellation of the first sentence of Section 3 of Article III is inexplicable on any expressed theory. It is probably a manifestation of the basic fallacy—that news agencies ought to serve all comers equally.

Second: On the district court's theory of violations, Paragraphs II B, III B and IV B should be stricken from the Judgment.

Let us take Paragraph IV as exemplar. This concerns the Canadian Press Contract. The exclusive provisions of the Canadian Press Contract were held unlawful solely "taken in connection with the by-laws" restricting membership in AP (Conclusion VI, R. 2629; Judgment IV A, R. 2632). The exclusive provisions of the Canadian Press contract "taken by themselves apart from the by-laws" restricting membership "are reasonable and are not in violation of the anti-trust statutes of the United States" (Conclusion VII, R. 2629). Now, it is perfectly logical to hold that the Canadian Press contract violated the Sherman Act in the past, for in the past it was conjoined with the membership restrictions and, on the theory of the court, violated the Sherman Act. But in the future the court has cancelled the membership restrictions by Paragraph I: the court has perpetually enjoined AP from observing those membership restrictions or similar ones. In the future,

therefore, the Canadian Press contract will not be conjoined with the illegal membership restrictions, hence there is no basis in logic to enjoin observation of any part of it. Yet the exclusive provisions of the Canadian Press contract, although in the future entirely separated from the illegal membership restrictions, is perpetually enjoined by Judgment Paragraph IV B.

Exactly the same inconsistency appears with respect to the permanent cancellation and injunction against Section 6 of Article VII of the by-laws relating to the return of local spontaneous news solely to AP. This was held to be a violation in the past only because it was taken in connection with the membership restrictions (Conclusion V, R. 2628); yet it was cancelled and permanently enjoined in the future in spite of the fact that in the future it will not be combined with the membership restrictions. The same is true of the cancellation and permanent injunction against Section 4 of Article VII, which requires AP to furnish its news reports to members only (Judgment II, R. 2631).

This inconsistency works serious injury to AP. If AP in the future were not deprived of the exclusiveness of the Canadian Press contract, of its sole right to the local spontaneous news of members and of its right to serve members only, then it undoubtedly would be able to continue to function with its present memberships frozen in fields where members now exist. It cannot function in the future as a membership cooperative corporation unless it be entitled to serve its members only.

Third: The unexpressed conclusion of law. The foregoing inconsistency can be rationalized only by assuming that the district court indulged in a conclusion of law nowhere expressed and perhaps unconscious, namely, that there is some undefined basic illegality somewhere in the

by-laws of AP other than the membership restrictions cancelled in Paragraph I; and that this undefined illegality must be cured before AP will be allowed in the future to function normally under the Canadian Press contract, the return of local news and serving members only. These three items can only be reinstated if this unexpressed illegality is obviated by amending the by-laws of AP "in conformity with Paragraph I hereof" (Judgment V, R. 2633). Now Paragraph I, after holding the present membership restrictions unlawful, cancelling them and enjoining the observation of any similar ones, concludes with the following proviso, which is purely permissive in its terms:

> "* * * provided, however, that nothing herein shall prevent the adoption by The Associated Press of new or amended by-laws which will restrict admission, provided
>
> (a) that members in the same city and in the same 'field' (morning, evening or Sunday), as an applicant publishing a newspaper in the United States of America or its territories, shall not have power to impose, or dispense with, any conditions upon his admission and
>
> (b) that the by-laws shall affirmatively declare that the effect of admission upon the ability of such applicant to compete with members in the same city and 'field' shall not be taken into consideration in passing upon his application." (R. 2631.)

Although permissive by its terms, this proviso becomes mandatory if AP is to function normally under the Canadian Press contract and with the return of local spontaneous news and service only to members. Thus, the Canadian Press contract is not unlawful solely because joined with the unlawful membership restrictions as stated in Conclusions, Paragraph VII: it is forbidden in the future even

when the proscribed membership restrictions shall have been removed and until new membership by-laws shall have been passed.

The hidden quantity in the equation is that AP is not merely *permitted* to enact new membership by-laws conforming to the proviso in Paragraph I: it is *required* to amend its by-laws to conform to that proviso, if it wishes to operate normally. This again manifests the underlying fallacy: news agencies are morally and socially required to serve all equally; hence they will be required to do so in so far as they can be forced to do so.

B. The Judgment, contrary to Rule 65 (d), Civil Procedure, is not specific in terms and does not apprise the defendants of what they may and may not do.

Paragraph I B enjoins the defendants from observing any amended membership by-laws having the purpose and effect described in Paragraph I A, which is

> (a) "whereby members * * * in the same field as an applicant * * * may impose or dispense with any conditions upon the admission of such applicant" and
>
> (b) "whereby the defendants in passing upon an application of such applicant * * * may take into consideration the effect of admission upon the ability of such applicant to compete with members * * * in the same territory and field."

The proviso of Paragraph I B, expressed as permissive but actually mandatory, allows AP to pass new or amended membership by-laws provided

> (a) "that members in the same city and field * * * as an applicant shall not have power to impose or dispense with any condition upon his admission," and
>
> (b) "that the by-laws shall affirmatively declare that the effect of admission upon the ability of such appli-

> cant to compete with members in the same city and field shall not be taken into consideration in passing upon his application."

