ADVANCE SHEET- MAY 28, 2021

In this issue

President's Letter

On April 5 of this year, Justice Clarence Thomas, a frequent iconoclast but on occasion a far-seeing one, delivered an opinion concurring in dismissal of a moot case, but suggesting that 'social media' networks like Twitter and Facebook might well be required to treat all comers equally on a 'public accommodations' or 'public utility' theory, at least where there was some state action involved. Curiously, Justice Thomas did not refer to a forgotten antitrust case, *United States v. Associated Press*, 326 U.S.1 (1945), relevant antitrust doctrine not being dependent on a finding of state action. The dismissed case involved the exclusion of posts from former President Trump's website, a 'man bites dog' case in view of Trump's later total de-platforming from social media, which has drawn criticism from persons as diverse as Chancellor Angela Merkel and Senator Bernard Sanders.

Justice Thomas' concern may have derived in part from the exclusion from sale of a flattering film biography of him *Created Equal*, by Amazon, another media monopolist or near-monopolist, which has also refused to distribute one recent work critical of trans-genderism. It was not asserted that either of these works was libelous or incited to riot. The current vogue for de-platforming has excited little critical comment from the contemporary American Bar. We here tender relics from a different age, the opinion of Justice Black, for the Supreme Court and the concurring opinion of Justice Frankfurter in the Associated Press case and the district court opinion in that case by Judge Learned Hand.

George W. Liebmann

What Does The Bar Library Have In Common With A Corn & Potato Chip?

One night, my wife and I had finished watching one thing or another, I believe it was on the history channel, when a program came on about the origins of Fritos and Lay's potato chips. I too am not sure why we did not change the channel, but in a few minutes, we were hooked. The two stories involved individuals that were bigger than life, who when faced with adversity, found a way to overcome it. It was known as the American way, and the events of the past year or so, shows that it is alive and well.

It was 1932 and Charles Elmer Doolin was looking for something to attract customers to his San Antonio shop. He spotted a classified ad in the newspaper "CORN chips business for sale, a new food product, making good money." He was intrigued enough to contact the owner of the chip business to arrange a tasting. The cost for the business was $100. A small matter, the Great Depression, meant that $100 was an almost impossible amount to come up with for a humble shop owner. How pray tell did he find the money? His mother pawned her wedding ring. For $100 he purchased the recipe as well as the equipment to make the chips with, an adapted potato ricer.

The company, which struggled at first, eventually took off, and the rest is corn chip history.

Herman W. Lay worked for Sunshine Biscuits until he was let go because of the Great Depression. After that, he worked as a traveling salesman for the Barrett Food Company, delivering potato chips to his customers in his Ford Model A. His territory eventually expanded and his profits began to grow. In 1932, he borrowed $100 and founded the H. W. Lay Distributing Company based in Atlanta, a distributor for the Barrett Food Products Company, and began to hire employees. He sold potato chips from Atlanta to Nashville, Tennessee. By

1937, he had 25 employees, and had begun producing his own line of snack foods.

In 1945, the two companies began engaging in joint ventures and in 1961 they would merge. Today Frito-Lay employees tens of thousands, with annual sales in the billions. Not bad when you consider that both Doolin and Lay each started out with a borrowed $100.

Now, what does this have to do with the Bar Library? Like Doolin and Lay, the Bar Library has always found a way. It has endured even more tumultuous times than the companies discussed above including a civil war and the pandemic of 1919, which, over the course of the past year, we have discovered is not an easy thing to do.

I believe that the past year symbolizes the stuff of which the Library is made. We not only endured, we, I might humbly offer, elevated our game. To say that we never closed because of the pandemic, not one day, is fine, but not so great if you did nothing during that time. What we did was serve members old and new (the folks unable to get anything from anywhere else) in any way we could, from the e-mailing of material to curbside pick-up. Under the guidance of Board President, Mr. George Liebmann, the newsletter morphed into a bi-weekly magazine of the first order, and Zoom lectures sponsored by the Library kept everyone entertained and informed.

Although we would just as soon live a nice, quiet uneventful corporate existence, to the next challenging situation that might be lurking out there we say "Bring It On!"

To all, take care. We might be, just about there.

Joe Bennett

Associated Press v. United States, 326 U.S. 1 (1945)

No. 57

Argued December 5, 6, 1944

Decided June 18, 1945

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Syllabus

By-laws of the Associated Press, a cooperative association engaged in gathering and distributing news in interstate and foreign commerce, prohibited service of AP news to nonmembers, prohibited members from furnishing spontaneous news to nonmembers, and empowered members to block membership applications of competitors. A contract between AP and a Canadian press association obligated both to furnish news exclusively to each other. Charging, *inter alia,* that the bylaws and the contract violated the Sherman Antitrust Act, the Government sought an injunction against AP and member publishers. Upon the Government's motion, the District Court rendered summary judgment.

Held:

1. The bylaws and the contract, together with the admitted facts, justified summary judgment. Rule 56 of the Rules of Civil Procedure. P. 326 U. S. 5.

2. Publishers charged with violating the Sherman Act are subject, no less than others, to the summary judgment procedure. P. 326 U. S. 7.

3. The bylaws, on their face, constitute restraints of trade and violate the Sherman Act. P. 326 U. S. 12.

(a) That AP had not achieved a complete monopoly is irrelevant. P. 326 U. S. 12.

(b) Trade in news carried on among the States is interstate commerce. P. 326 U. S. 14.

(c) The fact that AP's activities are cooperative does not render the Sherman Act inapplicable. P. 326 U. S. 14.

(d) Although true in a general sense that an owner of property may dispose of it as he pleases, he can not go beyond the exercise of that right and, by contracts or combinations, express or implied, unduly hinder or obstruct the free flow of interstate commerce. P. 326 U. S. 15.

(e) The fact that there are other news agencies which sell news, and that AP's reports are not "indispensable," can give AP's restrictive bylaws no exemption under the Sherman Act. P. 326 U. S. 17.

(f) The result here does not involve an application of the "public utility" concept to the newspaper business. P. 326 U. S. 19.

(g) Arrangements or combinations designed to stifle competition can not be immunized through a membership device which would accomplish that purpose. P. 326 U. S. 19.

(h) Application of the Sherman Act to a combination of publishers to restrain trade in news does not abridge the freedom of the press guaranteed by the First Amendment. Pp. 326 U. S. 19-20.

4. The decree of the District Court, interpreted as meaning that AP news is to be furnished to competitors of members without discrimination through bylaws controlling membership or otherwise, is not vague and indefinite, and is approved. P. 326 U. S. 21.

5. The District Court did not err in refusing to hold as a violation of the Sherman Act standing alone (1) the bylaws provision forbidding service of AP news to nonmembers, (2) the bylaws provision forbidding AP members from furnishing spontaneous news to nonmembers, or (3) the Canadian press contract; and the court was justified in enjoining their observance temporarily pending AP's abandonment of the bylaws provision empowering members to block membership applications of competitors. P. 326 U. S. 21.

6. The fashioning of a decree in an antitrust case, to prevent future violations and eradicate existing evils, rests largely in the discretion of the trial court. P. 326 U. S. 22.

7. The case having been presented on the narrow issues arising out of undisputed facts, it cannot be said that the District Court's decree should have been broader, and, if the decree in its present form should prove inadequate to prevent further discriminatory trade restraints against nonmember newspapers, the District Court's retention of jurisdiction of the cause will enable it to take appropriate action. P. 326 U. S. 22.

52 F. Supp. 362, affirmed.

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Appeals from a decree of a district court of three judges in a suit by the United States to enjoin alleged violations of the Sherman Act.

MR. JUSTICE BLACK delivered the opinion of the Court.

The publishers of more than 1,200 newspapers are members of the Associated Press (AP), a cooperative

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association incorporated under the Membership Corporations Law of the State of New York. Its business is the collection, assembly and distribution of news. The news it distributes is originally obtained by direct employees of the Association, employees of the member newspapers, and the employees of foreign independent news agencies with which AP has contractual relations, such as the Canadian Press. Distribution of the news is made through interstate channels of communication to the various newspaper members of the Association, who pay for it under an assessment plan which contemplates no profit to AP.

The United States filed a bill in a Federal District Court for an injunction against AP and other defendants charging that they had violated the Sherman Anti-Trust Act, 26 Stat. 209, in that their acts and conduct constituted (1) a combination and conspiracy in restraint of trade and commerce in news among the states, and (2) an attempt to monopolize a part of that trade.

The heart of the government's charge was that appellants had, by concerted action, set up a system of bylaws which prohibited all AP members from selling news to nonmembers, and which granted each member powers to block its nonmember competitors from membership. These bylaws, to which all AP members had assented, were, in the context of the admitted facts, charged to be in violation of the Sherman Act. A further charge related to a contract between AP and Canadian Press (a news agency of Canada similar to AP) under which the Canadian agency and AP obligated themselves to furnish news exclusively to each other. The District Court, composed of three judges, held that the bylaws unlawfully restricted admission to AP membership, and violated the Sherman Act insofar as the bylaws' provisions clothed a member with powers to impose or dispense with conditions upon the admission of his business competitor.

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Continued observance of these bylaws was enjoined. The court further held that the Canadian contract was an integral part of the restrictive membership conditions, and enjoined its observance pending abandonment of the membership restrictions. The government's motion for summary judgment, under Rule 56 of the Rules of Civil Procedure, [Footnote 1] was granted, and its prayer for relief was granted in part and denied in part. 52 F. Supp. 362. Both sides have brought the case to us on direct appeal. 15 U.S.C. § 29; 28 U.S.C. § 345.

At this point, it seems advisable to pass upon the contention of the appellants that there were genuine disputes as to material facts, and that the case therefore should have gone to trial. The only assignments of error made by the appellants in No. 57 (*Associated Press et al. v. United States*), relating to this question are that the court erred "[i]n holding that there was no genuine issue between the parties as to any material fact" and "[i]n not entering summary judgment against the plaintiff." This latter assignment is based on the premise that summary proceedings were properly utilized in the case. The appellants in No. 58 (*Tribune Company et al. v. United States*) have one assignment of error to the effect that

"[t]he defendants are entitled to a trial of genuine issues of fact unmentioned in the findings of the court but which if found for the defendants would render this holding unwarranted."

None of the appellants has pointed to any

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disputed facts essential to a determination of the validity or invalidity of the bylaws and the contract. Admitting the existence of both the bylaws and the contract, their answers and their affidavits in the summary proceedings defended the legality of the restrictive arrangements, but did not in any instance deny that nonmembers of AP were denied access to news of AP and of all of its member publishers by reason of the concerted

arrangements between the appellants. Nor was it denied that the bylaws granted AP members powers to impose restrictive conditions upon admission to membership of nonmember competitors. The court below, in making findings and entering judgment, carefully abstained from the consideration of any evidence which might possibly be in dispute. We agree that Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a *bona fide* dispute of facts between them. *Sartor v. Arkansas Nat. Gas. Co.,*321 U. S. 620. There was no injury to any of the appellants as a result of the summary proceedings, since, for reasons to be indicated, the restrictive arrangements, which appellants admitted, were sufficient to justify summary action by the court at that stage of the case. In reaching our conclusion on the summary judgment question, we are not unmindful of the argument that newspaper publishers charged with combining cooperatively to violate the Sherman Act are entitled to have a different and more favorable kind of trial procedure than all other persons covered by the Act. No language in the Sherman Act or the summary judgment statute lends support to the suggestion. There is no single element in our traditional insistence upon an equally fair trial for every person from which any such discriminatory trial practice could stem. For equal -- not unequal -- justice under law is the goal of our society. Our legal system has not established different measures of proof for the trial of cases in which equally intelligent and responsible

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defendants are charged with violating the same statutes. Member publishers of AP are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. *See International News Service v. Associated Press,*248 U. S. 215, 248 U. S. 229, 248 U. S. 230. All are alike covered by the Sherman Act. The fact that the publisher handles news, while others handle food, does not, as we shall later point out, afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices.

Nor is a publisher who engages in business practices made unlawful by the Sherman Act entitled to a partial immunity by reason of the "clear and present danger" doctrine which courts have used to protect freedom to speak, to print, and to worship. That doctrine, as related to this case, provides protection for utterances themselves, so that the printed or spoken word may not be that subject of previous restraint or punishment unless their expression creates a clear and present danger of bringing about a substantial evil which the government has power to prohibit. *Bridges v. California,*314 U. S. 252, 314 U. S. 261. Formulated as it was to protect liberty of thought and of expression, it would degrade the clear and present danger doctrine to fashion from it a shield for business publishers who engage in business practices condemned by the Sherman Act. Consequently, we hold that publishers, like all others charged with violating the Sherman Act, are subject to the provisions of the summary judgment statute. And that means that such judgments shall not be rendered against publishers or others where there are genuine disputes of fact on material issues. Accordingly, we treat the cause as did the court below, and will consider the validity of the bylaws and the contract exclusively on the basis of their terms and the background of facts which the appellants admitted.

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To put the issue into proper focus, it becomes necessary at this juncture to examine the

bylaws.

All members must consent to be bound by them. They impose upon members certain duties and restrictions in the conduct of their separate businesses. For a violation of the bylaws, severe disciplinary action may be taken by the Association. The Board of Directors may impose a fine of.$1,000.00 or suspend a member, and such "action . . . shall be final and conclusive. No member shall have any right to question the same." [Footnote 2] The offending member may also be expelled by the members of the corporation for any reason

"which, in its absolute discretion, it shall deem of such a character as to be prejudicial to the welfare of the corporation and its members, or to justify such expulsion. The action of the regular members of the corporation in such regard shall be final, and there shall be no right of appeal against or review of such action."

