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The Associated Press Case

NOTES AND COMMENTS

CONSTITUTIONAL LAW

THE ASSOCIATED PRESS CASE

Defendant, a cooperative association consisting of the publishers of over 1200 newspapers,[1] set up a system of by-laws with respect to the admission of new members. Non-competing applicants could be elected to membership by the Board of Directors without payment of money or the imposition of terms; but competing applicants could be elected over the objection of competing members only upon: (a) payment to the Association of 10% of the total amount of the regular assessments received by it from old members in the same competitive field for the period from Oct. 1, 1900 to the first day of the month preceeding the date of applicant's election, (b) relinquishment of any exclusive rights applicant might have to any news or news picture services, and, upon request of a member competitor, furnishing it to the competitor on the same terms as available to applicant, (c) a majority vote of the regular members voting.

Other by-laws required members to promptly furnish the Association all the news of their respective districts and prohibited the selling or furnishing of spontaneous news to any other agency or publisher. They also prohibited members from making available to non-members, in advance of publication, any news furnished by The Associated Press.

The United States filed a bill for injunction charging a violation of the Sherman Anti-Trust Act[2] in that the acts of the Association constituted (1) a combination and conspiracy in restraint of interstate[3] trade in news, and (2) an attempt to monopolize. Over defendant's objection, the District Court entered a summary decree enjoining the enforcement of the by-laws relating to admission of competing applicants, but without prejudice to the right of adoption of by-laws legally restricting admission.[4] Held: *affirmed.* The by-laws with respect to admission of competing applicants were invalid as restricting members' admission in violation of the Act. The by-laws forbidding members' communication of spontaneous news to non-members, though not invalid in themselves, were invalid as part of an unlawful combination while those unlawfully restricting membership were in force. *Associated Press et al. v. United States,* —— U. S. ——, 65 Sup. Ct. 1416 (1945).

1. The membership included 81% of the morning papers in the country and 59% of the evening papers. Through these members the news gathered by AP reached 96% of the morning circulation and 77% of the evening circulation.
2. 26 Stat. 209 (1890), 15 U. S. C. A. §§1-7 (1941).
3. Associated Press v. National Labor Relations Board, 301 U. S. 103 (1937) is precedent that AP is in interstate commerce.
4. 52 F. Supp. 362 (1945).

Since the rule of strict construction[5] of the Sherman Act gave way to the reincarnation of the common law "rule of reason"[6] what the court will declare illegal has been often difficult to predict. The application of the Act to certain kinds of combinations is clear. A combination which fixes prices, either directly or indirectly, is illegal *per se*;[7] and this is true irrespective of the business necessity of price-fixing. A combination which effectively excludes, or tries to exclude, outsiders from the business entirely is unlawful.[8] Nor is an attempt to extend the scope of a lawful monopoly[9] permitted.[10] A combination which uses illegal means in order to effect purposes in themselves lawful is condemned activity.[11] Although these instances of violation are settled, they are by no means exclusive.[12] For ever present is the necessity of weighing the advantages resulting from the combination against the interest of the public.[13]