What does this mean?

That members in the same field shall not have power to impose or dispense with any condition upon applicant's admission, probably means that AP and the member may not agree in the by-laws that AP shall not furnish its services to an applicant in the field of a member except upon the member's consent; that AP may not provide that the applicant must pay a certain sum of money to the member in the field; that AP may not require the applicant to relinquish his exclusive rights to other services in favor of the member in the field. If this is the meaning, the phrase is not ambiguous.

But the second clause of the proviso is ambiguous: "that the by-laws shall affirmatively declare that the effect of admission upon the ability of such applicant to compete with members in the same city and field shall not be taken into consideration in passing upon his application."

First, may the membership vote upon admissions?—there are expressions in the opinion that the members, being human, cannot vote without considering the effect on competition in the field (R. 2592).

Second, may the directors pass upon applications?—can they completely eliminate these competitive considerations even when passing on applicants in fields other than their own?

Third, or is this phase of the proviso met if AP merely enacts a solemn declaration that such competitive motives shall be eschewed—as is indicated by the opinion (R. 2598):

> "It is true, of course, that the members may disregard the last provision in practice; but that is not to

> be assumed. At any rate, we think the plaintiff is entitled to that much positive assurance in the organic law; and it is as far as we can go."

—even though the members disregard it in practice or even though the government believes they are disregarding it in practice?

Suppose the by-laws should be amended to permit the directors to pass upon applications and suppose it should be set forth that in passing upon such applications the directors shall not take into consideration the forbidden competitive factor. Suppose the directors should deny the application of Field, Patterson and others deemed fit by appellee and suppose appellee should thereupon cite the directors for contempt for violation of the injunction. Could the respondents in such contempt proceedings purge themselves by asserting under oath that they had not weighed the forbidden competitive motives. Or, on the other hand, would the court apply its own standards of admission and its own standards of fitness and rule that the forbidden factors must have been considered else the applicant would have been elected?

The net practical result of this vague language will be to force AP, under fear of citation for punishment for contempt, to accept into membership all applicants who can pay the assessments. Apparently the district court felt that it was not empowered directly to transform AP wholly from a private calling into a public calling required to serve all on equal terms; else the district court would simply have done so. Yet in practice the judgment will have no other effect.

It is to be noted that this judgment goes far beyond cancelling agreements held to be in unreasonable restraint of trade. AP must solemnly pledge itself that hereafter in

determining whether it will or will not serve an applicant it will not weigh the proscribed competitive considerations. Other corporate sellers of products, such as Colgates (*U. S.* v. *Colgate & Co.*, 1919, 250 U. S. 300, 307), Raymond Company (*Federal Trade Comm.* v. *Raymond Co.*, 1924, 263 U. S. 565) and the Goodyear Company (*Baran* v. *Goodyear Tire & Rubber Co.*, D. C. S. D., N. Y., 1919, 256 Fed. 571) may sell or not sell their product for any reason or for no reason providing their determination is unfettered by contract; they may weigh competitive factors in making their single determination. But AP—and by parity of reasoning UP, INS and perhaps other news agencies—may not make its independent determination to serve or not to serve an applicant: the judgment requires AP in making this determination, although unfettered by tying contract, to pledge itself not to give any effect whatsoever to the consideration that the applicant when admitted will compete with its existing subscribers. Even if the pledge were meant to be entirely unenforceable—in which case it has no place in the decree of a civil court—nevertheless the exaction of such a pledge deprives AP of its freedom of contract in violation of the due process clause of the Fifth Amendment. The defendants do not know whether the pledge is purely *pro salute animo*.

III.

THE JUDGMENT OF THE DISTRICT COURT CONTRAVENES THE FIRST AMENDMENT.

Up to this point we have endeavored to show that the defendants have not violated the Sherman Act under the principles ordinarily applicable to anti-trust cases, without any reference to the "preferred position" of the appellants as publishers and owners of newspapers, or of AP as an indispensable agency of the newspaper press, or of the

peculiar impact of the injunctive relief upon freedom of speech and of the press guaranteed by the First Amendment. Conformably to the oft-quoted language of Brandeis, J., in *Chicago Board of Trade* v. *U. S.* (1918), 246 U. S. 231, 238, we have discussed the nature of the industry, its history, its condition before and after the imposition of the alleged unlawful restraints, and the probable effects of the restraints upon the supposed public policy, in order to show that the restraints are reasonable. Such matters, we contend, are not to be resolved against the defendants on motion for summary judgment.

The judgment is also erroneous because it violates the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; * * *" This is a command not only to the legislative but also to the executive and judicial branches of the federal government. (4 Elliot's Debates 569-70, Madison's Report, etc.; *Bridges* v. *California* (1941), 314 U. S. 252, 263-267; *Board of Education* v. *Barnette* (1943), 319 U. S. 624, 638). All powers granted to the three branches of the federal government are curtailed by this limitation. We point out, as did Jefferson, that the First Amendment guards "in the same sentence and under the same words, the freedom of religion, of speech, and of the press; insomuch that whatever violates either, throws down the sanctuary which covers the others * * *" (7 Writings of Thomas Jefferson, Ford 1896 Edition, 295; Kentucky Resolutions of 1798).