These bylaws, for a violation of which members may be thus fined, suspended, or expelled, require that each

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newspaper member publish the AP news regularly in whole or in part, and that each shall

"promptly furnish to the corporation, through its agents or employees, all the news of such member's district, the area of which shall be determined by the Board of Directors. [Footnote 3]"

All members are prohibited from selling or furnishing their spontaneous news to any agency or publisher except to AP. Other bylaws require each newspaper member to conduct his or its business in such manner that the news furnished by the corporations shall not be made available to any nonmember in advance of publication. The joint effect of these bylaws is to block all newspaper nonmembers from any opportunity to buy news from AP or any of its publisher members. Admission to membership in AP thereby becomes a prerequisite to obtaining AP news or buying news from any one of its more than twelve hundred publishers. The erection of obstacles to the acquisition of membership consequently can make it difficult, if not impossible, for nonmembers to get any of the news furnished by AP or any of the individual members of this combination of American newspaper publishers. [Footnote 4]

The bylaws provide a very simple and nonburdensome road for admission of a noncompeting applicant. The Board of Directors in such case can elect the applicant without payment of money or the imposition of any other onerous terms. In striking contrast are the bylaws

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which govern admission of new members who do compete. Historically, as well as presently, applicants who would offer competition to old members have a hard road to travel. This appears from the following facts found by the District Court.

AP originally functioned as an Illinois corporation, and at that time an existing member of the Association had an absolute veto power over the applications of a publisher who was or would be in competition with the old member. The Supreme Court of Illinois held

that AP, thus operated, was in restraint of trade. *Inter-Ocean Publishing Co. v. Associated Press,* 184 Ill. 438, 56 N.E. 822. As a result of this decision, the present Association was organized in New York. Under the new bylaws, the unqualified veto power of the Illinois AP members was changed into a "right of protest" which, when exercised, prevented the AP directors from electing the applicants as in other cases. The old member's protest against his competitor's application could then be overruled only by the affirmative vote of four-fifths of all the members of AP.

In 1931, the bylaws were amended so as to extend the right of protest to all who had been members for more than 5 years and upon whom no right of protest had been conferred by the 1900 bylaws. In 1942, after complaints to the Department of Justice had brought about an investigation, the bylaws were again amended. These bylaws, presently involved, leave the Board of Directors free to elect new members unless the applicants would compete with old members, and, in that event, the Board cannot act at all in the absence of consent by the applicant's member competitor. Should the old member object to admission of his competitor, the application must be referred to a regular or special meeting of the Association. As a prerequisite to election, he must (a) pay to the Association 10% of the total amount of the regular assessments received by it from old members in the same

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competitive field during the entire period from October 1, 1900, to the first day of the month preceding the date of the election of the applicant, [Footnote 5] (b) relinquish any exclusive rights the applicant may have to any news or news picture services, and, when requested to do so by his member competitor in that field, must

"require the said news or news picture services, or any of them, to be furnished to such member or members, upon the same terms as they are made available to the applicant,"

and (c) receive a majority vote of the regular members who vote in person or by proxy. These obstacles to membership, and to the purchase of AP news, only existed where there was a competing old member in the same field.

The District Court found that the bylaws, in and of themselves, were contracts in restraint of commerce [Footnote 6] in that they contained provisions designed to stifle competition in the newspaper publishing field. [Footnote 7] The court also

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found that AP's restrictive bylaws had hindered and impeded the growth of competing newspapers. [Footnote 8] This latter finding, as to the past effect of the restrictions, is challenged. We are inclined to think that it is supported by undisputed evidence, but we do not stop to labor the point. For the court below found, and we think correctly, that the bylaws, on their face, and without regard to their past effect, constitute restraints of trade. Combinations are no less unlawful because they have not as yet resulted in restraint. An agreement or combination to follow a course of conduct which will necessarily restrain or monopolize a part of trade or commerce may violate the Sherman Act, whether it be "wholly nascent or abortive on the one hand, or successful on the other." [Footnote 9] For

these reasons the argument, repeated here in various forms, that AP had not yet achieved a complete monopoly is wholly irrelevant. Undisputed evidence did show, however, that its bylaws had tied the hands of all of its numerous publishers, to the extent that they could not and did not sell any part of their news so that it could reach any of their nonmember competitors. In this respect, the Court did find, and that finding cannot possibly be challenged, that AP's bylaws had hindered and restrained the sale of interstate news to nonmembers who competed with members.

Inability to buy news from the largest news agency or any one of its multitude of members can have most serious effects on the publication of competitive newspapers, both those presently published and those which, but for these restrictions, might be published in the future. [Footnote 10] This is illustrated by the District Court's finding that, in 26 cities of the United States, existing newspapers already have contracts for AP news and the same newspapers have contracts with United Press and International News Service under which new newspapers would be required to pay the contract holders large sums to enter the field. [Footnote 11] The net effect is seriously to limit the opportunity of any newspaper to enter these cities. Trade restraints of this character, aimed at the destruction of competition, tend to block the initiative which brings newcomers into a field

of business and to frustrate the free enterprise system which it was the purpose of the Sherman Act to protect. [Footnote 12]

We need not again pass upon the contention that trade in news carried on among the states is not interstate commerce, *Associated Press v. Labor Board,*301 U. S. 103, or that, because AP's activities are cooperative, they fall outside the sphere of business, *American Medical Ass'n v. United States,*317 U. S. 519, 317 U. S. 528. It is significant that, when Congress has desired to permit cooperatives to interfere with the competitive system of business, it has done so expressly by legislation. [Footnote 13]

Nor can we treat this case as though it merely involved a reporter's contract to deliver his news reports exclusively to a single newspaper, or an exclusive agreement as to news between two newspapers in different cities. For such trade restraints might well be "reasonable," and therefore not in violation of the Sherman Act. *Standard Oil Co. v. United States,*221 U. S. 1. But however innocent such agreements might be, standing alone, they would assume quite a different aspect if utilized as essential features of a program to hamper or destroy competition. It is in this light that we must view this case.

It has been argued that the restrictive bylaws should be treated as beyond the prohibitions of the Sherman Act, since the owner of the property can choose his associates and can, as to that which he has produced by his own enterprise and sagacity, efforts or ingenuity, decide for

himself whether and to whom to sell or not to sell. While it is true in a very general sense that one can dispose of his property as he pleases, he cannot

"go beyond the exercise of this right, and by contracts or combinations, express or

implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade."

*United States v. Bausch & Lomb Co.,*321 U. S. 707, 321 U. S. 722. The Sherman Act was specifically intended to prohibit independent businesses from becoming "associates" in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete. Victory of a member of such a combination over its business rivals achieved by such collective means cannot, consistently with the Sherman Act or with practical, everyday knowledge, be attributed to individual "enterprise and sagacity"; such hampering of business rivals can only be attributed to that which really makes it possible -- the collective power of an unlawful combination. That the object of sale is the creation or product of a man's ingenuity does not alter this principle. *Fashion Originators' Guild, Inc., v. Federal Trade Commission,*312 U. S. 457, 668. [Footnote 14] It is obviously fallacious to view the bylaws

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here in issue as instituting a program to encourage and permit full freedom of sale and disposal of property by its owners. Rather, these publishers have, by concerted arrangements, pooled their power to acquire, to purchase, and to dispose of news reports through the channels of commerce. They have also pooled their economic and news control power and, in exerting that power, have entered into agreements which the District Court found to be "plainly designed in the interest of preventing competition." [Footnote 15]

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It is further contended that, since there are other news agencies which sell news, it is not a violation of the Act for an overwhelming majority of American publishers to combine to decline to sell their news to the minority. But the fact that an agreement to restrain trade does not inhibit competition in all of the objects of that trade cannot save it from the condemnation of the Sherman Act. [Footnote 16] It is apparent that the exclusive right to publish news in a given field furnished by AP and all of its members gives many newspapers a competitive advantage over their rivals. [Footnote 17] Conversely, a newspaper without AP service is

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more than likely to be at a competitive disadvantage. The District Court stated that it was to secure this advantage over rivals that the bylaws existed. It is true that the record shows that some competing papers have gotten along without AP news, but morning newspapers, which control 96% of the total circulation in the United States, have AP news service. And the District Court's unchallenged finding was that

"AP is a vast, intricately reticulated organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed to be of great consequence."

Nevertheless, we are asked to reverse these judgments on the ground that the evidence failed to show that AP reports, which might be attributable to their own "enterprise and sagacity," are clothed "in the robes of indispensability." The absence of

"indispensability" is said to have been established under the following chain of reasoning: AP has made its news generally available to the people by supplying it to a limited and select group of publishers in the various cities; therefore, it is said, AP and its member publishers have not deprived the reading public of AP news; all local readers have an "adequate access" to AP news, since all they need do in any city to get it is to buy, on whatever terms they can in a protected market, the particular newspaper selected for the public by AP and its members. We reject these contentions. The proposed "indispensability" test would fly in the face of the language of the Sherman Act and all of our previous interpretations of it. Moreover, it would make that law a dead letter in all fields of business, a law which Congress has consistently maintained to be an essential safeguard to the kind of private competitive business economy this country has sought to maintain.

The restraints on trade in news here were no less than those held to fall within the ban of the Sherman Act with

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reference to combinations to restrain trade outlets in the sale of tiles, *Montague & Co. v. Lowry,*193 U. S. 38; or enameled ironware, *Standard Sanitary Mfg. Co. v. United States,*226 U. S. 20, 226 U. S. 48-49; or lumber, *Eastern States Retail Lumber Dealers' Assn. v. United States,*234 U. S. 600, 234 U. S. 611; or women's clothes, *Fashion Originators' Guild v. Federal Trade Commission, supra;* or motion pictures, *United States v. Crescent Amusement Co.,*323 U. S. 173. Here, as in the *Fashion Originators' Guild* case, *supra,*312 U. S. 465,

"the combination is, in reality, an extra-governmental agency which prescribes rules for the regulation and restraint of interstate commerce and provides extrajudicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.' *Addyston Pipe & Steel Co. v. United States,*175 U. S. 211, 175 U. S. 242."

By the restrictive bylaws, each of the publishers in the combination has, in effect, "surrendered himself completely to the control of the association," *Anderson v. Shipowners' Ass'n,*272 U. S. 359, 272 U. S. 362, in respect to the disposition of news in interstate commerce. Therefore, this contractual restraint of interstate trade, "designed in the interest of preventing competition," cannot be one of the "normal and usual agreements in aid of trade and commerce which may be found not to be within the [Sherman] Act. . . ." *Eastern States Retail Lumber Dealers' Assn. v. United States, supra,*234 U. S. 612, 234 U. S. 613. It is further said that we reach our conclusion by application of the "public utility" concept to the newspaper business. This is not correct. We merely hold that arrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose.

Finally, the argument is made that to apply the Sherman Act to this association of publishers constitutes an abridgment of the freedom of the press guaranteed by the First Amendment. Perhaps it would be a sufficient answer to

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this contention to refer to the decisions of this Court in *Associated Press v. Labor Board, supra,* and *Indiana Farmer's Guide Co. v. Prairie Farmer Co.,*293 U. S. 268. It would be

strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all, and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. [Footnote 18] The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.

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We now turn to the decree. Having adjudged the bylaws imposing restrictions on applications for membership to be illegal, the Court enjoined the defendants from observing them, or agreeing to observe any new or amended bylaw having a like purpose or effect. If further provided that nothing in the decree should prevent the adoption by the Associated Press of new or amended bylaws

"which will restrict admission, provided that members in the same city and in the same 'field' (morning, evening or Sunday), as an applicant published in 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 that the bylaws 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 its application."

Some of appellants argue that this decree is vague and indefinite. They argue that it will be impossible for the Association to know whether or not its members took into consideration the competitive situation in passing upon applications for membership. We cannot agree that the decree is ambiguous. We assume, with the court below, that AP will faithfully carry out its purpose. Interpreting the decree to mean that AP news is to be furnished to competitors of old members without discrimination through bylaws controlling membership, or otherwise, we approve it.

The Court also held that, taken in connection with the restrictive clauses on admissions to membership, those sections of the bylaws violated the Sherman Act which prevented service of AP news to nonmembers and prevented AP members from furnishing spontaneous news to anyone not a member of the Association. It held the agreement between AP and the Canadian Press, under which AP secured exclusive right to receive the news reports

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of the Canadian Press and its members was also, when taken in connection with the

restrictive membership agreements, in violation of the Sherman Act. It declined to hold these bylaws and the agreement with Canadian Press illegal standing by themselves. It consequently enjoined their observance temporarily, pending AP's obedience to the decree enjoining the restrictive membership agreements. The Court's findings justified this phase of its injunction. *United States v. Bausch & Lomb Co., supra,*321 U. S. 724.

The government has appealed from the Court's refusal to hold each of these last mentioned items a violation of the Sherman Act standing alone. The government also asks that the decree of the District Court be broadened so as permanently to enjoin observance of the Canadian Press contract and all the challenged bylaws. It also suggests certain specific terms which should be added to the decree to assure the complete eradication of AP's discrimination against competitors of its members.