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5. United States v. Joint Traffic Association, 171 U. S. 505 (1898); United States v. Trans-Missouri Freight Association, 166 U. S. 290 (1897).
6. Standard Oil Co. of New Jersey v. United States, 221 U. S. 1 (1911); United States v. American Tobacco Co., 221 U. S. 106 (1911).
7. United States v. Socony Vacuum Oil Co., 310 U. S. 150 (1940). This case reaffirms the doctrine of United States v. Trenton Potteries Co., 273 U. S. 392 (1927) which had previously been modified by the holdings of Sugar Institute Inc. v. United States, 297 U. S. 553 (1936) and Appalachian Coals, Inc. v. United States, 288 U. S. 344 (1933). The latter two cases had applied the "rule of reason" to combinations indirectly fixing prices.
8. American Medical Association v. United States, 317 U. S. 519 (1943); Fashion Originators Guild of America, Inc. et al. v. Federal Trade Commission, 312 U. S. 457 (1941).
9. A lawful monopoly is one granted by the sovereign, e.g. a patent or a copyright.
10. Ethyl Gasoline Corp. v. United States, 309 U. S. 436 (1940); Standard Sanitary Manufacturing Co. v. United States, 226 U. S. 20 (1912).
11. Bedford Cut Stone Co. v. Journeymen Stone Cutters Association, 274 U. S. 37 (1927); Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921); Loewe v. Lawler, 208 U. S. 274 (1908).
12. Weston, "The Application Of The Sherman Act To 'Integrated' And 'Loose' Industrial Combinations" (1940) 7 Law and Contemp. Prob. 42, 60. "Although certain types of activity have been found to be within the statutory prohibitions, and there is now a cluster of legal doctrine around some of these types of activity, neither these typical situations nor the legal rules announced in determining them are exclusive. The scope of the law's application remains essentially fluid. And ample opportunity exists to extend the law's reach into regions where its presence has not yet been detected."
13. Paramount Famous Lasky Corporation et al. v. United States, 282 U. S. 30 (1930); United States v. First National Pictures, Inc., 282 U. S. 44 (1930); Anderson v. Shipowners Association, 272 U. S. 359 (1926). In these cases, although the combinations 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 court found that the benefit to the combination was outweighted by the injury to the public, and the combinations were outlawed. See Apex Hosiery Co. v. Leader, 310 U. S. 469, 500 (1940).

In the instant case defendant's activities did not fit into any of the previously crystallized categories of conduct barred by the Act. Their legality was necessarily tested by balancing their utility against the interest of the public. The court stated no new doctrine in its conclusion that the public's interest was paramount since "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," it having long before stated that liberty of the press is a right of the public.[14] The weightier public interest found was therefore a legitimate one.

The decree in no sense declares the Associated Press a public calling[15] despite criticism to that effect.[16] The confusion is due to an unfortunate, though perhaps inevitable, use of language. For the phrase "affected with a public interest" has been applied as a test of a public calling, while the phrase "effect on the public" has been used as a test of reasonableness under the Sherman Act.[17] When the use of the terms are considered in their contexts, the "public calling" criticism becomes untenable. And the court legitimately "extended the law's reach into a region where its presence had not yet been detected."[18]

CONSTITUTIONAL LAW

RESTRAINTS ON ALIENATION

Plaintiff corporation, owner of a lake development, brought an action to recover the unpaid balance on an installment contract for the sale of land. Defendant alleged the contract was void and against public policy because by its terms the purchaser is restrained from

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14. See Grossjean v. American Press Co., 297 U. S. 234, 250 (1936). "The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information."

15. See Associated Press v. United States, 65 Sup. Ct. 1416, 1426 (1945) (Mr. Justice Douglas concurring). "The decree which we approve does not direct Associated Press to serve all applicants. It goes no further than to put a ban against competitors of its members in the same field or territory. —— If Associated Press, after the effects of that discrimination have been eliminated, freezes its membership at a given level, quite different problems would be presented."

16. See United States v. Associated Press, 52 F. Supp. 362, 375 (1945) (Judge Swan dissenting).

17. Small, "Anti-Trust Laws And Public Callings: The Associated Press Case" (1944) 23 N. C. L. Rev. 1. "In public calling cases, the finding of a business 'affected with a public interest' is an inflexible condition precedent to that type of regulation. It acts as a barrier beyond which the court cannot trespass. On the other hand, the 'effect on the public' as spoken of in anti-trust cases, is only a test, a method, or means to determine reasonableness and consequent validity. It is not a bar, but rather an economic weight to be measured with other elements, on the anti-trust balance scale in order to arrive at the ultimate reasonable or unreasonable nature inherent in the make-up of the combination."

18. Weston, supra note 12, at 60.