A. The judgment requires the defendants to utter when they wish to remain mute.

Whether or not the net practical result of the judgment is to force AP to serve all equally, as we believe, it is

beyond dispute that the judgment was intended to require and will require AP to serve many applicants whom it wishes not to serve: AP must eschew exclusion "for competitive reasons," it must not allow members in the field to impose or dispense with conditions, its by-laws as to membership are to be "liberalized." The district court spoke of its purpose to compel AP members "to make their news dispatches accessible to others" (Op. R. 2600, fol. 3168); and it conceived of AP as a combination "bound to admit all on equal terms" (R. 2599). If AP is not completely transformed into a public calling, it is compelled by the judgment to furnish its dispatches to many persons to whom it would not furnish them save for the judgment.

Coercing any one to speak or publish when he wishes to remain mute violates the First Amendment (*Board of Education* v. *Barnette* (1943), 319 U. S. 624, overruling the *Gobitis* case, 310 U. S. 586); for the right to remain silent is as sacred as the right to speak (*ex parte Harrison* (1908), 212 Mo. 88, 110 S. W. 709; *Gladney* v. *Sydnor* (1903), 172 Mo. 318, 72 S. W. 554; *Wallace* v. *Georgia* (1894), 94 Ga. 732, 22 S. E. 579; *Atchison, Etc. Ry. Co.* v. *Brown* (1909), 80 Kans. 312, 102 P. 459; *St. Louis, Etc. Ry. Co.* v. *Griffin* (1914), 106 Tex. 477, 171 S. W. 703; *Shuck* v. *Carroll* (1933), 215 Ia. 1276, 247 N. W. 813; *Reeda* v. *Tribune* (1920), 218 Ill. App. 45). Compelling AP to utter its dispatches to applicants to whom it wishes not to utter them can only be justified if there is grave and immediate danger of injuries to interests which the state may lawfully protect (*Barnette* case, p. 639). There must be more than "a rational basis" for the exercise of the compulsion: it must be essential to the "maintenance of effective government and orderly society (idem 645), there must be clear and present danger to "society as a whole" and the danger must be "grave and pressingly imminent" (idem 643). No such "clear and present danger" is revealed in this record.

What "clear and present dangers" to the State or to our institutions are so "grave and pressingly imminent" that these defendants must be compelled to speak when they would remain silent? Since 1900, the failure of AP to speak to all has resulted in the healthy growth of other news agencies and of free competition between newspapers. No newspaper has ceased publication, no potential publisher has failed to publish because of AP's activities, no dangers have arisen since Attorney General Gregory's Opinion in 1915, or the decision in the *Star* case in 1900, or the *Matthews* case in 1893. No threat to our institutions has appeared on the scene since both houses of Congress received the presentment of the New York Sun on February 4, 1914, and nevertheless took no legislative action respecting news agencies. The quantum of competition, actual and potential, is greater now than then. Public "illumination" is greater now than then. New methods of covering news events and of communicating dispatches have grown up. The public enjoys a new instrumentality of full illumination—the radio. The only new factor is the advent of The Chicago Sun.

B. The judgment not only compels the defendants to utter, it determines what they shall utter, to whom and on what terms.

The opinion states (R. 2600, fol. 3167-8) "the effect of our judgment will be, not to restrict AP members as to what they shall print, but only to compel them to make their dispatches accessible to others." But this is not all.

What dispatches must AP furnish to others whom it is compelled to serve? Plainly, AP will not be allowed to discriminate in the nature of the dispatches it sends to "the others"—it must furnish "the others" with the same

dispatches it furnishes to those it wishes to serve. Plainly, it must serve "the others" on equal terms. It cannot discriminate in terms or in service.

The judgment therefore compels AP to do much more than to utter when it wishes to remain mute. It compels AP to utter to X that which it is about to utter to Y and Z; it is not only compelled to speak, it is commanded what to say.

An implied term of the judgment therefore is that AP shall render *indiscriminate* service to the undesired customer. The policing of this implied term will require the court on citation for contempt to exercise visitorial powers over the affairs of AP. For example, the new customer would be allowed to contend that AP is discriminating against him by spending disproportionate sums for development and thus making it impossible for him to meet his assessments; that AP is discriminating against him by furnishing too few or too many words in its country or metropolitan service with the intent of making its service unsuited to his needs; or that AP is discriminating against him by increasing a service which he cannot use while eliminating a service which he conceives to be of benefit to him; or that AP is discriminating against him by unduly favoring evening (or morning) subscribers in respect of hours of service, length of dispatches; that AP is discriminating against him by threatening to expel him for garbling AP news dispatches; etc., etc. (McCormick, R. 1307). All of these matters, which have long been a constant source of intra-corporate differences would, under this judgment, be fought out under citations for contempt.