The fashioning of a decree in an Antitrust case in such way as to prevent future violations and eradicate existing evils is a matter which rests largely in the discretion of the Court. *United States v. Crescent Amusement Co., supra.* A full exploration of facts is usually necessary in order properly to draw such a decree. In this case, the government chose to present its case on the narrow issues which were within the realm of undisputed facts. In the situation thus narrowly presented, we are unable to say that the Court's decree should have gone further than it did. Furthermore, the District Court retained the cause for such further proceedings as might become necessary. If, as the government apprehends, the decree in its present form should not prove adequate to prevent further discriminatory trade restraints against nonmember newspapers, the Court's retention of the cause will enable it

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to take the necessary measures to cause the decree to be fully and faithfully carried out.

The judgment in all three cases is affirmed.

Affirmed.

[Footnote 1]

Rule 56 provides,

"A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

[Footnote 2]

The Directors who have this power to punish are elected by the members, but each member does not have equal voting privileges in the election. The bylaws grant one additional vote for each $25.00 of AP bonds held by a member. This means that in the election of Directors the owner of a $1,000.00 bond can cast 40 more votes than a member who owns no bonds. All members, however, do not, and cannot, under restrictive provisions of the bylaws, own an equal amount of bonds. In 1942, 99 out of

1247 members owned blocks of bonds of the face value of $1,000.00 or more, totaling more than 50% of the outstanding bonds. The court below found on the undisputed evidence that the bondholder vote, rather than the membership vote, controls the selection of AP Directors. The Directors have power to apportion among the members the expenses of collecting and distributing news, and to levy assessments upon the members. As to this apportionment and levy, the bylaws provide that

"There shall be no right to question the action of the Board of Directors in respect to such apportionment or assessments, either by appeal to a meeting of members, or otherwise, but the action of the Directors, when taken, shall be final and conclusive."

[Footnote 3]

Another bylaw provides that

"The news which a member shall furnish as herein required shall be all such news as is spontaneous in its origin, but shall not include any news that is not spontaneous its origin, or which has originated through deliberate and individual enterprise on the part of such member of the newspaper specified in such member's certificate of membership."

[Footnote 4]

The Court found that, out of the 1803 daily English language newspapers published in the United States, with a total circulation of 42,080,391, 1179 of them, with a circulation of 34,762,120, were under joint contractual obligations not to apply either AP or their own "spontaneous" news to any nonmember of AP.

[Footnote 5]

Under these terms, a new applicant could not have entered the morning field in New York without paying $1,432,142.73, and in Chicago, $416,631.90. For entering the evening field in the same cities, it would have cost $1,095,003.21, and $595,772.31, respectively.

[Footnote 6]

"The bylaws of AP are, in effect, agreements between the members: that one which restricts AP to the transmission of news to members, and that which restricts any member to transmitting 'spontaneous' news to the association, are both contracts in restraint of commerce. They restrict commerce because they limit the members' freedom to relay any news to others, either the news they learn themselves, or that which they learn collectively through AP as their agent."

United States v. Associated Press, 52 F. Supp. 362, 368.

[Footnote 7]

The District Court found that, among all the news gathering agencies in the United States, AP ranked "in the forefront in public reputation and esteem," and that it was "the chief single source of news for the American press, universally agreed to be of great importance"; that the combination of AP owners acted together for the purpose of using the news gathering facilities of the individual publishers and of the combination, which news was made available to members and denied to others; and that the restrictive bylaws had been observed, carried out, and applied in practice. The Court declared that

the conditions which old members could impose upon new applicants for membership were "plainly designed in the interests of preventing competition," and that the requirement of payments from new members to competing old members

"were also designed to compensate competitors for the loss in value of their membership, arising out of the applicant's improved position as a competitor."

The Court pointed out that these restrictive provisions would "act as a deterrent", and might "prove a complete bar to the admission of [membership]."

[Footnote 8]

That finding is as follows:

"The growth of news agencies has been fostered to some extent as a result of the restrictions of The Associated Press' services to its own members, but other restrictions imposed by The Associated Press have hampered and impeded the growth of competing news agencies and of newspapers competitive with members of The Associated Press."

The Court's opinion, and its findings as a whole show that the "other restrictions" found to have hampered competition were those relating to admissions to membership in AP and to restraints upon a member's freedom to sell his news.

[Footnote 9]

*United States v. Socony-Vacuum Oil Co.,*310 U. S. 150, 310 U. S. 225. *See also United States v. Trenton Potteries Co.,*273 U. S. 392, 273 U. S. 402; *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission,*312 U. S. 457, 312 U. S. 466, 668; *United States v. Patten,*226 U. S. 525, 226 U. S. 543; *Paramount Famous Lasky Corp. v. United States,*282 U. S. 30, 282 U. S. 41; *Standard Oil Co. v. United States,*221 U. S. 1, 221 U. S. 65-66.

[Footnote 10]

The District Court found as a fact that

"It is practically impossible for any one newspaper alone to establish or maintain the organization requisite for collecting all of the news of the world, or any substantial part thereof; aside from the administrative and organization difficulties thereof, the financial cost is so great that no single newspaper acting alone could sustain it."

[Footnote 11]

INS and UP make so-called "asset value" contracts under which, if another newspaper wishes to obtain their press services, the newcomer shall pay to the competitor holding the UP or INS contract the stipulated "asset value."

[Footnote 12]

*Paramount Famous Lasky Corp. v. United States, supra,*282 U. S. 42, quoted *United States v. Colgate & Co.,*250 U. S. 300, 250 U. S. 307, to the following effect:

"The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those

engaged, or who wish to engage, in trade and commerce -- in a word, to preserve the right of freedom to trade."

[Footnote 13]

See, e.g., 7 U.S.C. §§ 291, 292, as to farm cooperatives; 15 U.S.C. § 17, as to labor organizations. *But see also,* as to the latter, *Apex Hosiery Co. v. Leader,*310 U. S. 469, 310 U. S. 487-498.

[Footnote 14]

It is argued that the decision in *Board of Trade v. Christie Grain & Stock Co.,*198 U. S. 236, requires a holding that these arrangements are consistent with the Sherman Act. In that case, the Board of Trade gathered "quotations" of the prices on sales of grain for future delivery and sold the "information" under agreements forbidding the purchasers to reveal it. The Board of Trade filed suit to prevent its purchasers from breaking this agreement by transmitting the statistics to a "bucket shop or place where they are used as a basis for bets or illegal contracts," p. 198 U. S. 246. It was said in the opinion that the statistics were in the nature of a "trade secret." The opinion stated that the Board's collection of statistical information was entitled to the protection of the laws; that it had a right to keep it to itself, and that it did not

"lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust, and using knowledge obtained by such a breach."

Of course, one who has created or acquired something of value has a general right to use it according to the dictates of his own discretion, but this right of ownership is measured by the limitations of law, and the Sherman Act, which obviously restricts the free and untrammeled use of property, in the public interest, is a clear and pointed instance of the non-absolute character of property rights. An argument to the contrary was expressly rejected in *Fashion Originators' Guild v. Federal Trade Commission, supra,*312 U. S. 467, 312 U. S. 468.

Furthermore, the contracts involved in the *Christie* case were "not relied on as a cause of action." This Court found that those contracts did not show a purpose to deny sale of the statistics to nonmembers of the Board of Trade. Whether such a contractual restriction would have violated the Sherman Act, the Court refused to decide. In the instant case, as we have pointed out, both the individual publishers and AP have bound themselves to furnish their news to each other and to deny it to all others. Two later cases repeated the statement as to the right of one who gathered statistics to sell them on conditions. Neither of them, however, decided that such restrictive arrangements as appear in the instant case would not constitute unreasonable restraints of trade. *Moore v. New York Cotton Exchange,*270 U. S. 593; *Hunt v. New York Cotton Exchange,*205 U. S. 322.

[Footnote 15]

Even if additional purposes were involved, it would not justify the combination, since the Sherman Act cannot

"be evaded by good motives. The law is its own measure of right and wrong, of what it

permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results."

*Standard Sanitary Mfg. Co. v. United States,*226 U. S. 20, 226 U. S. 49.

[Footnote 16]

*United States v. Socony-Vacuum Oil Co., Inc., supra,*310 U. S. 221, 310 U. S. 224.

This Court said in *Paramount Famous Lasky Corp. v. United States, supra,*282 U. S. 44,

"In order to establish violation of the Sherman Anti-Trust Act, it is not necessary to show that the challenged arrangement suppresses all competition between the parties, or that the parties themselves are discontented with the arrangement. The interest of the public in the preservation of competition is the primary consideration."

Again, in *Fashion Originators' Guild v. Federal Trade Commission, supra,*312 U. S. 466, we said,

"Nor is it determinative in considering the policy of the Sherman Act that petitioners may not yet have achieved a complete monopoly. For 'it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition.' *United States v. E. C. Knight Co.,*156 U. S. 1, 156 U. S. 16; *Addyston Pipe & Steel Co. v. United States,*175 U. S. 211, 175 U. S. 237."

*See also Apex Hosiery Co. v. Leader,*310 U. S. 469, 310 U. S. 485.

[Footnote 17]

The District Court pointed out that

"monopoly is a relative word. If one means by it the possession of something absolutely necessary to the conduct of an activity, there are few except the exclusive possession of some natural resource without which the activity is impossible. Most monopolies, like most patents, give control over only some means of production for which there is a substitute; the possessor enjoys an advantage over his competitors, but he can seldom shut them out altogether; his monopoly is measured by the handicap he can impose. . . . And yet that advantage alone may make a monopoly unlawful. It would be possible, for instance, to conduct some kind of a newspaper without any news service whatever; but nobody will maintain that, if AP were the only news service in existence, the members could keep it wholly to themselves and reduce all other papers to such news as they could gather by their own efforts."

United States v. Associated Press, 52 F. Supp. 362, 371.

[Footnote 18]

It is argued that the decree interferes with freedom "to print as and how one's reason or one's interest dictates." The decree does not compel AP or its members to permit publication of anything which their "reason" tells them should not be published. It only provides that, after their "reason" has permitted publication of news, they shall not, for their own financial advantage, unlawfully combine to limit its publication. The only compulsion to print which appears in the record is found in the bylaws, previously set

out, which compel members of the Association to print some AP news or subject themselves to fine or expulsion from membership in the Association.

MR. JUSTICE FRANKFURTER, concurring.

The District Court properly applied the Sherman Law in enjoining the defendants from continuing to enforce

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the existing bylaws restricting membership in the Associated Press, and further enjoining the enforcement of another restrictive bylaw forbidding Associated Press members to communicate "spontaneous" news to nonmembers. I would sustain the judgment substantially for the reasons given below by Judge Learned Hand. 52 F. Supp. 362.

The Associated Press is, in essence, the common agent of about 1300 newspapers in the various cities throughout the country for the interchange of news which each paper collects in its own territory, and for the gathering, editing, and distributing of news which these member papers cannot collect single-handed, and which requires their pooled resources. The historic development of this agency, its world-wide scope, the pervasive influence it exerts in obtaining and disseminating information, the country's dependence upon it for news of the world -- all these are matters of common knowledge, and have been abundantly spread upon the records of this Court. *International News Service v. Associated Press,*248 U. S. 215; *Associated Press v. Labor Board,*301 U. S. 103. *See* Desmond, The Press and World Affairs (1937) Chapters I, II, III.

The bylaws in controversy operate, in substance, as a network of agreements among the members of the Associated Press whereby they mobilize the interest of all against the danger of competition to each by a present or future rival -- to the extent that inability to obtain an Associated Press "franchise" is a serious factor in the competition between papers in the same city. While a member newspaper no longer has an absolute veto power in the denial of facilities of the Associated Press service to a rival paper applying for membership, for practical purposes, there remain effective barriers to admission to the Associated Press based solely on grounds of business competition. As Judge Learned Hand has pointed out, the abatement in the bylaw from a former absolute veto to a

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conditional veto against an applicant competing with an existing member

"by no means opened membership to all those who would be entitled to it, if the public has an interest in its being free from exclusion for competitive reasons, and if that interest is paramount. Although, as we have said, only a few members will have any direct personal interest in keeping out an applicant, the rest will not feel free to judge him regardless of the effect of his admission on his competitors. Each will know that the time may come when he will himself be faced with the application of a competitor. . . . A bylaw which leaves it open to members to vote solely as their self-interest may dictate disregards whatever public interest may exist."

52 F. Supp. 362, 370, 371.

Indubitably, then, we have here arrangements whereby members of the Associated Press bind one another from selling local news to nonmembers and exercise power, which reciprocal self-interest invokes, to help one another in keeping out competitors from membership in the Associated Press, with all the advantages that it brings to a newspaper. Since the Associated Press is an enterprise engaged in interstate commerce, *Associated Press v. Labor Board, supra,* these plainly are agreements in restraint of that commerce. But ever since the Sherman Law was saved from stifling literalness by "the rule of reason," *Standard Oil Co. v. United States,*221 U. S. 1; *United States v. American Tobacco Co.,*221 U. S. 106, it is not sufficient to find a restraint. The decisive question is whether it is an unreasonable restraint. This depends, in essence, on the significance of the restraint in relation to a particular industry. *Compare Chicago Board of Trade v. United States,*246 U. S. 231, 246 U. S. 238.

