



2-1-1966

## Recent Decisions

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### Recommended Citation

Stephen R. Lamantia & Clifford A. Roe, *Recent Decisions*, 41 Notre Dame L. Rev. 402 (1966).

Available at: <http://scholarship.law.nd.edu/ndlr/vol41/iss3/14>

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## RECENT DECISIONS

ANTITRUST — SECTION 1, SHERMAN ACT — TYING ARRANGEMENTS — NEWS WIRE SERVICE'S PRACTICE OF REQUIRING SUBSCRIBERS TO TAKE AND PAY FOR FOUR WIRE SERVICES AS A PREREQUISITE TO RECEIVING ANY ONE OF THEM IS AN ILLEGAL TYING ARRANGEMENT. — Taft-Ingalls Corporation<sup>1</sup> (hereinafter *Times-Star*), publisher of the *Cincinnati Times-Star*, contracted with Associated Press (hereinafter AP), in 1948 to receive AP's basic news wire service, consisting of three news wires.<sup>2</sup> It was AP's established practice to require member newspapers in metropolitan cities of Ohio to receive and pay for all three of these wires. In addition, in Cincinnati, AP required *Times-Star* to receive and pay for its Kentucky wire. The contract further provided that *Times-Star* would give two years' written notice of termination and would, upon sale or transfer of *Times-Star's* business, cause its successor to fulfill the terms of the contract. In 1957, faced with an operating deficit, *Times-Star* undertook a stringent cost reduction program and concluded it did not need all of AP's basic news service. Only the Ohio Big Cities circuit was considered necessary. *Times-Star* requested a reduction in the basic wire service package. AP declared that *Times-Star* must continue to pay the unit price for all the wires in order to receive any of them. Because of inability to reduce costs, *Times-Star* ceased publication in 1958 and sold the paper to its competitor, *The Cincinnati Post*, which did not promise to assume the obligations of the AP contract. *Times-Star* did not give the requisite two years' notice of termination to AP, nor did it pay the two years' assessment. AP sued for damages equal to the assessment under the contract. *Times-Star* asserted a violation of § 1 of the Sherman Act<sup>3</sup> as an affirmative defense and counterclaimed for treble damages. The United States District Court for the Southern District of Ohio, Western Division, gave judgment for AP, holding that *Times-Star* had failed to prove the existence of a tying arrangement. In a divided opinion, the United States Court of Appeals for the Sixth Circuit reversed the district court and *held*: the Ohio Big Cities wire was a product separate and distinct from the other AP wire services, thus making the established practice of AP in requiring *Times-Star* to receive and pay for the "A" and "D" wires, plus the Kentucky state wire, as a prerequisite to receiving the desired Ohio Big Cities wire, a tying arrangement in violation of § 1 of the Sherman Act and a complete defense to AP's action for breach of

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1 Until its sale on July 19, 1958, the Cincinnati Times-Star newspaper was published by the Cincinnati Times-Star Company. Contemporaneously with the sale of the paper, the name of appellant was changed to Taft-Ingalls Corporation.

2 A stipulation of facts entered into between the parties describes the basic AP wire services furnished to Times-Star as follows:

The leased wire news service . . . consisted of general news and stories of general interest carried and transmitted over the "A" trunk circuit; the financial stories, commodity quotations and business news carried and transmitted over the "D" trunk circuit; and the Ohio regional news and general news copy carried and transmitted over the Ohio Big Cities Circuit.

Associated Press v. Taft-Ingalls Corp., 340 F.2d 753, 757 (1965).

3 26 Stat. 209 (1890), as amended, 69 Stat. 282 (1955), 15 U.S.C. §1 (1964): "Every contract, combination in the form of trusts or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . ."

contract. *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir.), *cert. denied*, 86 Sup. Ct. 47 (1965).