C. The judgment discriminates against the press.

To forbid news agencies and AP in particular to sell their product under the protection of the ancillary restraint

discussed in Point I while it is allowed to all other industries is to discriminate against the press.

News agencies, according to the complaint and the findings of fact, are essential instrumentalities of the press; without them no modern newspaper can exist. The collection of news by these essential instrumentalities is protected by the First Amendment (semble *Associated Press* v. *KVOS* (1935), 80 F. 2d 575, 581; dismissed 299 U. S. 269), just as the circulation of newspapers is protected thereby (*Grosjean* v. *American Press* (1936), 297 U. S. 233), and advertising (*Grosjean* v. *American Press, supra; Indiana* v. *Prairie Farmer* (1934), 293 U. S. 268; 2nd appeal 299 U. S. 156; final appeal 301 U. S. 696, 302 U. S. 773).*

Even if "the mere fact that a person is engaged in publication does not exempt him from the municipal law" (R. 2600, fol. 3168), it nevertheless exempts him from discriminatory interpretation of the law (*Grosjean* v. *American Press,* supra). It is discriminatory to deny to news agencies, and to news agencies only, the right to sell their product under an ancillary restraint that it will not be sold to another purchaser in the same community for a limited space of time (absent monopoly, monopolization or unreasonable restraint of competition).

The First Amendment was intended to bar every branch of the federal government from encroachments on a free press. It was intended as a shield against *governmental* encroachments (*Powe* v. *U. S.* (C. C. A. 5th, 1940), 109 F. 2d 147; cert. denied 309 U. S. 679; *Bridges* v. *California* (1941), 314 U. S. 252; *Near* v. *Minnesota* (1931), 283 U. S. 697; *City of Chicago* v. *Tribune Company* (1923), 307 Ill.

*That circulation is protected by the First Amendment, see also *Jones* v. *Opelika* (1942), 316 U. S. 584, rev. 319 U. S. 103; *Murdock* v. *Pennsylvania* (1943), 319 U. S. 105; *Martin* v. *Struthers,* 319 U. S. 141; *Douglas* v. *Jeannette* (1943), 319 U. S. 157).

595, 139 N. E. 86). It was intended to shield the free, private, commercial press (the *Jehovah Witness* cases, supra),—to shield it against the power over interstate commerce granted to the federal government. The free press was to be in a "preferred position" in respect of governmental regulations (*Murdock* v. *Pennsylvania* (1943), 319 U. S. 105, 111). Here the prohibition against governmental infringement becomes a mandate for governmental interference. The only industry mentioned in the Constitution, the industry elevated to "a preferred position," has now become by court decree the only industry abridged in its right to sell its product on the normal, customary, universal, ancillary restraints. The free press has been ordered what to publish and directed to whom to publish it.

Respectfully submitted,

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APPENDIX A

Cases in which courts have expressly held a seller's agreement to sell exclusively to a purchaser in a particular field is not a violation of the common law, the Sherman Act or the applicable state anti-trust statute.

Agricultural Machines & Implements:

U. S. v. International Harvester, 274 U. S. 693; 71 L. Ed. 1302; 47 S. C. 748..... 1927
Wood M. & R. Co. v. Greenwood Hardware Co., 75 S. C. 378; 55 S. E. 973..... 1906
Zellner Merc. Co. v. Parlin Plow Co., 98 Kan. 609; 159 Pac. 391..... 1916

Automobiles:

Cole Motor Car Co. v. Hurst, 228 Fed. 280 (C.C.A. 5), cert. denied, 247 U. S. 511, 62 L. Ed. 1242; 38 S. C. 579..... 1915
McConkey v. Smith, 112 Kan. 560; 211 P. 631..... 1923

Automobile Tires:

Baran v. Goodyear Tire & Rubber Co., 256 F. 571 (D.C. S.D. N.Y.)..... 1919

Beer:

Anheuser-Busch v. Houck, 27 S. W. 692 (Texas)... 1894
Vandeweghe v. American Brewing Co., 61 S. W. 526 (Texas) 1901

Blankets:

Saddlery Hardware Co. v. Hillsboro Mills, 68 N. H. 216; 44 A. 300..... 1895

Bricks:

Sorrentino v. Glen-Gery Shale Brick Corp., 46 F. Supp. 709 (D.C. E.D. Pa.)..... 1942

Churners:

Sherrill v. Alabama Appliance Co., 240 Ala. 46; 197 So. 1 1940

Cigars:

Newell v. Meyendorff, 9 Mont. 254; 23 P. 333..... 1890

Coal:

Appalachian Coals, Inc. v. U. S., 288 U. S. 344; 77 L. Ed. 825; 53 S. C. 471..... 1933
Superior Coal Co. v. Lumber Co., 236 Ill. 83; 86 N. E. 180 1908

Cross-Ties (Railroad):

Lewis et al. v. Archbell et al., 199 N. C. 205; 154 S. E. 11..... 1930

Certain Commodities:

Thomas v. Belcher, 184 Okl. 410; 87 P. (2d) 1084.. 1939

False Teeth:

Clark v. Crosby, 87 Vt. 187; 88 Atl. 736..... 1864

Fire Clay:

Southern Fire Brick Clay Co. v. Garden City Sand Co., 223 Ill. 616; 79 N. E. 313..... 1906

Furniture:

Roller v. Ott, 14 Kan. 461..... 1875

Knapsacks:

Levine Dist. Co. v. Rubinstein, 159 Misc. Repts. 28; 285 N. Y. Supp. 1020..... 1935

Matches:

Match Corp. of America v. Acme Match Corp., 285 Ill. App. 197; 1 N. E. (2d) 867..... 1936

Middy Blouses:

Mar-Hof v. Rosenbacher, 176 N. C. 330; 97 S. E. 169. 1918

Motion Pictures:

Goldman Theaters, Inc. v. Lowes, Inc. (D.C. E.D. Pa.) .....May, 1944
Westway Theater, Inc. v. 20th Century-Fox, 30 F. Supp. 830 (D.C. Md.)..... 1940

Natural Gas:

S. W. Kansas Oil & Gas Co. v. Argus Pipe Line Co., 141 Kans. 287; 39 P. (2d) 906..... 1935

Optical Glass & Glasses:

Keith v. Hirschberg Optical Co., 48 Ark. 138; 2 S. W. 777..... 1887
U. S. v. Bausch & Lomb Optical Co., 321 U. S. 707; 88 L. Ed. 736; 64 S. C. 805; 45 F. Supp. 387..... 1942

Phonographs:

Crowley Merchantile Co. v. Brenard Mfg. Co., 287 S. W. 127 (Tex.)..... 1926

Pianos:

Houck v. Wright, 77 Miss. 476; 27 So. 616..... 1900

Plate Glass:

Pittsburgh Plate Glass Co. v. Paine & Nixon Co., 182 Minn. 159; 234 N. W. 453..... 1930

Printing Press:

N. Y. Bank Note Co. v. Kidder Press Mfg. Co., 78 N. E. 463 (Mass.)..... 1906
N. Y. Bank Note Co. v. Hamilton Bank Note Co., 73 N. E. 48 (N.Y.)..... 1905

Real Estate:

Woods v. Hart, 50 Neb. 497; 70 N. W. 53..... 1897

Sand & Gravel:

American S & G Co. v. Chicago Gravel Co., 184 Ill. App. 509 1914

Slate:

American Sea Green Slate Co. v. O'Halloran, 229 Fed. 77 (C.C.A. 2)..... 1915

Tobacco:

Locker v. American Tobacco Co., 218 Fed. 447 (C.C.A. 2) 1914

Tractors:

U. S. v. International Harvester Co. (supra)..... ....

Whiskey Warehouse Receipts:

Gt. Western Dis. Prod. v. Waphen Dist. Co., 10 Cal. (2d) 442; 74 P. (2d) 745..... 1937

Wooden Ware:

Carter-Crume Co. v. Peurrung, 86 Fed. 439 (C.C.A. 6) 1898

APPENDIX B

Cases in which a seller's agreement to sell exclusively to a purchaser in a particular field has been in issue and the validity of the restraint was not questioned.

Alemite:

Bassick Mfg. Co. v. Riley, 9 F. (2d) 138 (D.C. E.D. Pa.) 1925

Automobiles:

Huffman v. Page Motor Car Co., 262 F. 116; C.C.A. 8 1919
Jordan v. Buick Motor Co., 75 F. (2d) 447; C.C.A. 7. 1935
Moon Motor Car Co. v. Moon Motor Car Co., Inc., 29 F. (2d) 3; C.C.A. 2..... 1928
Oakland Motor Car Co. v. Indiana Auto Co., 201 F. 499; C.C.A. 7..... 1912
Studebaker Corp. v. Wilson, 247 F. 403; C.C.A. 3.. 1918
Velie Motor Car Co. v. Kopmeier, 194 F. 324; C.C.A. 7 1912
White Co. v. American Motor Car Co., 11 Ga. Appeals 285; 75 S. E. 345..... 1912

Automobile Axles:

Beebe v. Columbia Axle Co., 233 Mo. App. 212; 117 S. W. (2d) 624..... 1938

Automobile Tires & Parts:

Hompes v. Goodrich Co., 137 Neb. 84; 288 N. W. 367. 1939
Kelly-Springfield v. Bobo, 4 F. (2d) 71; C.C.A. 9, cert. denied, 268 U. S. 694; 69 L. Ed. 1161; 45 S. C. 513 1925

Beer:

R. F. Baker & Co. v. P. Ballantine & Sons, 127 Conn. 680; 20 A. (2d) 82..... 1941

Falstaff Brewing Corp. v. Iowa Fruit & Produce Co., 112 F. (2d) 101; C.C.A. 8 1940
Terre Haute Brewing Co. v. Dugan, 102 F. (2d) 425; C.C.A. 8 1939

Borax:

William S. Gray & Co. v. Western Borax Co., 99 F. (2d) 239; C.C.A. 9 1938

Bread:

Ehrenworth v. Stuhmer, 229 N. Y. 210; 128 N. E. 108; C.C.A. N.Y. 1920

Candy:

Curtiss Candy Co. v. Silberman, 45 F. (2d) 451; C.C.A. 6 1930

Cigars:

Santaella & Co. v. Lange Co., 155 F. 719; C.C.A. 8.. 1907

Coffee:

Brandenstein v. McGrann-Reynolds, 56 N. D. 201; 216 N. W. 567 1927

Cordage Products:

Brunvold v. Johnson, 36 Cal. App. (2d) 226; 97 P. (2d) 489; Cal. App. 1939

Cosmetics:

Caspary v. Moore, 21 Cal. App. (2d) 694; 70 P. (2d) 224; Cal. App. 1937
Western Beauty Supply Co. v. Duart Sales Co., 192 Okla. 6; 133 P. (2d) 202 1943

Designs and Patterns:

Weibolt v. Standard Fashion Co., 80 Ill. App. 67.. 1898
Wood v. Lucy, Lady Duff-Gordon, 222 N. Y. 88; 118 N. E. 214 1917

Electric Power Plants:

Jay Dreher Corp. v. Delco Appliance Co., 93 F. (2d) 275; C.C.A. 2 1937

Flour:

Mountain City Mill Co. v. Cobb, 124 Ga. 937; 53 S. E. 458 1906

Manure Spreaders:

New Idea Spreader Co. v. Rogers, 122 Va. 54; 94 S. E. 351 1917

Margarine:

Miami Butterine Co. v. Frankel, 190 Ga. 88; 8 S. E. (2d) 398 1940

B. S. Pearsall Butter Co. v. F.T.C., 292 F. 720; C.C.A. 7 1923

Meats:

Lightner v. Minzel, 35 Cal. 452 1868

Milk:

Ruben v. Dairymen's League Co-op Assn., 284 N. Y. 32; 29 N. E. (2d) 458 1940

Oil:

Dubeshter v. Life-Lube Oil Corp. 264 App. Div. 875; 35 N. Y. Supp. (2d) 481 1942

Oil Burners:

Alida Oil Burner Sales Corp. v. Berggren & Anderson Mach. Co., 251 App. Div. 745, 296 N. Y. Supp. 88 1937

Oil Meal for Livestock Feeding:

Sheesley v. Bisbee Linseed Co., 337 Pa. 197; 10 A. (2d) 401 1940

Moving Picture Equipment:

Excelsior Supply Co. v. Sound Equipment Co., 73 F(2d) 725; C.C.A. 7, cert. denied 294 U. S. 706, 79 L. Ed. 1241, 55 S. C. 352 1934

Paints:

Dupont v. Claiborne-Reno Co. 64 F(2d) 224; C.C.A. 8, cert. denied 290 U. S. 646, 78 L. Ed. 561, 54 S. C. 64 1933

Pharmaceuticals:

Marrinan Medical Supply, Inc. v. Ft. Dodge Serum Co., 47 F.(2d) 458; C.C.A. 8..... 1931

Phonographs:

Thomas A. Edison, Inc. v. Blackman Distributing Co., 66 F. (2d) 722; C.C.A. 2..... 1933

Radios:

Chappel v. F. A. D. Andrea, Inc., 41 Ga. Appeals 413; 153 S. E. 218..... 1930
Thomas A. Edison Inc. v. Blackman Distributing Co. (supra) ....
Hedeman v. Fairbanks Morse, 286 N. Y. 240; 36 N. E. (2) 129 1941

Radio Tubes:

Ken-Rad Corp. v. Bohannan Inc., 80 F(2d) 251; C.C.A. 6 1935

Refrigerators:

Hedeman v. Fairbanks Morse (supra)..... ....
United Appliance Corp. v. Boyd, 108 S. W. (2d) 760; (Tex.) 1937

Sewing Machines:

Brown v. Rounsavell, 78 Ill. 589..... 1875

Shoes:

Abrams v. George E. Keith Co., 30 F. (2d) 90; C.C.A. 3..... 1929
Florsheim Shoe Co. v. Leader Dept. Store, 212 N. C. 75, 193 S. E. 9; N. C..... 1937
Fowler's Bootery v. Selby Shoe Co., 273 Ky., 670; 117 S. W. (2d) 931..... 1938
General Shoe Corp. v. Hall, 123 S. W. (2d) 721 (Tex.) 1938
Sargent v. Drew-English, Inc., 12 Wash. 2nd 320; 121 P. (2d) 373..... 1942

Soft Drinks:

Big Cola Corp. v. World Bottling Co., 134 F. (2d) 718 1943
Miami Coca Cola Co. v. Orange Crush Co., 296 F. 693; C.C.A. 5..... 1924
Pepsi-Cola Co. v. Wright, 187 Ga. 723; 2 S. E. (2d) 73 1939

Tractors:

Schnerb v. Caterpillar Tractor Co., 43 F. (2d) 920; C.C.A. 2, cert. denied, 282 U. S. 892; 75 L. Ed. 791; 51 S. C. 182..... 1930

Washing Machines:

Bendix Home Appliances v. Radio Accessories Co., 129 F. (2d) 177; C.C.A. 8..... 1942
Hedeman v. Fairbanks Morse (*supra*).....