To be sure, the Associated Press is a cooperative organization of members who are "engaged in a commercial business for profit." *Associated Press v. Labor Board, supra,* at 301 U. S. 128. But in addition to being a commercial

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enterprise, it has a relation to the public interest unlike that of any other enterprise pursued for profit. A free press is indispensable to the workings of our democratic society. The business of the press, and therefore the business of the Associated Press, is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes. And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect. I find myself entirely in agreement with Judge Learned Hand that

"neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive, for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many, this is, and always will be, folly, but we have staked upon it our all."

52 F. Supp. 362, 372.

From this point of view, it is wholly irrelevant that the Associated Press itself has rival news agencies. As to ordinary commodities, agreements to curtail the supply and to fix prices are in violation of the area of free enterprise which the Sherman Law was designed to protect. The press in its commercial aspects is also subject to the regulation of the Sherman Law. *Indiana Farmers' Guide Co. v. Prairie Farmer Co.,*293 U. S. 268. But the freedom of enterprise protected by the Sherman Law necessarily has different aspects in relation to the press than in the case of ordinary commercial pursuits. The interest of

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the public is to have the flow of news not trammeled by the combined self-interest of those who enjoy a unique constitutional position precisely because of the public dependence on a free press. A public interest so essential to the vitality of our democratic government may be defeated by private restraints no less than by public censorship.

Equally irrelevant is the objection that it turns the Associated Press into a "public utility" to deny to a combination of newspapers the right to treat access to their pooled resources as though they were regulating membership in a social club. The relation of such restraints upon access to news and the relation of such access to the function of a free press in our democratic society must not be obscured by the specialized notions that have gathered around the legal concept of "public utility."

The short of the matter is that the bylaws which the District Court has struck down clearly restrict the commerce which is conducted by the Associated Press, and the restrictions are unreasonable because they offend the basic functions which a constitutionally guaranteed free press serves in our nation.

52 F. Supp. 362 (1943)

UNITED STATES
v.
ASSOCIATED PRESS et al.

District Court, S. D. New York.

October 6, 1943.

*363*364 Charles B. Rugg, of Boston, Mass., and John Henry Lewin, of Washington, D. C., for plaintiff.

Timothy N. Pfeiffer and Morris Hadley, both of New York City, for Associated Press et al.

Robert T. Neill, of San Angelo, Tex., for special committee of Associated Press members in smaller communities.

Weymouth Kirkland, of Chicago, Ill., for Chicago Tribune and Robert R. McCormick.

Before L. HAND, SWAN, and AUGUSTUS N. HAND, Circuit Judges.

L. HAND, Circuit Judge.

This action comes before a special court, convened under § 28 of 15 U.S.C.A., upon a motion by the plaintiff for summary judgment. The complaint charged that the defendants had conspired to restrain and monopolize interstate commerce in violation of the Sherman Act, 15 U.S.C.A. §§ 1-7, 15 note, and the Clayton Act, 38 Stat. 730, and prayed that they be enjoined. The particulars of the charge may be summarized as follows: (1) A by-law, restricting membership in the Associated Presswhich we shall call APto such applicants as a majority of all the members may elect, and then only upon conditions which we shall describe later; (2) other by-laws, forbidding members of AP and their employees to communicate to anyone else any "spontaneous news", so-

called, communicated by them to AP, and forbidding AP to communicate its dispatches to non-members; (3) the purchase by AP of the shares of a news picture companyWide World Photos, Inc.(this in violation of § 7 of the Clayton Act, 15 U.S.C.A. § 18); (4) an agreement of AP with the Canadian Press, a similar organization operating in Canada, by which each furnishes its news exclusively to the other. The defendants have answered, and much evidence has been taken in the form of interrogatories, admissions under Rule 36, examinations before trial, and affidavits. Upon all of these the plaintiff has now moved for summary judgment. Although upon such a motion we are confined to such facts as are not disputed, or as to which the dispute does not raise any substantial issue, for reasons that will appear we hold that a trial will not be necessary. The case is therefore in posture for final disposition both as to those matters as to which we decide in the plaintiff's favor, and as to those as to which we decide in the defendants'.

AP is a New York corporation organized in 1900, the successor of an Illinois corporation of the same name. It is not a profit-making company, but strictly co-operative, paying its expenses by assessments levied upon its members, and never declaring any dividends, although it has accumulated large assets. Its purpose, as its charter declares, is "the collection and interchange, with greater economy and efficiency, of information and intelligence for publication in the newspapers" of its members. The news which it gathers is of two kinds, domestic and foreign; and originally it relied for the first largely upon the interchange of news between members, the association acting somewhat as a clearing house. News gathered in this way on the spot"spontaneous news"is still sent by members to be properly edited at the central offices which then sends it out at large. In recent years, however, although news so collected still remains an important part of its dispatches, AP has itself set up so many collecting agencies that the importance of such news has much diminished. Similarly as to foreign news. Originally AP obtained this from collecting agencies abroad whose dispatches it received and transmitted to its members after proper editing. As it has grown in size, however, it has set up its own foreign agencies like its domestic ones, and has come to depend less and less upon independent foreign news gatherers.

Since the plaintiff's chief attack is upon the by-laws, we must state these in some detail; especially those governing the admission of members, which are the turning point of the whole action, as will appear. The earlier Illinois corporation did not admit any applicant over the veto of existing members with whom the applicant was competing (papers in the same "field" in the same city). AP changed this by giving power to the members at large to overrule such vetoes by a four-fifths vote. Very recently, and after the Department of Justice showed signs of moving against it, AP reduced the vote necessary to overrule a veto, and at present applicants can be admitted by a bare majority vote of all the members at large. Admission is, however, subject to certain conditions which we shall describe laterrelaxed in one respect after this action was brought. The plaintiff argues from this progressive retreat, ***365** and from the paucity of admissions in the past thatwhatever AP's present surface complaisanceexperience proves that the majority always, or at least usually, will yield to the inevitable pressure of members in the same "field" in the same city, to resist the admission of competing applicants. We agree that, even though the by-laws were valid on their face, evidence, drawn from past practice, might be strong enough to justify the inference that they would be administered substantially as though they had not been changed; but we

ought to make no such assumption upon a motion for summary judgment, for we should be deciding a controversial issue on which the defendants would have the right to a trial. Therefore we disregard all the evidence as to admission of members in the past; not because that is not pertinent, but because it is not persuasive enough to put the issue beyond substantial question. Nevertheless, although the defendants are entitled to have us treat the by-laws as they read, they are not entitled to have us assume that those motives will not be operative in their enforcement which ordinarily actuate human beings similarly situated.

Article II of the by-laws divides members into two classes: "regular", and "associate". Only the "sole owner of a newspaper * * * shall be eligible." Every applicant must, in his or its application, describe the "field"that is whether a morning, afternoon, or Sunday paperin which his or its newspaper is published, and must specify the newspaper which is to receive the service. A member ipso facto ceases to be such when he ceases to own the newspaper described in his certificate, or when that newspaper ceases regular publication. A "retiring owner may, however, * * * assign his or its certificate of membership to the succeeding owner of such newspaper and such succeeding owner shall thereupon become a member of the same class as the predecessor upon signing the roll of members" etc. "When a change shall be made in the ownership of any newspaper * * * the member may transfer his or its certificate of membership with his or its newspaper, and the new owner shall be constituted a member of the same class as the predecessor by virtue of such assignment."

Article III provides for the admission of members. The owner of any newspaper may be admitted by the affirmative vote of a majority of the "regular" members, voting in person or by proxy at a regular meeting or at a special meeting called for the purpose. "Where there are one or more existing memberships in the field (morning, evening, or Sunday) in the city in which an applicant has been so elected, he or it shall not be admitted to membership" except upon the payment of "a sum equal to ten (10%) per cent of the total amount of the regular assessments received by the Corporation from members in the field (morning, evening or Sunday) in the city in which the applicant has been elected to membership, during the period from October 1, 1900, to the first day of the month preceding the date of the election of the applicant." (Until an amendment was made in this by-law after the complaint was filed, it had provided that the sum must also not "be less than three times the current annual regular assessments"). In addition, "the applicant shall relinquish any exclusive right that he or it may have * * * to any news or news picture services * * * and when requested to do so by any member or members in the field in the city * * * shall require the said news or news picture services * * * to be furnished to such member * * * upon the same terms as they are made available to the applicant." The moneys paid by the applicant are to be distributed among the members "in the field in the city * * * in proportion to the regular assessments paid by them over the period from October 1, 1900." If any such member chooses to release ("waive") his share, the applicant's burden is reduced accordingly. An alternative method of admission is by the Board of Directors; but this is limited to "a field in a city where there is no existing membership," or, if there are one or more such memberships, to cases where the "members in such field and city shall have waived the payment, in whole or in part."

Article VII defines the rights of the members. The regular members alone may vote; associate members may attend meetings, but may not vote; each regular member has

one vote by virtue of his membership, and additional votesnot more than forty for each memberreckoned at the rate of one vote to each $25.00 of the corporation's bonds which he holds. The board of directors determines the nature and extent of the news service to be received by a member. "The news service of this Corporation shall be furnished only to the members thereof, or to newspapers ***366** owned by them and specified in their certificates of membership. A member shall publish the news * * * only in the newspaper, the language and the place specified in such member's certificate of membership and shall not permit any other use to be made of the news furnished."

Article VIII describes the duties and obligations of the members. "Each member shall take the news service of the Corporation and publish the news regularly in whole or in part in the newspaper named in the Certificate of Membership. Each member shall also promptly furnish to the Corporation * * * all the news of such member's district, the area of which shall be determined by the Board of Directors." "The news which a member shall furnish * * * shall be all such news as is spontaneous in its origin," but not any other newsespecially no news "which has originated through deliberate and individual enterprise on the part of such member." "No member shall furnish * * * to any person who is not a member the news of the Corporation in advance of publication," or furnish any news to another member which AP is itself debarred from furnishing to that member. "No member shall furnish or permit anyone to furnish to anyone not a member of this Corporation, the news which he or it is required by the By-Laws to supply to this Corporation, or which he or it obtains from the Corporation or from any other member by virtue of his membership. Provided, however, that associate members may furnish or permit to be furnished to non-members, any news which they are required by the By-Laws to furnish to the Corporation."

At the present time, 1,274 newspapers are members of AP, of which 303 are morning, and 887 evening, papers. Of these, ninety-nine hold bonds in the amount of $1,000 or more, each of these having forty votes, as we have said. (These ninety-nine newspapers thus have nearly eighty per cent of the voting power). After receiving the news from its own agencies and elsewhere, AP edits it and by teletype transmits it to the members and to them alone. In levying assessments upon members it divides the United States into areas determined by cities, with a surrounding territory generally of not more than ten miles. The entire levy is allocated "fundamentally upon a plan of distributing the total cost * * * in proportion to the population served by each member." Each allotment is then divided among all the members in the same "field" and city in proportion to their number, not to their circulation. In the course of its existence AP has accumulated tangible property, estimated by it at more than $7,000,000most of which is in the City of New York. In addition, it appraises its "good-will" and other intangibles at $12,000,000.

Eighty-one per cent of the morning newspapers of the United States are members, and 59% of the evening newspapers; the aggregate of circulation of these newspapers is 96% of the total circulation of morning newspapers in the United States, and 77% of that of the evening newspapers. It has its own staff of 5,394, to whom should be added those engaged in gathering news in the employ of associate news services and of members. All in all, there are over 100,000 persons engaged in gathering news which is transmitted to it. It has 290,000 miles of leased news wires connecting 727 cities, and ninety-four news bureaus in the United States; and it has offices in more than 250 cities in this country and elsewhere. Its annual budget is approximately $12,000,000. There

are sixty-four morning newspapers in the United States, having a circulation of over 50,000: all but one of thesethe Chicago Sunare members; and all but two of the morning newspapers having a circulation of between 25,000 and 50,000, are members. Aside from the news which it gathers from its members and through its staffs, it contracts with a number of individuals called "string men", who also gather news and send it on to the proper office, being paid only for what is accepted and printed.

There are a great many other news gathering associations of one sort or another in the United States; but of these, only two are comparable in size and efficiency with APUnited Press (which we shall call UP) and International News Service (which we shall call INS). UP is the larger: it is a corporation organized for profit, unlike AP. It makes contracts with its customers at stated rates, and without any exclusive provision except that out of 981 domestic subscribers, it has entered into "asset-value" contracts with 215 scattered among 144 cities. This means that, if another paper wishes to secure UP service but will compete with the holder of an "asset-value" contract, the newcomer must pay to the holder the amount stated as the "asset-value" of his contract. For *367 the year 1941 UP's expenses were nearly $7,000,000; it maintained sixty-one news bureaus, and thirty-three foreign offices; it had 2885 employees, and received news gathered by the staffs of 584 domestic newspapers and 454 domestic radio stations; it had 176,000 miles of leased wires. Many newspapersapparently over 300which are members of AP, also subscribe to UP; it served 40% in number, and 64% in circulation of the daily morning papers written in English, and 45% in number and 65% in circulation of the evening newspapers. Of the sixty-four newspapers with a circulation of over 50,000, it served thirty-nine, and of the forty-six with a circulation of between 25,000 and 50,000, it served twenty-three. Upon this motion we must take it as in dispute whether the general opinion in the calling is that the service of UP is better than that of AP, or vice versa; many prefer the foreign and financial services of UP; some, even its domestic service. There have been instances of members of AP surrendering their rights and taking on UP service, and vice versa.