A "tying arrangement" may be defined as an agreement by a party to sell one product only on the condition that the buyer also purchase a different (or tied) product.<sup>4</sup> The evil of tying arrangements lies in the fact that they force a buyer to give up his independent judgment as to whether, or where, to purchase the tied product.<sup>5</sup> The development of the law of tie-in contracts may be viewed as the history of an attempt to prevent interference with freedom of choice in the market place. As Justice Frankfurter stated, "tying arrangements serve hardly any purpose beyond the suppression of competition."<sup>6</sup> Such coercive restrictions are diametrically opposed to both the spirit and letter of our federal antitrust laws which are declarative of an economic policy that unfettered competition rule the marts of trade. Thus, tying arrangements may be assailed under § 1 of the Sherman Antitrust Act,<sup>7</sup> § 3 of the Clayton Act,<sup>8</sup> or both, as illegal restraints of trade; under § 5 of the Federal Trade Commission Act,<sup>9</sup> as an unfair method of competition; or under § 2 of the Sherman Act,<sup>10</sup> as an attempt to monopolize.

At common law, the few cases dealing with the legality of tying arrangements generally upheld them as acceptable incidents of an individual's freedom to contract.<sup>11</sup> There were two exceptions to this rule: such agreements could be successfully challenged where they were used by monopolies affected with a public interest,<sup>12</sup> or where the monopolies were the result of an illegal horizontal combination of suppliers.<sup>13</sup>

Tying arrangements were first struck down as a matter of patent law, without explicit reliance upon theoretical bases of possible antitrust liability.<sup>14</sup> The Government confers upon the holder of a patent a legal monopoly over a specified product or process. To the extent that a patentee uses this monopoly to secure a legitimate reward for his invention or to protect it against infringement, he is immune from the antitrust laws.<sup>15</sup> A patentee's legal monopoly places

4 *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). For general discussions of tying arrangements and their legal significance, see 6 TOULMIN, *ANTITRUST LAWS OF THE UNITED STATES* §2.6 (Supp. 1965); Bowman, *Tying Arrangements and the Leverage Problem*, 67 *YALE L.J.* 19 (1957); Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 *HARV. L. REV.* 913 (1952); Stedman, *Tying Arrangements*, 22 *A.B.A. ANTITRUST SECTION* 64 (1962-63); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 *HARV. L. REV.* 50 (1958); Note, *Tying Restrictions: Changing Standards of Legality*, 48 *COLUM. L. REV.* 733 (1948).

5 *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753, 762 (6th Cir.), *cert. denied*, 86 Sup. Ct. 47 (1965).

6 *Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949).

7 26 Stat. 209 (1890), as amended, 69 Stat. 282 (1955), 15 U.S.C. §1 (1964).

8 38 Stat. 731 (1914), 15 U.S.C. §14 (1964).

9 38 Stat. 717 (1914), as amended, 15 U.S.C. §45(a) (1964).

10 26 Stat. 209 (1890), as amended, 15 U.S.C. §2 (1964).

11 *United Shoe Mach. Co. v. Burnett*, [1909] A.C. 330; *Ferris v. American Brewing Co.*, 155 *Ind.* 539, 58 *N.E.* 701 (1900).

12 *Tallassee Oil & Fertilizer Co. v. Holloway*, 200 *Ala.* 492, 76 *So.* 434 (1917).

13 *Cf. Strait v. National Harrow Co.*, 18 *N.Y. Supp.* 224, 234 (Sup. Ct. 1891). *But cf. Schlitz Brewing Co. v. Nielson*, 77 *Neb.* 868, 110 *N.W.* 746 (1906).

14 For a good discussion of tying arrangements and the law of patents, see Note, *Patent Abuses and Antitrust: The Per Se Rule*, 64 *HARV. L. REV.* 626 (1951).