Welding Rods:

Noble v. Reid-Avery Co., 89 Cal. App. 75; 264 P. 341 1928

Whiskey (in Bulk):

United Distillers Agency, Inc. v. Old Rock Distilling Co., 3 F. R. D. 179; D. C. Mo..... 1942

Whikey (Case Goods):

Jas. Barclay & Co. v. Bailey, 34 F. Supp. 665; D. C. Tenn. 1940

Whiskey, Liquor & Gin:

Silbernagel v. Hirsch Distilling Co., 99 F (2d) 829; C.C.A. 8..... 1938

APPENDIX C

Jurisdictions in which courts have held, expressly or impliedly, that a seller's agreement to sell exclusively to a purchaser in a particular field is not an agreement in unreasonable restraint of trade.

Federal Courts:

The Supreme Court of the United States
Circuit Court of Appeals, Second Circuit
Circuit Court of Appeals, Third Circuit
Circuit Court of Appeals, Fifth Circuit
Circuit Court of Appeals, Sixth Circuit
Circuit Court of Appeals, Seventh Circuit
Circuit Court of Appeals, Eighth Circuit
Circuit Court of Appeals, Ninth Circuit
District Court, Maryland
District Court, Missouri
District Court, S.D. New York
District Court, E. D. Pennsylvania
District Court, Tennessee

State Courts:

Alabama
Arkansas
California
Connecticut
Georgia
Illinois
Kansas
Kentucky
Massachusetts
Minnesota
Mississippi
Missouri
Montana
Nebraska
New Hampshire
New York
North Carolina
North Dakota
Oklahoma
Pennsylvania
South Carolina
Texas
Vermont
Virginia
Washington

APPENDIX D

Legislative History of Clayton and Robinson-Patman Acts

A. The Clayton Act.

The Clayton Act (Act of October 15, 1914, c. 323, 38 Stat. 730; 15 U. S. C. §§12-27, p. 185) was introduced to supplement existing laws against unlawful restraints and monopolies. Section 2 of the bill reported out of the House Committee on the Judiciary (H. R. Rep. No. 627, 63d Con., 2d Session (1914) p. 1) made it a misdemeanor to discriminate in price between different purchasers of a commodity with intent to injure the business of a competitor. The concluding proviso of Section 2 and Section 3 were as follows:

> "And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers, *except as provided in section 3 of this act.*"
>
> "Sec. 3: That it shall be unlawful for the owner or operator, of any mine or for any person controlling the products of any mine engaged in selling its products in commerce to refuse arbitrarily to sell such product to a responsible person, firm, or corporation who applies to purchase such product for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and any person violating this section shall be deemed guilty of a misdemeanor and shall be punished as provided in the preceding section."

Section 4 outlawed sales to a purchaser under an agreement that the purchaser would not deal in the goods of a competitor.

The bill containing the above provisions was passed by the House except Section 3 was broadened in scope to include not only the owner or operator of any mine, but in

addition "the owner or operator of any oil or gas well, reduction works, refinery, or hydroelectric plant producing coal, oil, gas or hydroelectric energy." The Senate Judiciary Committee struck out Section 3 entirely, which was subsequently approved by the House. Section 4 then became Section 3 of the Act as passed. The concluding proviso of Section 2 quoted above was also changed to read:

> "That nothing herein contained shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

The omission from the proposed Section 3 of all producers except those dealing only in natural resources and the subsequent complete elimination of that section were in the public interest. This is clear by reference to the Congressional debates.

First: The Judiciary Committee stated that Section 3 was "based on the broad conservation idea that natural products such as iron, coal, and other minerals stored in the earth as the result of nature's laws should not be monopolized by the mere acquisition of the title to the lands which contain such resources." The evil sought to be remedied by Section 3 was the virtual monopoly of natural resources obtained by railroads, United States Steel Corporation and others through acquisition of vast areas containing minerals. The remedy was to compel such owners to sell to all manufacturers who desired "to purchase same for cash" (H. R. 627, supra, page 10).

The debates clearly show that the Congress fully understood that the proposed Section 3 was limited to natural resources:

> "Mr. BARKLEY. Mr. Chairman, I notice the committee permits manufacturers and dealers in products to select their customers in different portions of the country, and under section 3 certain industrial cor-

porations are forbidden from doing that same thing. Has the committee considered whether or not that might be regarded as in a sense class legislation—permitting one class of people to do a certain thing and forbidding another class to do the same thing?

"Mr. WEBB. Yes; we have gone all through that. There is quite a difference, in the first place, from the moral side on the question of policy. One is the product as it naturally lies in the bowels of the earth, placed there by God Almighty, and we think that a man who happens to own it, no matter how he happened to get title to it, ought not to have the right arbitrarily to close his fist and say that he will not sell except to a favored few, especially when the products of mines are put there for the benefit of God's creatures" (51 Cong. Rec. 9071 (1914)).

Second: The subject of including other products in Section 3 in addition to mineral resources was frequently discussed in the Congressional debates. The Judiciary Committee was strongly opposed to inclusion of any such products. The Congressional Record does not show that any amendment to include other than natural resources was proposed.