INS is a department of a larger corporation, organized for profit like UPthe King Features Syndicate, Inc.which combines a "straight" news service, a news photograph service, and a "feature syndicate": i.e. furnishing comment upon the news, comic strips, stories, etc. INS alone incurred expenses in 1941 of $2,600,000; it had 592 subscribers, of whom 338 were newspapers, and 182 radio stations; it maintained thirty-two domestic, and six foreign bureaus, and employed for news-gathering purposes over 2,100 persons, including its "string men." In addition, some seventy-five newspapers, and a number of radio stations furnished it with local news. It maintained a leased wire system connecting 186 cities. Like UP, it also makes "asset-value" contracts with its subscribers. Some newspapers are members of AP and also have "asset-value" contracts with both UP and INS. This is true in twenty-six cities, in which there is either only one daily paper or several owned in common; it is also true in eighteen other cities where the only morning or evening paper is in the same position. In such cases no newspaper can obtain any of the three services without a substantial payment to the papers already in possession. We insert in the margin,[1] a table of the cost of admission to AP in accordance with its present rule, requiring the payment of ten percent of the aggregate past assessments paid in the assessing areas since 1900. The "asset-value" of six of the UP contracts was under $10,000; of twenty it was between $10,000 and $20,000; of fifteen, between $20,000 and $30,000; of six, between $30,000 and

$40,000; of four, between $40,000 and $50,000; of one, between $50,000 and $60,000; and of one, between $60,000 and $70,000. There are no figures, so far as we can find, as to INS.

There are in this country, at least twenty to thirty other news agencies of various kinds; of these the most important are the Chicago Tribune-New York News Syndicate, the New York Herald Tribune Syndicate, and the New York Times News Syndicate. Each of these furnishes its service to any subscriber who meets its terms, but will ordinarily not furnish the service to two subscribers in the same city. It is not necessary to explain in detail the extent of these services; they are all substantial, but depend for the most part upon their own news gathering, as they are forbidden to distribute AP news by virtue of the AP by-laws. In competition with AP's picture service is Acme News Photos, Inc. There is so much dispute as to the relative efficiency of these two services that we must take it that Acme is at least the equal of AP. There have been a number of newspapers which have grown to very large size without AP service; the New York Daily News is an outstanding example, reaching a circulation of 1,200,000 before it became a member. The Chicago Sun, which has never succeeded in becoming a memberin July, 1942, had attained a circulation of 327,000, and a Sunday circulation of over 400,000. Among others of very substantial circulation are the Cleveland Press, the Pittsburgh Press, the East St. Louis Journal, and the Harrisburg ***368** Evening News. Until 1937 the New York Daily Mirror, and until 1936 the New York Journal, each achieved extremely large circulations indeed, without membership.

In 1941 AP bought all the shares of Wide World Photos, Inc. This company had been furnishing news pictures to newspapers both members of AP and others; and it was in competition with AP, which paid $359,000 for its business in the western hemisphere and in all possessions of the United States. The sellerthe New York Timesagreed not to sell news pictures in this territory for fifteen years; it had found the Wide World Photos, Inc., not a profitable undertaking, and that AP itself furnished adequate picture service. Six hundred and thirty-seven out of the 1,274 members of AP took the AP picture service, which it rendered to members alone. At the time of the transfer, the Wide World Photos, Inc., had 127 customers in all parts of the worldsixty of whom were English language newspapers in the United States. Forty-three of these were members of AP and eighty-four were not: of the forty-three AP members, all but seven also took pictures from AP. After buying the shares, AP changed the name of its picture service to "Wide World Features", and advertised it as the most complete coverage of news photographs and features. The old Wide World service has now been discontinued as to every subscriber in the United States who is not an AP member, except the newspaper, "P.M." One of the important assets purchased was the "morgue": i.e., a large collection of pictures suitable for publication.

The Canadian Press is the Canadian counterpart of AP; its by-laws provide: "No member shall furnish news * * * of the Canadian Press nor his own local news to which the Corporation has exclusive rights, to any person in Canada who is not a member of the Corporation, nor to any United States news agency or newspaper other than the Associated Press and its members." On November 1, 1935, AP and the Canadian Press agreed that the Canadian Press would furnish its news exclusively to AP outside of its own territory, and would prevent any of its members from furnishing its own news or local news to any newspapers or agencies other than AP and its members. The consideration for this promise was a similar promise by AP not to sell to anyone other

than the Canadian Press in Canadian territory. On September 15, 1942, the Canadian Press had eighty-seven regular members and one associate member, and in February, 1943, there were at least seven daily newspapers in the Dominion of Canada which were not members of the Canadian Press. The aggregate circulation of members of that association was 2,305,203; and of those who were not its members, 116,583. UP has a wholly owned subsidiary, called the British United Press, which covers Canadian news. Its subscribers in Canada are fifty-three newspapers and thirty-nine radio stations; it exchanges news with UP. All Canadian radio stations which are subscribers to the British United Press must supply their local news to it. INS, The Chicago Tribune and the New York Times, also have newsgathering means in Canada.

The by-laws of AP are in effect agreements between the members: that one which restricts AP to the transmission of news to members, and that which restricts any member to transmitting "spontaneous" news to the association, are both contracts in restraint of commerce. They restrict commerce because they limit the members' freedom to relay any news to others, either the news they learn themselves, or that which they learn collectively through AP as their agent. The commerce which they restrict is interstate commerce. Associated Press v. National Labor Relations Board, 301 U.S. 103, 57 S. Ct. 650, 81 L. Ed. 953. However, as everyone now agrees, since the decisions of the Supreme Court in Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619, 34 L.R.A.,N.S., 834, Ann.Cas.1912D, 734, and American Tobacco Co. v. United States, 221 U.S. 106, 31 S. Ct. 632, 55 L. Ed. 663, restriction alone is not enough to stamp a combination as illegal; it must be "unreasonable" in the sense that the common law understood that word; and that never has been, and indeed in the nature of things never can be, defined in general terms. Courts must proceed step by step, applying retroactively the standard proper for each situation as it comes up, just as they do in the case of negligence, reasonable notice, and the like. As good a statement as any of the common law upon the subject is that in the Restatement of Torts (§ 765, Vol. IV, Comment on Subsection 2): "Decision in each case depends upon a comparative appraisal of the values of the object sought to be accomplished by the actors' conduct, the effects of such conduct *369 and of the object on competition and on business enterprise, and the opposing interests of the actors in freedom of action and of the person harmed in freedom of opportunity to do business." Again, "self-interest particularly a purpose to advance the business interest of the actors, may be a justification even though the harm caused by the refusal" (to deal) "is intended to be the means of advancing that interest."

There are some situations in which the liabilities have now become settled. No combination fixing prices is valid; it is no excuse that some such arrangement may be necessary to prevent destructive price wars or the like. Whatever doubts were thrown upon United States v. Trenton Potteries Co., 273 U.S. 392, 47 S. Ct. 377, 71 L. Ed. 700, 50 A.L.R. 989, by Appalachian Coals, Inc., v. United States, 288 U.S. 344, 375, 53 S. Ct. 471, 77 L. Ed. 825, and Sugar Institute, Inc., v. United States, 297 U.S. 553, 599, 56 S. Ct. 629, 80 L. Ed. 859, have been finally laid in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210-228, 60 S. Ct. 811, 84 L. Ed. 1129. Again, if a combination effectively excludes, or tries to exclude, outsiders from the business altogether, it is a monopoly, or an incipient monopoly, and it is unconditionally unlawful. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136; Montague & Co. v. Lowry, 193 U.S. 38, 24 S. Ct. 307, 48 L. Ed. 608; Fashion Originators' Guild v. Federal

Trade Commission, 312 U.S. 457, 668, 61 S. Ct. 703, 85 L. Ed. 949; American Medical Ass'n v. United States, 317 U.S. 519, 63 S. Ct. 326, 87 L.Ed. . That is indeed the standard type of an illicit combination. A third instance is an attempt indirectly to extend the scope of a lawful monopoly: e. g., a patent or a copyright, beyond the terms of the grant, even though the sanction employed is no more than the monopoly itself. Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 33 S. Ct. 9, 57 L. Ed. 107; Interstate Circuit, Inc., v. United States, 306 U.S. 208, 59 S. Ct. 467, 83 L. Ed. 610; Ethyl Gasoline Corporation v. United States, 309 U.S. 436, 60 S. Ct. 618, 84 L. Ed. 852. Finally, a combination may be illegal because of the means used to effect purposes lawful in themselves; and the means may be unlawful although it would not be, if used by a single person. It is arguable that a boycott, for instance, is always such a means: i.e., any use by a combination of its economic power to force a third person not to deal with another whom the combination wishes to coerce. At least, there is language in the books which lends itself to such a conclusion. Loewe v. Lawlor, 208 U.S. 274, 28 S. Ct. 301, 52 L. Ed. 488, 13 Ann.Cas. 815; Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A. L.R. 196; Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37, 47 S. Ct. 522, 71 L. Ed. 916, 54 A.L.R. 791; Fashion Originators' Guild v. Federal Trade Commission, supra, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949. It is unnecessary to enumerate more of those means which have been condemned; and indeed, since they are generally part of an effort to monopolize, it is not always easy to be sure that that has not been the basis of their condemnation.

But these settled instances are not exhaustive; they are only illustrations of a general doctrine, whose scope they do not measure. When a situation does not fall within one of them, a court is forced to weigh the advantages gained by the combination against the injury done to the public, and apparently in this connection the public is the "purchasers or consumers" whom the combination will deprive "of the advantages which they derive from free competition." Apex Hosiery Co. v. Leader, 310 U.S. 469, 501, 60 S. Ct. 982, 996, 84 L. Ed. 1311, 128 A.L.R. 1044. It is not necessarily enough that a combined refusal to deal with others always has a weightier impact than that of an individual; as courts have frequently recognized that it must have. Grenada Lumber Co. v. State of Mississippi, 217 U.S. 433, 440, 30 S. Ct. 535, 54 L. Ed. 826; Binderup v. Pathe Exch., Inc., 263 U.S. 291, 312, 44 S. Ct. 96, 68 L. Ed. 308; Federal Trade Commission v. Raymond Bros.-Clark Co., 263 U.S. 565, 573, 574, 44 S. Ct. 162, 68 L. Ed. 448, 30 A.L.R. 1114. That is indeed a most important element, but alone it will not always serve; a combination may be within its rights, although it operates to the prejudice of outsiders whom it excludes. Anderson v. United States, 171 U.S. 604, 19 S. Ct. 50, 43 L. Ed. 300; Appalachian Coals, Inc., v. United States, supra, 288 U.S. 344, 53 S. Ct. 471, 77 L. Ed. 825; Matthews v. Associated Press, 136 N.Y. 333, 32 N.E. 981, 32 Am.St.Rep. 741. This is illustrated in addition by those decisions in which, although ***370** the court finally condemned a trade association, it went to great lengths to find its apparently innocent regulations a cover for price-fixing; the clear implication being that, without that element, the combination would have been lawful. Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 34 S. Ct. 951, 58 L. Ed. 1490, L.R.A.1915A, 788; American Column & Lumber Co. v. United States, 257 U.S. 377, 42 S. Ct. 114, 66 L. Ed. 284, 21 A.L.R. 1093; United States v. American Linseed Oil Co., 262 U.S. 371, 43 S. Ct. 607, 67 L. Ed. 1035; Sugar Institute, Inc., v. United States, supra, 297 U.S. 553, 597, 56 S. Ct. 629, at page 641, 80 L. Ed. 859. On the other hand, in cases like Anderson v. Shipowners' Ass'n, 272 U.S. 359, 47 S. Ct. 125, 71 L. Ed. 298; Paramount

Famous Lasky Corp. v. United States, 282 U.S. 30, 51 S. Ct. 42, 75 L. Ed. 145; and United States v. First Nat. Pictures, Inc., 282 U.S. 44, 51 S. Ct. 45, 75 L. Ed. 151, although the combination did not try to fix prices, or altogether to exclude outsiders from the industry, but only to impose conditions upon their freedom of action, the injury imposed upon the public was found to outweigh the benefit to the combination, and the law forbade it. We can find no more definite guide than that.

Certainly such a function is ordinarily "legislative"; for in a legislature the conflicting interests find their respective representation, or in any event can make their political power felt, as they cannot upon a court. The resulting compromises so arrived at are likely to achieve stability, and to be acquiesced in: which is justice. But it is a mistake to suppose that courts are never called upon to make similar choices: i.e., to appraise and balance the value of opposed interests and to enforce their preference. The law of torts is for the most part the result of exactly that process, and the law of torts has been judge-made, especially in this very branch. Besides, even though we had more scruples than we do, we have here a legislative warrant, because Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case. Congress might have proceeded otherwise; it might have turned the whole matter over to an administrative tribunal, as indeed to a limited extent it has done to the Federal Trade Commission. But, though it has acted, it has left, these particular controversies to the courts, where they have been from very ancient times.