15 NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 262 (1962).

him in a dominant bargaining position. Patent holders sought to enlarge the legitimate limits of their patent monopoly by using it as a "lever" with which to compel purchasers of patented devices to buy unpatented commodities over which the patentee enjoyed no such monopoly. Such restrictive conditions limited the freedom of purchasers to obtain unpatented commodities in the competitive market.<sup>16</sup>

Paralleling the early common law view of tying, the courts in the first thirty years of this century generally viewed patents as conferring broad powers. *Henry v. A. B. Dick Co.*<sup>17</sup> typified the judicial attitude which condoned schemes conditioning the sale or lease of patented apparatus or processes upon the purchase of unpatented goods. This undesirable extension of government-granted monopolies was noted with apprehension by Congress. It attempted to overrule the doctrine of *A. B. Dick* by enacting § 3 of the Clayton Act.<sup>18</sup> The *A. B. Dick* case was overruled by *Motion Picture Co. v. Universal Film Co.*<sup>19</sup> which set the tone for the modern development of tying arrangement law. The Court, without relying on the Clayton Act, held as a matter of patent law that any contract was illegal whereby a seller, enjoying a lawful monopoly over a patented product, would sell that product only on the condition that the buyer also purchase some other unpatented product.<sup>20</sup>

*United Shoe Machine Co. v. United States*<sup>21</sup> was the first patent tie-in case under § 3 of the Clayton Act to come before the Supreme Court. The Court held that a condition United Shoe imposed upon lessees of their machinery — that certain supplies needed in shoe manufacturing must be purchased exclusively from them — was a tying clause which fell squarely within the proscription of § 3 of the Clayton Act. The Court stressed the dominant position of United Shoe which controlled more than 95% of the shoe machinery business and the concomitant substantial effect on competition.<sup>22</sup>

The *United Shoe* case was the harbinger of a series of decisions in which the Court systematically struck down conditions by which a patentee sought to extend the scope of his lawful monopoly through tying arrangements.<sup>23</sup> In

16 Note, *Tying Restrictions: Changing Standards of Legality*, 48 COLUM. L. REV. 733, 738 (1948). For a discussion of leverage, see Bowman, *supra* note 4.

17 224 U.S. 1 (1912). Patentee required that its patented duplicating machine should be used only with stencil paper and ink supplied by it and successfully sued, as an infringer, one who used other materials.

18 38 Stat. 731 (1914), 15 U.S.C. §14 (1964):

It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

19 243 U.S. 502 (1917). The use of unpatented film was tied to the use of a patented device for feeding the film into the projector.

20 *Id.* at 516.

21 258 U.S. 451 (1922).

22 *Id.* at 455.

23 *E.g.*, *B. B. Chemical Co. v. Ellis*, 314 U.S. 495 (1942) (sale to shoe manufacturers of special adhesive compounds required for a patented manufacturing process was tied to the sale of that process); *Morton Salt Co. v. Suppiger Co.*, U.S. 488 (1942) (sale of salt was tied to the lease of patented machines for depositing salt tablets in canned foods); *Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458 (1938) (the holder of a process patent may not tie the licensing of

*Carbice Corp. v. American Patents Corp.*,<sup>24</sup> Mr. Justice Brandeis held that the attempt to employ the patent as a device to monopolize unpatented materials was analogous to the use of patents to restrain commerce, and added in a footnote that such use is a "direct violation of the Anti-Trust Acts."<sup>25</sup> Similarly, in dicta in *Mercoid Corp. v. Honeywell Co.*,<sup>26</sup> Mr. Justice Douglas equated the patent misuse doctrine with an antitrust violation.<sup>27</sup>

The patent misuse cases culminated in the landmark case of *International Salt Co. v. United States*.<sup>28</sup> Here, the Supreme Court affirmed an injunction brought by the Government under both § 1 of the Sherman Act and § 3 of the Clayton Act enjoining International Salt, a lessor of patented salt tablet dispensing machines, from requiring its lessees to use only the lessor's tablets in the leased machines. The Court held that such a condition was illegal under both the Sherman and Clayton Acts. Without investigating the market position of International Salt, the Court ruled that where "[t]he volume of business affected by these contracts cannot be said to be insignificant or insubstantial," such a condition is illegal since "it is unreasonable, *per se*, to foreclose competitors from any substantial market."<sup>29</sup> While the Court dealt only with a patent tying arrangement, the opinion can be read as applying to *all* such arrangements. It is submitted that while the Court did not specifically hold tying arrangements to be illegal *per se* in *International Salt*, it held that they were virtually illegal *per se* (although these express words were not used) by including them in a broader category of acts illegal *per se*, *viz.*, foreclosure of competition from a substantial market.<sup>30</sup> Thus, for all practical purposes, patent tie-ins were declared illegal *per se*.