"Mr. GARRETT of Texas. * * * Suppose an individual desires to go to the Harvester Co. which is a combination of all the manufacturers of harvesters in the United States, and offers that company the price at which it is selling binders and mowers and hayrakes to another person in his town. Can he do that under this bill? Would not the manufacturer have the right to say. "No; I will not accept your money, although you offer me the same price and the same terms which I am receiving from another citizen in your town"?

"Mr. WEBB. That is undoubtedly true, and that is the law today. We have not changed the right of a man to select his own customer; but we have changed his right to select his customer on condition that that customer will not sell any competitive goods, and that is

where the evil is most widespread in this country today and has been for 15 years.

"Mr. OGLESBY. With regard to this particular section * * * I understand that to mean * * * that if there were two merchants in a village, town, or city who wanted the agency for some article, and both of them applied to the manufacturer asking to handle that article, the manufacturer under this section would have the right to decide which one of those two men he would deal with, and which one should have the agency in that town.

"Mr. WEBB. That is true" (51 Cong. Rec. 9070 (1914)).

* * * * *

"Mr. COOPER. * * * Is there any provision here that would require a trust or a big manufacturer who make a fine article to sell to the little man?

"Mr. WEBB. No, sir.

"Mr. COOPER. Why should there not be? That is exactly what goes on now. Suppose there are two little concerns in a given village. One of them is already engaged in selling certain articles that are useful and which have a large scale. There is a demand for another article of the same general description, but the maker of that other article will sell it to only one of those two stores in the village. Why should he not be compelled to sell to the customer, a bona fide, responsible customer, just the same as you propose to provide that the mine owner shall sell his products?

"Mr. WEBB. We took this view of it: The man who, with his own industry and with his own money, manufactures or transforms the raw material into some useful object ought to have the right to select his purchaser; but we did not think that ought to apply to the man who takes products from the bowels of the earth as God deposited them" (Id. p. 9073).

* * * * *

"Mr. FLOYD of Arkansas. * * * We leave the law as it is as to the things mentioned in the proviso. * * * We make it a high crime under the law to discriminate in price by methods and evil practices described, but we have not attempted in this provision or anywhere in this bill to make it a crime for a man to carry on any legitimate and customary practice that the business world has recognized and followed for centuries, other than those methods and practices herein specifically condemned. The things mentioned in the provisos are authorized by existing law, and we do not forbid them. We did not intend to forbid them, and we do not believe they ought to be forbidden * * * (Id. p. 9158).

* * * * *

"Mr. BARKLEY. Taking these two sections together, [3 and 4] am I correct in interpreting the two together to mean this, that the Douglas Shoe Co. for instance, could select one shoe merchant in a given city and sell the Douglas shoe exclusively to that one merchant, provided their contract did not provide that that shoe merchant could not purchase shoes from the Robinson-Brown Shoe Co. or the Hamilton Shoe Co. or any other shoe company that might desire to sell him goods?

"Mr. FLOYD of Arkansas. That is correct. * * * (Id. p. 9161)

* * * * *

"Mr. FLOYD of Arkansas. And we draw the line in section 3 upon such products. It was insisted by some extremists that we ought to extend the provisions of section 3 so as to make them apply to manufactured products. It was not the purpose or the design of the committee to do anything of the kind, and the gentleman, on a much more difficult question, is seeking to depart from the original purpose of the bill and deal with manufactured products, such as electricity, when we refused to apply this section to any manufactured product of any kind whatsoever." (Id. 9472)

* * * * *

"Mr. CULBERSON. * * *

"The proposed Senate amendment is to strike out this section altogether, because, in the opinion of the committee, it would be unwise to enact such legislation as is contained in it. It would, primarily, deny freedom of contract to one of the parties, and consequently would be of doubtful constitutional validity. Passing from this consideration, the committee believe that such an enactment, which would practically compel owners of the products named to sell to anyone or else decline to do so at the peril of incurring heavy penalties, would project us into a field of legislation at once untried, complicated, and dangerous.

Those are the reasons which impelled the committee to recommend that section 3 be stricken out.

"Mr. JONES. Was the committee unanimous in that conclusion?

"Mr. OVERMAN. Yes." (Id. 13849)

B. The Robinson-Patman Act.

The Robinson-Patman Act (Act of June 19, 1936, c. 592, 49 Stat. 1526; 15 U.S.C.A. 13) in part amended Section 2 of the Clayton Act. As originally introduced and as subsequently passed, the Robinson-Patman Act contained in haeb verba the proviso contained in Section 2 of the Clayton Act permitting sellers to select their own customers (see Hearing Before the Committee on the Judiciary on H. R. 8442, 74th Cong., First Session, 1935, page 1). Mr. Utterback reporting the action of the Conference Committee on the bill stated as follows (80 Cong. Rec. 9418, 1936):

"The bill contains the proviso already contained in the present Clayton Act permitting sellers to select their own customers in bona-fide transactions and not in restraint of trade. * * * Nor does it permit absolute refusal to sell to particular customers where the facts are such as to show that it is done for the purpose of injuring or destroying them and that the elimination of their competition effects a restraint of trade."