As we have said, the crucial bylaws of AP are those which deal with the admission of members, for the fate of the others which the plaintiff challenges depends upon them. 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. When however the applicant is competing in the same "field" in a city with existing members, the directors have no power to admit him except upon the consent ("waiver") of his competitors; and while these have no longer their former absolute veto, they retain what we may fairly call a conditional veto. They may require the applicant to get the vote of a majority of all regular members and to fulfill the entrance conditions which we have described. To put the power into the hands of the majority, of whom only a very few can be competitors of the applicant, certainly gives the appearance of liberalizing admission; and unquestionably it has somewhat done so. Indeed, there have at times been sharp election contests, whose conduct was incidentally not always edifying. But, although the change was some abatement of the competitors' earlier control, it by no means opened membership to all those who would be entitled to it, if the public has an interest in its being free from exclusion for competitive reasons, and if that interest is paramount. Although, as we have said, only a few members will have any direct personal interest in keeping out an applicant, the rest will not feel free to judge him regardless of the effect of his admission on his competitors. Each will know that the time may come when he will himself be faced with the application of a competitor; and that will be true even as to those in whose "field" no applicant has as yet appeared. Unless he supports those who now object to the admission of their competitor, he will not in the

future be likely to get their support against his own. ***371** A by-law which leaves it open to members to vote solely as their self-interest may dictate, disregards whatever public interest may exist. It remains true that the situation may still be one of those in which, in the words of the Restatement, "self-interest * * * may be a justification even though the harm caused by the refusal is intended to be the means of advancing that interest"; but, the opposed interests must be assessed and balanced.

So much for the power of competing members to insist upon a vote of the majority. The conditions which they may exact when an applicant secures such a vote are plainly designed in the interest of preventing competition. The first is the payment of ten per cent of all the assessments paid by members in the same "field" for a period of over forty years: the payment to be distributed among those who have paid the assessments. This upon its face appears an exaction designed to compensate the applicant's competitors for the loss of their differential advantage, and incidentally to act as a deterrent. The defendants seek to justify it, however, upon the theory that it merely reimburses the competitors for that share in the capital assets which they must yield to him out of their collective interest. There are two answers to this. First, no such payment is required of an applicant who does not compete with any member, though he becomes equally a co-owner of the capital assets, and entitled to his share on any distribution. Second, the percentage was not in fact computed upon the value of the share in the capital assets to which an applicant becomes entitled on admission, even though we include in capital such questionable items as the employees' benefit fund (which, it would seem, could hardly be regarded as beneficial to members) or the value of the good-will (which, in part at any rate, must be dependent upon the power to exclude competitors). The evidence proves beyond doubt that, although the putative value of the assets, tangible and intangible, was a factor, the payments as a whole were also designed to compensate competitors for the loss in value of their membership, arising out of the applicant's improved position as a competitor. This was consistent enough with AP's position that membership is a purely personal privilege; but if that position be ill taken, the condition makes necessary the appraisal of the public interest. The other condition is that an applicant shall relinquish any exclusive right of his own to any news, and news picture, service; and shall "require" such service to be given on the same terms as he enjoys it, to any one of his competitors who demands it. To require him to relinquish his own exclusive rights may perhaps be "reasonable", but certainly it is not so to require him to secure similar rights to others. That may prove a complete bar to the admission of any applicant who is already a member of a news service not automatically open to all comers.

Is it permissible to treat membership in AP as a purely proprietary privilege? It is not a monopoly in the sense that membership is necessary to build up, or support, even a great newspaper. Such papers have been founded and have thriven without it; they have abandoned it, after they have used it. Indeed, there appear to be some who think that UP is a better service, at least in some departments, perhaps in all. But monopoly is a relative word. If one means by it the possession of something absolutely necessary to the conduct of an activity, there are few except the exclusive possession of some natural resource without which the activity is impossible. Most monopolies, like most patents, give control over only some means of production for which there is a substitute; the possessor enjoys an advantage over his competitors, but he can seldom shut them out altogether; his monopoly is measured by the handicap he can impose. Fashion

Originators' Guild v. Federal Trade Commission, 2 Cir., 114 F.2d 80, 85. And yet that advantage alone may make a monopoly unlawful. It would be possible, for instance, to conduct some kind of a newspaper without any news service whatever; but nobody will maintain that, if AP were the only news service in existence, the members could keep it wholly to themselves and reduce all other papers to such news as they could gather by their own efforts. The very virtues of the founders which had achieved their unique position, would force upon them hospitality to applicants. Nor need AP be even the best of all existing services; it might be enough that it was the largest and most popular, and that there was a substantial body of opinion in the calling which believed it to be the best. Its popularity is proved by the enormous preponderance of its members, both in number and in circulation; as well as by the fact that, out of nearly a thousand members of UP almost a third are also AP members, No decision ***372** of ours as to the relative merits of the two would convince those who may chance to prefer it; the grievance of being unable to choose his own tools is not assuaged, when a court finds that the user does not understand his interest. And so, even if this were a case of the ordinary kind: the production of fungible goods, like steel, machinery, clothes or the like, it would be a nice question whether the handicap upon those excluded from the combination, should prevail over the claim of the members to enjoy the fruits of their foresight, industry and sagacity. But in that event the only interest we should have to weigh against that of the members would be the interest of the excluded newpapers. However, neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.

News is history; recent history, it is true, but veritable history, nevertheless; and history is not total recall, but a deliberate pruning of, and calling from, the flux of events. Were it possible by some magic telepathy to reproduce an occasion in all its particularity, all reproductions would be interchangeable; the public could have no choice, provided that the process should be mechanically perfect. But there is no such magic; and if there were, its result would be immeasurably wearisome, and utterly fatuous. In the production of news every step involves the conscious intervention of some news gatherer, and two accounts of the same event will never be the same. Those who make up the first recordthe reporters on the spotare themselves seldom first hand witnesses; they must take the stories of others as their raw material, checking their veracity, eliminating their irrelevancies, finally producing an ordered version which will evoke and retain the reader's attention and convince him of its truth. And the report so prepared, when sent to his superiors, they in turn "edit", before they send it out to the members; a process similar to the first. A personal impress is inevitable at every stage; it gives its value to the dispatch, which without it would be unreadable. So much for those items which actually appear in all the larger news services, and which include all events of major interest. But these are not all: the same personal choice which must figure in preparing a dispatch, operates in deciding what events are important enough to appear at all; and about that men will differ widely; as we often find, when one service "carries" what others have thought too trivial; or may indeed have missed altogether.

For these reasons it is impossible to treat two news services as interchangeable, and to deprive a paper of the benefit of any service of the 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. Nor is it an answer that the by-law challenged only applies to a "field", in which by hypothesis there is already an AP newspaper in which AP dispatches will appear. That is true, but the final product to the reader is not the AP dispatch simpliciter; but how and where it appears in the paper as it comes before him. That paper may print it verbatim, or a summary of it, or a part of it. The last two are certainly as authentically new and original as the dispatch itself; they bear somewhat the same relation to it that it does to the first report, or that the first report does to the event or occasion. And, even though the whole dispatch be printed verbatim, its effect is not the same in every paper; it may be on the front page, or it may be in an obscure corner; depending upon the importance attached to it. The headlines may plangently call it to readers' attention, or they may be formal and unarresting. There is no part of a newspaper which is not the handiwork of those who make it up; and their influence is often most effective when most concealed.

But what, it is asked, are the limits of such a doctrine? Does it apply to the engagement of a single reporter by a single editor? Suppose the only source of information about momentous events in some remote region is a single exceptionally gifted correspondent: must any paper which engages him agree to admit all others on equal terms? Consistently, must we not recognize the overriding public interest in ***373** his reports, particularly since in such a case his employer will otherwise have a monopoly? The answer to such questions need not embarrass us: their pertinency presupposes that whatever is true in small matters, must be true in large; and the greater part of the law is founded upon a denial of exactly that; for in law differences in quantity again and again become decisive differences in quality. We need not therefore say how important the control of news in any supposititious case must be in order to demand relief; it is enough that in the case at bar AP is a vast, intricately reticulated, organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed to be of prime consequence. Wherever may be the vanishing point of public concern with any particular source of information, that point is far beyond this service.

Finally, we are told that what we propose is equivalent to declaring that the business is "clothed with a public interest", and that that is beyond the powers of a court. There are decisions which so declare, although we do not consider as among them Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co., 110 U.S. 667, 4 S. Ct. 185, 28 L. Ed. 291, or the Express Cases, 117 U.S. 1, 6 S. Ct. 542, 628, 29 L. Ed. 791. However, we could even assume arguendo that in the absence of any legislative action, courts will not undertake to say when any activity has enough public importance to demand their intervention. For, although any such conclusion is flatly contrary to the well-settled common law of contracts in restraint of trade, Congress, as we have said, has already acted, and it has acted by selecting the standard of the common law as the measure of its will. Historically that standard can only be applied by assessing the public importance of the activity which by hypothesis has been restricted; and practically no other conceivable standard is rationally available. So far therefore as the conclusion, when the public aspect of the activity prevails, involves a declaration that it is "clothed with a public interest," in administering the Anti-Trust Acts courts must so declare, as they have

independently of those acts declared from time immemorial. The unhappy metaphor itself is ordinarily used in cases where a legislature sets up a developed system of positive regulation, with whose administration it charges some agency created for the purpose. Obviously, that requires a legislative decision as preclude; and obviously, courts cannot discharge such duties. But there is no warrant for holding that the failure of Congress specifically to say that all activities are to be deemed so "clothed", whenever the courts find them to be, shall deny power to the courts to effect the legislative will. Indeed, the whole matter is a red herring which should no longer be allowed to break the scent. Since Nebbia v. People of State of New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469, there cannot be any excuse for misunderstanding the matterthere has really been none since Munn v. State of Illinois, 94 U.S. 113, 24 L. Ed. 77. "If one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue. * * * The phrase * * * can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good." Nebbia v. New York, supra, 291 U.S. 502, 534, 536, 54 S. Ct. 505, 514, 515, 78 L. Ed. 940, 89 A.L.R. 1469.

We conclude therefore that the present by-laws of AP unlawfully restrict the admission of members; and that further enforcement of them should be enjoined. We shall not attempt to say what conditions may be imposed; we hold no more than that members in the same "field" as the applicant shall not have power to impose, or dispense with, any conditions upon his admission, and that the by-laws shall affirmatively declare that the effect of admission upon the ability of an applicant to compete with members in the same "field" shall not be taken into consideration in passing upon his application. It is of course true that the members may disregard the last provision in practice; but that is not to be assumed. At any rate, we think that the plaintiff is entitled to that much positive assurance in the organic law; and it is as far as we can go.

The second charge is against the by-law which forbids the communication of news by AP to non-members, and of "spontaneous" news by members to nonmembers. The defendants answer as to the agreement not to disclose "spontaneous" news, that it is ancillary to the collection and transmission to AP of that news itself. News, they argue,as its very name implieshas no value after it has once been published; if a member were free to impart "spontaneous" news to ***374** others who could use it before AP, the whole value of the grant would be gone. Even if a member were allowed to impart it to others who could use it simultaneously, its chief value would be gone, for that rests upon priority. As to the agreement that AP shall not impart news collected by it to non-members, similar considerations apply; they would lose all benefit of the expenses incurred in its collection unless they had priority. It is well settled, they continue, that a restrictive covenant necessary to the protection of property transferred is "reasonable." The most common one is an agreement not to compete with the buyer of a business, or of a professional practice, for a limited time and in a limited territory; but that, they insist, is only one example of the general doctrine, which many and various decisions support. We quite agree with all this: taken by themselves, and apart from the restrictions upon membership, both agreements would be valid; it is essential to the protection of the main purpose that the member who furnishes "spontaneous" news, or AP itself, shall not destroy the value of what is transferred by making it available to others, before it can be published. Nevertheless, in all such cases the power must not be incident to a combination which, though bound to admit all on equal terms, does not do so. United

States v. Terminal Railroad Ass'n of St. Louis, 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed. 810; United States v. Great Lakes Towing Co., D.C., 208 F. 733, affirmed D.C., 217 F. 656. While the present by-laws as to admission are in force, these agreements are parts of an unlawful combination, and they must be enjoined until the primary wrong is remedied.

The third charge is the purchase of all the shares of Wide World Photos, Inc.; andno intent to monopolize being shownthat charge necessarily rests upon section seven of the Clayton Act, and, so in turn, upon whether the existing competition between AP and Wide World Photos, Inc., was "substantial." Plainly, it was not; AP did not sell its picture service to outsiders, so that the only possible competition of Wide World Photos, Inc., was in diverting from AP its members who might otherwise have taken AP's picture service. There were however only seven AP members, who subscribed to Wide World Photos, Inc., and did not subscribe to AP service. In these circumstances we cannot see how the purchase could have suppressed any but the most trivial competition. This part of the complaint must be dismissed.

The fourth and last charge is the "cartel", or agreement, between AP and the Canadian Press that Canadian Press dispatches shall go only to AP members, and that AP dispatches shall go only to Canadian Press members. So far as by this means AP secures to its own members exclusively all Canadian Press dispatches, the contract falls within the ban of the restrictive covenants challenged in the second charge. It is true that AP's only covenant is not to give its dispatches to newspapers in Canada which are not members of the Canadian Press, and that the Anti-Trust Acts are directed only to the protection of American interests; nevertheless, that covenant is the consideration for securing to AP members a monopoly of the Canadian Press dispatches, and condemns the contract as a whole. We can see no reason, however, why, if admission to AP were properly liberalized, it should not make such an agreement, whatever effect it may have in Canada. How far the Canadian law might forbid its execution there, is obviously not for us to decide.