In *Northern Pac. Ry. v. United States*,<sup>31</sup> the Supreme Court seized upon § 1 of the Sherman Act and the language of *International Salt* to strike down, as illegal, leases which contained "preferential routing" clauses whereby the lessee was required by Northern Pacific to ship all commodities or products from the land involved over the defendant's railroad if the rates and service equaled those of other carriers. The Court stated that it made little difference whether the tying product was patented or not.<sup>32</sup> Though there was no monopoly in-

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the patent to the sale of an unpatented material required in the process); *International Business Mach. Corp. v. United States*, 298 U.S. 131 (1936) (lease of business machines on condition that the lessee purchase tabulating cards used in the machines exclusively from lessor); *Carbice Corp. v. American Patents Corp.*, 283 U.S. 27 (1931) (sale of dry ice tied to patented insulated container).

24 283 U.S. 27 (1931).

25 *Id.* at 33-34.

26 320 U.S. 680 (1944).

27 "The legality of any attempt to bring unpatented goods within the protection of the patent is measured by the anti-trust laws and not by the patent law." *Id.* at 684.

28 332 U.S. 392 (1947).

29 *Id.* at 396.

30 Note 64 HARV. L. REV. 626, 630 (1951).

31 356 U.S. 1 (1958).

32 The defendant attempts to evade the force of *International Salt* on the ground that the tying product there was patented while here it is not. But we do not believe that this distinction has, or should have, any significance. In arriving at its decision in *International Salt* the Court placed no reliance on the fact that a patent was involved nor did it give the slightest intimation that the outcome would have been any different if that had not been the case. If anything, the Court held the challenged tying arrangements unlawful *despite* the fact that the tying item was patented, not

volved, the distinctiveness of the land (the tying product) gave Northern Pacific leverage with which to force those who desired the land to accept the railroad as a carrier (the tied service). The Court then set down what has come to be known as the *Northern Pacific* test of *per se* illegality.

They [tying arrangements] are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected.<sup>33</sup>

With the decision in *Northern Pacific*, the law of tie-in contracts took another leap forward. It had become a virtual certainty that courts would strike down, as illegal, any arrangement whereby a patented product or process was tied to an unpatented product or service, regardless of whether the Sherman or Clayton Act was applied. The early patent cases had played an important role in molding a strong judicial hostility to any dealing suggestive of being a tying arrangement. One commentator argues that since a patent proves no more than distinctiveness, in the interests of consistency of decision between patent and nonpatent tying cases, there was little reason why anything more than distinctiveness need be shown in nonpatent cases.<sup>34</sup> This logical extension was effected in the *Northern Pacific* case. The strong judicial bias against tying arrangements which was nurtured in the early patent cases grew to fruition in the nonpatent Sherman Act cases. Viewed in this historical perspective, the often complicated nonpatent Sherman Act tying cases and the decision of the Sixth Circuit in *Associated Press v. Taft-Ingalls Corp.* become more readily understandable.

Before the *Northern Pacific* rule may be applied, it must be established that a tying arrangement in fact exists.<sup>35</sup> Every tie-in requires the linking together of two or more distinct products. Hence, the separability of products is an essential element of every tying case. Determining whether there is one product with component parts or two distinct products is a question of fact. Since tying products have usually had physical and corporeal existence distinct from the tied product, the question of separability has rarely perplexed the courts. However, the alleged tying arrangement in *Taft-Ingalls* involved news wires. The Ohio Big Cities news service was the dominant "tying" product which *Times-Star* wanted, while not desiring the "tied" products—the "A," "D," and Kentucky state wires. The Sixth Circuit was faced with the difficult task of determining whether the Ohio wire was a product separate and distinct from the other wires, or whether all four wires constituted but one product, namely, news.

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because of it. . . . Nor have subsequent cases confined the rule of *per se* unreasonableness laid down in *International Salt* to situations involving patents (citing cases). *Id.* at 9-10.

33 *Id.* at 6.

34 Turner, *supra* note 4, at 57.

35 The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant "tying" product, resulting in economic harm to competition in the "tied" market. *Times-Picayune v. United States*, 345 U.S. 594, 614 (1953).

This difficult problem of separability was the issue that split the court in *AP v. Taft-Ingalls*. The district court had held that *Times-Star* had "failed to provide this Court with sufficient facts upon which it may be concluded that there is a natural division in the cost of gathering news transmitted over the A, D, and State trunks. Without such a complete division, it is unnecessary and futile to explore the other elements of the alleged tying agreement."<sup>36</sup> The majority opinion in the Sixth Circuit, finding this to be "clearly erroneous," reversed.<sup>37</sup> Judge O'Sullivan, dissenting, thought that the district court's holding was "clearly correct."<sup>38</sup>

The district court's "natural division of cost" approach was rejected.<sup>39</sup> In deciding whether the Ohio wire represented a separate product, the Sixth Circuit turned to an investigation of the few cases dealing with separability, cautiously noting that "each of them involved distinguishable facts."<sup>40</sup> AP placed heavy reliance upon *Times-Picayune v. United States*<sup>41</sup> where the Supreme Court held that a requirement by a publishing company that its advertisers take advertising space in both the company's morning and afternoon newspapers was not a tying arrangement in violation of the antitrust laws. One of the reasons for the Court's holding was its difficulty in delineating two distinct products. This unit advertising arrangement was said to involve two "indistinguishable products," neither of which had market leverage.<sup>42</sup> However, the Court was very careful to confine its decision to the narrow record before it.<sup>43</sup>

In *United States v. Loew's Inc.*,<sup>44</sup> the Supreme Court unanimously held that the practice employed by distributors of copyrighted motion picture films of only licensing such films to television stations in a package ("block booking") violated § 1 of the Sherman Act. From the uniqueness of these films — as evidenced by their copyright — the Court held "sufficiency of economic power is presumed," thus effecting a tie-in within the meaning of *Northern Pacific*.<sup>45</sup> The *Loew's* rationale was applied in *Taft-Ingalls* since AP's asserted property rights in its news dispatches were comparable to a copyright.<sup>46</sup> AP's news

36 *Associated Press v. Taft-Ingalls Corp.* (S.D. Ohio 1963) (Memorandum Opinion, Civil No. 4327). Cited in Brief for Appellant, p.11sa (App.).

37 A finding of fact by the district court is binding upon the reviewing court unless "clearly erroneous." FED. R. CIV. P. 52(a). The Sixth Circuit, citing *Ball v. Paramount Pictures*, 169 F.2d 317 (3d Cir. 1948), cert. denied, 339 U.S. 911 (1950) held it their obligation as an appellate court to overrule the "clearly erroneous" findings of the district court in an antitrust case tried without a jury. 340 F.2d 753, 765 (1965).

38 *Id.* at 772.

39 "... the determination of the existence of a tying arrangement which is illegal under the Sherman Act . . . is not controlled by the way AP has kept its cost records." *Id.* at 765.

40 *Id.* at 760.

41 345 U.S. 594 (1953).

42 *Id.* at 614. The Court, in *Times-Picayune*, intimated that the government might have been successful under § 3 of the Clayton Act. The Clayton Act provision dealing with tying arrangements (*supra* note 18) had heretofore been limited to tangible goods. At one time the courts treated tying arrangements involving goods under the Clayton Act differently than tying arrangements involving services under the Sherman Act. This distinction is no longer applied under *Northern Pac.*, 356 U.S. 1 (1958).