In conclusion it is perhaps proper that we should say a word about the freedom of the press, since that question has been mentioned in the briefs. 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. We do not understand on what theory that compulsion can be thought relevant to this issue; the mere fact that a person is engaged in publishing, does not exempt him from ordinary municipal law, so long as he remains unfettered in his own selection of what to publish. All that we do is to prevent him from keeping that advantage for himself. 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. For, if AP were open to all who wished the service, could pay for it, and were fit to use it, it would be no longer a monopoly: a monopoly of all those interested in an activity is no monopoly at all, for no one is excluded and the essence ***375** of monopoly is exclusion. AP would then be only a collective effort of the calling as a whole. If other services were incidentally driven out, that would not be an actionable wrong.

A judgment may therefore be entered enjoining the defendants from continuing to enforce the by-laws regulating the admission of members in their present form, but

leaving it open to them to adopt substitutes which will restrict admission, provided that members in the same "field" as the applicant shall not have power to impose, or dispense with, any conditions upon his admission, and that the by-laws shall affirmatively declare that the effect of admission upon the ability of an applicant to compete with members in the same "field" shall not be taken into consideration in passing upon his application. The judgment will also enjoin the enforcement of the restrictive by-laws forbidding members to communicate "spontaneous" news to non-members. (On the argument, the plaintiff declared that it did not object to the by-law which confines AP dispatches to its own members. We do not know whether it still would not object, if the admission provisions remained as they are. An injunction against the enforcement of that by-law will depend upon its choice.) The judgment will further enjoin performance of the contract, or "cartel", with the Canadian Press. In all other respects the complaint will be dismissed. Such a judgment will finally dispose of all the issues raised in the action upon the facts as they now are. However, it is appropriate and fair to provide that, if AP sees fit to amend its by-laws, governing the admission of members, it may have leave to apply in this action for supplemental relief upon the new state of facts. Moreover, in view of the disorganization which meanwhile might take place, if the injunction were enforced against the restrictive covenants as to the communication of news and against the Canadian Press contract, we will stay those injunctions for a period of 120 days after the judgment has been entered. That should be time enough for the defendants to decide what changes, if any, they care to make as to admission. Finally, because the interests involved are so important and so large; because the injury done may be so great, if we turn out to be wrong; and because we are not agreed, the whole judgment will be stayed for a period of sixty days after it is entered, and subsequently for the pendency of any appeal to the Supreme Court, if one is taken within that period.

The plaintiff will submit proposed findings and a proposed judgment; and will serve the same upon the defendants, who will submit any substitutes they may wish within thirty days thereafter.

SWAN, Circuit Judge (dissenting).

I regret that I am unable to concur in the decision of the court. Since my argument has not convinced my brothers, its validity is subject to grave doubt; nevertheless, I feel constrained to state briefly my reasons for differing with them.

This suit is founded upon alleged violations of the Anti-Trust Acts. The defendants are charged with having agreed to monopolize or unreasonably to restrain interstate commerce. It seems self-evident, and is not, I think, doubted by the majority opinion, that two newspapers might appoint a common agent to gather news and edit news reports for their common and exclusive use without running foul of the statutes. Such a case is thought to be differentiated from the present by the size and efficiency of the AP organization. I agree that what is true in small matters is not necessarily so in large matters; that difference in degree may produce difference in legal result. But to violate the antitrust law the combination, whatever its size, must tend to monopolize or to restrain unreasonably interstate trade. Clearly the provisions of AP's by-laws as to admission of members have had no tendency to create a monopoly in news gatheringwitness the growth of UP, INS, and other news gathering agencies. Nor is there proof that they have stifled competition between member newspapers and other

newspaper owners or prospective publishers. Not a single instance has been adduced where a newspaper failed because it lacked an AP membership or was not started because the intending publisher could not obtain one. On the contrary, numerous papers have attained great success without such membership. What, then, is the ground for holding that the by-law provisions have resulted in an unreasonable restraint of trade either in news gathering or in newspaper publishing? Solely the court's view that a news gathering organization as large and efficient as AP is engaged in a public calling, and so under a duty to admit "all 'qualified' applicants on equal terms."

***376** The only authority advanced by the plaintiff in support of the proposition that news gathering is a public calling is a discredited decision in Inter-Ocean Pub. Co. v. Associated Press, 184 Ill. 438, 56 N.E. 822, 48 L.R.A. 568, 75 Am.St.Rep. 184. This litigation involved not the present AP, but an earlier Illinois corporation whose charter granted it a power of eminent domain. The decision is contrary to Matthews v. Associated Press of State of New York, 136 N.Y. 333, 32 N.E. 981, 32 Am.St.Rep. 741, as was recognized in News Pub. Co. v. Associated Press, 190 Ill.App. 77. It was explained in a later opinion by the Supreme Court of Illinois, People v. Forest Home Cemetery Co., 258 Ill. 36, 41, 101 N.E. 219, L.R.A. 1917B, 946, Ann.Cas.1914B, 277, as resting upon the existence of the power of eminent domain. The Supreme Court of Missouri repudiated the doctrine of the Inter-Ocean case in State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 60 S.W. 91, 51 L.R.A. 151, 81 Am.St.Rep. 368.

The business of gathering news is not one of those occupations which were recognized at common law as affected with a public interest AP has never held itself out as ready to serve all newspapers. Nor has it been granted the power of eminent domain or any other public franchise which might justify imposing the duty to serve all applicants without discrimination. If such a duty is to be imposed on news gathering agencies, I think it should be by legislative, rather than judicial, fiat. In Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co., 110 U.S. 667, 4 S. Ct. 185, 28 L. Ed. 291, the question arose whether the Atchison was obliged to make joint traffic arrangements with the Denver & New Orleans on the same terms as it had granted to another connecting railroad. The court held that in the absence of appropriate legislation there was no such duty, saying at page 685 of 110 U.S., 4 S.Ct. at page 194, 28 L.Ed. 291:

"Were there such a statute in Colorado, this case would come before us in a different aspect. As it is, we know of no power in the judiciary to do what the Parliament of Great Britain has done, and what the proper legislative authority ought perhaps to do, for the relief of the parties to this controversy."

Again, in Express Cases, 117 U.S. 1, 6 S. Ct. 542, 628, 29 L. Ed. 791, which held that the railroads need not in the absence of a statute furnish to all independent express companies equal facilities for doing an express business upon passenger trains, it was said (117 U.S. at page 29, 6 S.Ct. at page 556, 29 L.Ed. 791): "The regulation of matters of this kind is legislative in its character, not judicial." The same thought was expressed by Mr. Justice Brandeis with respect to the very subject of news gathering in his dissenting opinion in International News Service v. Associated Press, 248 U.S. 215, at page 267, 39 S. Ct. 68, at page 82, 63 L. Ed. 211, 2 A.L.R. 293:

"Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be

deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations."

Similar views have been announced in cases involving stock exchanges, cotton warehouses, and stockyards. American Livestock Commission Co. v. Chicago Livestock Exch., 143 Ill. 210, 32 N.E. 274, 18 L.R.A. 190, 36 Am.St.Rep. 385; Heim v. New York Stock Exch., 64 Misc. 529, 118 N.Y.S. 591; Ladd v. Southern Cotton Press & Mfg. Co., 53 Tex. 172; Delaware, L. & W. R. Co. v. Central S. Y. & Transit Co., 45 N.J.Eq. 50, 17 A. 146, 6 L.R.A. 855, affirmed 46 N.J.Eq. 280, 19 A. 185. And I find nothing in Nebbia v. People of State of New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469, to contradict this view. There the New York legislature had acted; it had set up elaborate administrative machinery to regulate the milk industry. The chief question for decision was whether enforcement of Section 312(e) of the statute, Agriculture and Markets Law, Consol. Laws N.Y. c. 69, denied the appellant the due process secured to him by the Fourteenth Amendment. In sustaining the legislation, Mr. Justice Roberts remarked that so far as due process is concerned a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose; and he added (291 U.S. at page 537, 54 S.Ct. at page 516, 78 L. Ed. 940, 89 A.L.R. 1469) that "The courts are ***377** without authority either to declare such policy, or, when it is declared by the legislature, to override it."

In the case of a business which was not recognized as a public calling at common law, I believe it is sound policy to leave to the legislature to determine whether the public welfare requires that all applicants be served without discrimination. This is particularly true where the duty to serve all comers does not depend upon the mere nature of the occupation, but upon the fact that the particular business has reached such a state of size and efficiency as to give the persons whom it serves some competitive advantage over applicants whom it declines to serve. At once the question occurs to the mind whether UP, INS, the New York Times News Syndicate, or any of the other news gathering agencies must also serve all comers. The problem of when such a stage is reached is one of economic policy which should be settled by legislation, rather than having the answer plotted gradually by successive judicial decisions. Furthermore, although the decree we are to enter takes the form of an injunction, in substance we are assuming the legislative function of prescribing the terms and conditions upon which newspapers shall be admitted to membership. We do not, it is true, affirmatively order an amendment of the by-laws, but we give leave to apply for a lifting of the injunction after they have been amended. How the directors or members of AP are to determine in advance of adoption whether a proposed amendment will be satisfactory to the court I cannot see, unless we are in effect to supervise a revamping of the by-laws. Such revamping will require many changes in the present setup and will present many problems which I fear the court may be ill-equipped to decide.

Finally, the Anti-Trust Acts are not, in my opinion, a justification for imposing on AP the duty to serve without discrimination all newspaper applicants. The case principally relied upon by the plaintiff to show that the Sherman Act, 15 U.S.C.A. § 1 et seq., may be used to secure indiscriminate service to all comers is United States v. Terminal Railroad Ass'n of St. Louis, 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed. 810. In that opinion Mr. Justice Lurton pointed out that in ordinary circumstances a number of independent companies

might lawfully combine for the purpose of acquiring terminals for their common, but exclusive, use, but by reason of the peculiar topographical situation the terminals acquired by the Association gave it control of every feasible means of railroad access to St. Louis; and the decision was based in large measure upon that fact (224 U.S. at page 405, 32 S.Ct. at page 513, 56 L.Ed. 810). Although the Government urged that the Association be dissolved, the court directed, on account of the obvious advantages of a unification of terminal facilities, that the defendants submit a plan of reorganization which should make the Association the bona fide agent and servant of every railroad line desiring to use its facilities. I do not regard the case as apposite to the situation at bar. As already pointed out, the Terminal Association had obtained a complete monopoly. But AP has no monopoly in news gathering. The most that the plaintiff can urge is that a newspaper which is excluded from AP membership "operates under a competitive disadvantage with AP members." Even if this allegation of the complaint, which the answer denies, be accepted as proved despite the evidence that UP claims its service to be superior and many newspapers have preferred it, I think such handicap of competitors insufficient to establish a violation of the Anti-Trust Acts. The majority opinion intimates that in the case of ordinary goods it might not suffice, but holds that it does in the case of news reports. To my mind the nature of a news report, which is the intellectual product of him who makes it, points to the conclusion that he may choose to whom he will disclose it, rather than to the conclusion that he is under a duty to disclose it to all applicants.

For the foregoing reasons I am of opinion that the motion for summary judgment should be denied.

NOTES

[1] Morning and Sunday Evening - New York $824,333.82 $575,003.49

Chicago 334,250.46 342,310.35

Detroit 152,789.68 154,606.86

Los Angeles 228,126.82 134,709.80

St. Louis 182,323.42 186,882.23

Baltimore 169,163.78 148,658.13

Boston 253,680.16 218,917.92

Cleveland 144,865.63 131,474.18

Philadelphia 286,719.35 288,115.26

Pittsburgh 188,598.87 147,606.41

Washington, D. C. ... 118,930.08 88,293.20

All Aboard

In the November 27, 2020 issue of the *Advance Sheet,* we featured the first chapter from *The Prisoner At The Bar* (1907), written by Arthur Cheney Train, who was at the time an Assistant District Attorney in New York City. The chapter was entitled "What Is Crime?" In this issue we feature the second chapter from the same work "Who Are The Real Criminals?"

Arthur Cheney Train was born in Boston in 1875. He was a lawyer and writer of legal thrillers, perhaps best known for his creation of the fictional lawyer Mr. Ephain Tutt. Tutt was featured in a dozen or so novels and roughly twice that many articles in the "Saturday Evening Post." Train wrote both fiction and non-fiction. We thought that you might find it interesting to hear the musings on the subject of the original John Grisham of his times. We hope you enjoy. Please let us know what you think about this or any other material in the *Advance Sheet*.

CHAPTER II

WHO ARE THE REAL CRIMINALS?

Some reader of the preceding chapter may perhaps remark, "This is all very well so far as it goes. It doubtless is entirely true from a purely technical point of view. But that is only one side of the matter. How about the *real* criminals?" This is neither an unexpected nor an uninvited criticism. Who *are* the "*real*" criminals? Charles Dudley Warner says: "Speaking technically, we put in that [the criminal] class those whose sole occupation is crime, who live upon it as a profession and who have no other permanent industry. They prey upon society. They are by their acts at war upon it and are outlaws." Now the class of professional criminals to which Mr. Warner refers as contrasted with the great mass of criminal defendants as a whole is, in point of fact, relatively so small, and so easily recognized and handled, that it plays but an inconspicuous part in the administration of criminal justice.