43 345 U.S. 594, 627-28 (1953).

44 371 U.S. 38 (1962).

45 *Id.* at 45.

46 340 F.2d 767 (1965).

dispatches were not only unique, "but they possessed a uniqueness to suggest comparison with a monopoly by patent."<sup>47</sup>

The Sixth Circuit then examined *United States v. Jerrold Electronics Corp.*,<sup>48</sup> where the manufacturer of a community television antenna system refused to sell its equipment unless the customer would also purchase a service contract which would insure Jerrold supervision over installation and maintenance; and further refused to sell any item of equipment separately, but only as components of a complete system. In holding this practice violated the Sherman Act, the Court found four indicia of separability.<sup>49</sup> Although these findings seem to lay down little more than a rule of thumb for a decision upon the peculiar facts before the court in *Jerrold* rather than any universal norm by which all future issues of separability might be settled, the Sixth Circuit had little trouble in transposing them to the facts of *Taft-Ingalls* to find the news wires were separable products.<sup>50</sup>

The case with facts most closely analogous to *Taft-Ingalls* was *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theaters, Inc.*<sup>51</sup> Here, a tying arrangement was found where an advertiser was required to sponsor a television program on thirty-five stations which he did not desire in order to advertise on ninety-five which he did desire.<sup>52</sup> The court once again laid emphasis on the "uniqueness" of the program involved.

The court made other minor arguments in favor of separability in *Taft-Ingalls*.<sup>53</sup> However, in the last analysis, it seemed more concerned with the *coercive effect* the arrangement in issue had upon *Times-Star*, rather than any legal, semantical, or metaphysical inquiry as to whether news constituted one or several products.<sup>54</sup> In his dissent, Judge O'Sullivan castigated the majority's

47 *Ibid.* Mr. Justice Harlan, dissenting in *Northern Pac.*, believed that the test of the majority did not go far enough to be precise and offended the "market dominance" test of *Times-Picayune*. He added four other criteria, one of which was "such uniqueness of the tying product as to suggest comparison with a monopoly by patent." 356 U.S. 19 (1958).

48 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961), *rehearing denied*, 365 U.S. 890 (1961).

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There are several facts presented in this record which tend to show that a community television antenna system cannot properly be characterized as a single product. Others who entered the community antenna field offered all of the equipment necessary for a complete system, but none of them sold their gear exclusively as a single package as did Jerrold. The record also establishes that the number of pieces in each system varied considerably so that hardly any two versions of the alleged product were the same. Furthermore, the customer was charged for each item of equipment and not a lump sum for the total system. Finally, while Jerrold had cable and antennas to sell which were manufactured by other concerns, it only required that the electronic equipment in the system be bought from it.

187 F. Supp. 559 (1960).

50 340 F.2d at 764 (1965).

51 221 F. Supp. 848 (S.D.N.Y. 1963).

52 The court said, "Thirty-five *undesirable* stations are not the same as 95 *desirable* stations." (Emphasis added.) *Id.* at 850.

53 *E.g.*, the fact that AP quoted a separate price for the Kentucky wire; the sports wire was separated from the basic service and a separate charge was made for it; the Ohio Big Cities wire was operated at different hours from the other services; and the Ohio wire connected different cities. None of these factors taken in themselves is convincing. *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 762, 763 (6th Cir.), *cert. denied*, 85 Sup. Ct. 47 (1965).