The criminals who conform accurately to childhood's tradition are comparatively few in number. The masked highwayman, the safe-cracker and even the armed house burglar have, with a few exceptions, long since withdrawn from the actual pursuit of their romantic professions and exist practically only in the eagerly devoured pages of Sherlock Holmes and the memoirs of "great detectives." New and

almost more picturesque figures have taken their places,—the polite and elegant swindler, the out-at-the-elbows but confidence-inspiring promoter of assetless corporations, the dealer in worthless securities, and the forger who drives in his own carriage to the bank he intends to defraud. In some cases the individuals are the same, the safe-cracker merely having doffed his mask in favor of the silk hat of Nassau Street. Of yore he stole valuable securities which he was compelled to dispose of at a tremendous discount; now he sells you worthless stocks and bonds at a slight premium. Mr. J. Holt Schorling, writing in *The Contemporary Review* for June, 1902, points out that while all crimes other than fraud decreased materially in England from 1885 to 1899, the crime of fraud itself materially increased during the same period.*

The subject is a tempting one, but it is not essential to our thesis. The devil is not dead; he has merely changed his clothes. Criminal activity has not subsided; it has instead sought new ways to meet modern conditions, and so favorable are these that

*Including under the general term "fraud," obtaining money by false pretences, thefts by solicitors, bankers, agents, directors, trustees, etc. ("generally recorded under the euphony 'mis-appropriation'"), falsifying accounts, etc., Mr. Schorling found that taking the number of these two divisions of crime between 1885–1889 as 100% there had been the following relative decrease and increase between them:

All Crimes Except Fraud		*Frauds*	
1885–1889	100 %	1885–1889	100 %
1890–1894	96.2%	1890–1894	110.1%
1895–1899	90.4%	1895–1899	138.3%

A similar table constructed for the United States during the last fifteen years would be instructive but perhaps unduly depressing. Recent financial and other disclosures would probably send up the mercury of the "fraud" thermometer until it burst.

while polite crime may be said still to be in its infancy, it is nevertheless thriving lustily.

While the degenerate criminal class is the subject of much elaborate and minute analysis by our continental neighbors, its extent is constantly exaggerated and its relation to the other criminal classes not fully appreciated. To read some supposedly scientific works one would imagine that every court of criminal justice was or should be nothing but a sort of clinic. To these learned authors, civilization, it is true, owes a debt for their demonstration that some crime is due to insanity and should be prevented, and, where possible, cured in much the same manner. But they have created an impression that practically all crime is the result of abnormality.

Every great truth brings in its train a few falsehoods,—every great reform a few abuses. The first penological movement was in the direction of prison reform. While perhaps the psychological problem was not entirely overlooked, it was completely subordinated to the physical. It is a noble thing that the convict should have a warm cell in winter and a cool one in summer, with electric light and running water, wholesome and nutritious food, books, bathrooms, hospitals, chapels, concerts, ball games and chaplains. "But it must be noted that along with this movement has grown up a sickly sentimentality about criminals which has gone altogether too far, and which, under the guise of humanity and philanthropy, confounds all moral distinctions." To a large number of well-meaning people every convict is a person to whom the State has done an injury.

Then came the study of degeneracy, with the cranium of every criminal as a specimen for analysis.

In 1881 or thereabouts Professor Benedickt published his conclusion that "the brains of criminals exhibit a deviation from the anthropological variety of their species, at least among the cultured races." It was a commendable thing to point out the relation of insanity to crime. It is an undeniable truth that there are insane people who are predisposed to crime just as there are those who are predisposed to dance.

The vicious criminal class contains many who are actually or incipiently insane, and it numbers a great many more who are physically and mentally normal, who yet by reason of their education and environment are not much to be blamed for doing wrong. But it is far from true that a majority of the "real" criminals are mentally defective. Crime and insanity are no more closely related than sin and insanity. Certain criminals are also perverts. But they would be criminals even if they were not perverts. The fact that a man who takes drugs is also a criminal does not prove that he is a criminal because he takes drugs. We know many drug-takers who are otherwise highly respectable. Go to the General Sessions and watch the various defendants who are brought into court and you will discover little more degeneracy or abnormality than you would find on the corner of Twenty-third Street and Fifth Avenue among the same number of unaccused citizens.

The point which the writer desires to make is that, leaving out the accidental and experimental criminals, there is a much closer relation between all lawbreakers than the public and our legislators seem to suppose. The man who adulterates his milk to make a little extra money is in the same class with

the financial swindler. One waters his milk, the other his stock. The same underhanded desire to better one's self at the expense of one's neighbor is the moving cause in each case. The forger belongs to the class whose heads the criminologists delight to measure, but they would not measure your milkman's. The man who steals your name is a felon and a subject of scientific investigation and discussion; the man who forges a trade-mark commits only a misdemeanor and excites no psychological interest. But they are criminals of exactly the same type.

The "crime-is-a-disease" theory has been worked entirely too hard. It is a penologic generality which does not need any truckling to popular sentimentality to demonstrate its truth. But there are as many sorts of this disease as there are kinds of crime, and some varieties would be better described by other and less euphemistic names. Crime is no more a disease than sin, and the sinners deserve a good share of the sympathy that is at present wasted on the criminals. The poor fellow who has merely done wrong gets but scant courtesy, but once jerk him behind the bars and the women send him flowers. If crime is a disease, sin is also a disease, and we have all got a case of it. It is strange that there is not more "straight talk" on this subject. Every one of us has criminal propensities,—that is to say, in every one of us lurks the elemental and unlawful passions of sex and of acquirement. It is but a play on words to say that the man who yields to his inclinations to the extent of transgressing the criminal statutes is "diseased." Up to a certain point it is his own business, beyond it becomes ours, and he transgresses at his peril.

The ordinary criminal usually is such because he "wants the money"; he either does not like to work or wants more money than he can earn honestly. He has no "irresistible impulse" to steal,—he steals because he thinks he can "get away with it."

The so-called professional thief is usually one who has succeeded in so doing or who, having been convicted of larceny, finds he cannot live agreeably other than by thieving; but the man is no less a professional thief who systematically puts money in his pocket by dishonest and illegal methods in business. The fact that it is not, in the ordinary sense, his "sole occupation," does not affect the question at all. Indeed, it would be difficult for one whose business life was permeated by graft to refute the general allegation that his "sole occupation" was criminal. Granting this, your dishonest business man fulfils every requirement of Mr. Warner's definition, for he "preys upon society and is [secretly] at war upon it." He may not be an "outlaw," but he should be one under any enlightened code of criminal laws.

There is no practical distinction between a man who gets all of a poor living dishonestly and one who gets part of an exceedingly good living dishonestly. The thieving of the latter may be many times more profitable than that of the former. So long as both keep at it systematically there is little to choose between the thief who earns his livelihood by picking pockets and the grocer or the financier who swindles those who rely upon his representations. The man who steals a trade-mark, counterfeits a label, or adulterates food or drugs, who makes a fraudulent assignment of his property, who as a director of a cor-

poration declares an unearned dividend for the purpose of selling the stock of himself and his associates at an inflated value, who publishes false statements and reports, makes illegal loans, or who is guilty of any of the thousand and one dishonest practices which are being uncovered every day in the management of life insurance, banking, trust, and railroad companies, is precisely as "real" a criminal as one who lurks in an alley and steals from a passing wagon. *Each is guilty of a deliberate violation of law implying conscious wrong,* and each commits it for essentially the same reason.

Yet at the present time the law itself recognizes a fictitious distinction between these crimes and those of a more elementary sort. The adulteration of foods, the theft of trade-marks, stock-jobbing, corporation frauds, and fraudulent assignments are as a rule only misdemeanors. The trouble is that we have not yet adjusted ourselves to the idea that the criminal who wears a clean collar is as dangerous as one who does not. Of course, in point of fact he is a great deal worse, for he has not the excuse of having a gnawing at his vitals.

If a rascally merchant makes a fraudulent conveyance of his property and then "fails," although he may have secreted goods worth fifty thousand dollars, the punishment of himself and his confederate is limited to a year in the penitentiary and a thousand dollars fine, while if a bank cashier should steal an equivalent amount and turn it over to an accomplice for safe keeping he could receive ten years in State's prison. Even in this last case the receiver's punishment could not exceed *five* years. Thus Robert A. Ammon, who was the sole person

to profit by the notorious "Franklyn Syndicate," when convicted of receiving the proceeds of the fraud, could be sentenced to only five years in Sing Sing, while his dupe, Miller, who sat at the desk and received the money, although he acted throughout by the other's advice and counsel, in fact did receive a sentence of ten years for practically the same offence. However inequitable this may seem, what inducements are offered in the field of fraudulent commercial activity when a similar kind of theft is punishable by only a year in the penitentiary?

One can hardly blame such picturesque swindlers as "Larry" Summerfield, who saw gigantic financial and commercial frauds being perpetrated on every side, while the thieves who had enriched themselves at the expense of a gullible public went scot-free, for wanting to participate in the feast. Almost every day sees some new corporation brought into being, the only object of which is to enable its organizers to foist its worthless stock among poorly paid clerks, stenographers, trained nurses, elevator men and hard-working mechanics. The stock is disposed of and the "corporation" (usually a copper or gold mining enterprise) is never heard of again. Apparently if you do the thing correctly there can be no "come back." Accordingly Summerfield and his gang of "sick engineers" hawked through the town nearly eighty thousand dollars' worth of the securities of the Horse Shoe Copper Mining Company, which owned a hole in the ground in Arizona. It was all done under legal advice and was undoubtedly believed to be within the letter of the law. But there were a few unnecessary falsehoods, a few slips in the schedule, a few complainants who would not be

placated, and "Larry" found himself in the toils. He was convicted of grand larceny in the first degree, secured a certificate of reasonable doubt and gave bail in a very large amount. Within a short time he was re-arrested for working the same game upon an unsuspecting Southerner. This time his bail was increased to thirty thousand dollars. It was not long after the investigations into the Ship-Building Trust scandal and New York had been edified by seeing the inside workings of some very high finance. After his temporary release Summerfield strolled over to Pontin's restaurant for lunch, where he sat down at a table adjoining one occupied by the assistant district attorney who had prosecuted and convicted him.

"How are you, Mr. ——?" inquired "Larry" with his usual urbanity. "How are things?"

"So so," replied the prosecutor, amused at the nonchalance of a man who might reasonably expect to be in Sing Sing within three months. "How's business?"

"Oh, pretty good," returned Larry. "You know there is a sucker born every minute."

"I should think after your conviction you would have had sense enough to keep out of swindling for a while," continued the assistant.

"Swindling!" exclaimed Summerfield. "Swindling nothin'! My lawyer says I didn't commit any crime. Didn't the Supreme Court say there was a reasonable doubt in my case? Well, I'm just giving myself the benefit of it,—that's all. I'm entitled to it. How about those Ship-Building fellers?"

The "Ship-Building fellers" have never been convicted of any wrong-doing. Perhaps they committed

no crime. Summerfield has three years more to serve in Sing Sing.

In this connection the reader will recall the attitude of the inhabitants of Lilliput as chronicled by Gulliver.—"They look upon fraud as a greater crime than theft, and therefore seldom fail to punish it with death; for they allege that care and vigilance, with a very common understanding, may preserve a man's goods from theft, but honesty has no *defence* against superior cunning; . . . the honest dealer is always undone, and the knave gets the advantage. I remember when I was once interceding with the king for a criminal who had wronged his master for a great sum of money, which he had received by order, and ran away with; and happening to tell his Majesty by way of extenuation that it was only a breach of trust, the Emperor thought it monstrous in me to offer as a defence the greatest aggravation of the crime; and truly I had little to say in return, further than the common answer, that different nations had different customs; for, I confess, I was heartily ashamed."

Any definition of the criminal class which limits it to those who "make their living" by crime is inadequate and begs the question entirely. There is no choice between the grafter and the "professional" thief, the boodler and the bank robber. They are all "real" criminals. One is as "diseased" and "degenerate" as the other. Every reversed conviction of a "grafter" lowers a peg the popular respect for law. The clerk in the corner grocery in Dakota feels the wireless influence of the boodler in St. Louis, and the "successful" failure

in New York sets some fellow thinking in San Francisco.

The so-called degenerate and professional criminals constitute a very small fraction of the law-breakers and it is not from either class that we have most to fear. Our real danger lies in those classes of the population who have no regard for law, if not an actual contempt for it, and who may become criminals, or at least criminal, whenever any satisfactory reason, coupled with adequate opportunity, presents itself. From this class spring the experimental criminals of every sort, who in time become "professionals," and from it the embezzler, the stock jobber, the forger and business thief. From it as well are largely recruited those who commit the crimes of violence which, however undeservedly, give the United States such an unenviable place upon the tables of the statisticians. From it spring the "fellow who does not care" or who "will take a chance," the dynamiter, the man who is willing to "turn a trick" at a price, and all those who need the strong arm of the law to restrain them from yielding to their entirely normal evil inclinations.

The man who deliberately violates the law by doing that which he knows to be wrong is a real criminal, whether he be a house-breaker, an adulterator of drugs, the receiver of a fraudulent assignment or a trade-mark thief, an insurance "grafter," a bribe giver, or a butcher who charges the cook's commission against next Sunday's delivery. The writer fails to see the slightest valid distinction between them and believes it should be made possible to punish them all with equal severity. There is

no reason why one should be a felon, another guilty of only a misdemeanor, while still another is guilty of nothing at all. The cause of crime is our general and widespread lack of respect for law, and this in turn is largely due to the unpunished, and often unpunishable, dishonesty which seems to permeate many phases of commercial activity. Diogenes's job is still vacant.