54 The court said:

. . . there can be no doubt that the arrangement here involved forced the publishers of *Times-Star* to give up their independent judgment as to which of the wire services was required for its operation. . . . [W]ho better than appellant [*Times-Star*]



inquiry into product separability as an awkward approach. He felt that the intricacies and complexities involved made it "impossible to offer any evidence for reliably dividing into separate and distinct products or articles the incorporeal thing called news."<sup>55</sup> He preferred to examine AP's policy from a general *rule of reason* analysis. Recognizing that separability is a question of fact to be determined by the trier of fact, Judge O'Sullivan concluded that the district court was the proper forum for this decision. He stated:

I am unaware of any case where an appellate court has found clearly erroneous a finding of fact involving such nuances of meaning and such delicate appraisal and balancing as were involved in determining whether each news "wire" represented a "separate and distinct product."<sup>56</sup>

The Sixth Circuit framed its decision in terms of separability mainly because this was AP's basic contention. However, what role "separability" had in influencing the court's final decision that AP's practice constituted a tying arrangement is questionable. As noted above, the court placed strong emphasis on the coercive nature of AP's practice in requiring *Times-Star* to continue its subscription to three wires which it did not want or need in order to receive the wire it considered essential to its continued operations. The vice of the traditional tying arrangement—that a party in a dominant position with respect to a product is using this as a lever to require the purchase of another, often undesired product—is present in *Taft-Ingalls*. Such a practice, viewed in the light of a strong judicial bias against coercive restrictions and the policy of our federal antitrust laws in favor of unrestricted competition, is naturally suspect. Courts have consistently sought to protect buyers against the coerced sacrifice of alternatives. It is submitted that the adverse effect which AP's established practice had upon *Times-Star*, rather than its detailed analysis of product separability, was the key to the Sixth Circuit's finding of a tying arrangement in *Taft-Ingalls*.

Given the fact that there is a tying arrangement, the court must next address itself to the question of its legality. Due to the large number of economic variables which must be taken into account, the standards for judging the validity of tying arrangements under the Sherman Act do not admit of any precise, mechanical definitions.<sup>57</sup> Two tests are generally employed to judge the legality of a tying arrangement under the Sherman Act. The so-called

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was in a position to choose which wire services it needed and wanted and to exercise independent judgment to that end? Yet the record clearly establishes that AP required appellant to continue to subscribe and pay for three wires which appellant did not want and need, in order to receive a fourth wire which it considered to be essential, and thereby forced appellant to give up its independent judgment as to whether to subscribe to the three unwanted and unneeded services. This is one of the situations which is "an object of anti-trust concern." 340 F.2d 762 (1965).

This language of the court is found in that section of the opinion devoted to the issue of separability.

55 *Id.* at 774. Judge O'Sullivan went on to say:

. . . it would require excessive subtlety and subjective evaluation to break down into various components the tangled skein of human events called news so as to be able to say, as a fact, that information as to certain events . . . can be divided so as to be identified as distinct and separate products. *Ibid.*

56 *Id.* at 776.

57 Comment, 4 B.C. IND. & COMM. L. R. 405, 406 (1963).

“rule of reason” test involves a thorough examination of the entire record for evidence tending to show an unreasonable restraint upon trade.<sup>58</sup> This is the approach Judge O’Sullivan suggests in his dissent. The majority preferred to follow the *per se* rule set out in *Northern Pacific*:

. . . there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.<sup>59</sup>

The *per se* rule has obvious advantages. It avoids the necessity for a prolonged and complicated economic investigation into the history of the entire industry involved — “an inquiry so often wholly fruitless when undertaken.”<sup>60</sup> As one recent commentator noted:

What emerges as *per se* violation is a number of specific patterns of conduct as to which the courts, and particularly the Supreme Court, have perhaps pragmatically determined that they will not be led into making complex economic judgments as to what is or is not a reasonable restraint.<sup>61</sup>

The Sixth Circuit reflected this concern that salient issues should not be bogged down in “a mass of complex and detailed economic data”<sup>62</sup> when it applied the *per se* rule of *Northern Pacific* to the facts of *Taft-Ingalls*. The two conditions which had to be met for a tying arrangement to be considered a *per se* violation under *Northern Pacific* were: that the seller have “sufficient economic power with respect to the tying product”; and that a “not insubstantial” amount of interstate commerce is affected.<sup>63</sup> The majority had little trouble in applying this test to the facts of *Taft-Ingalls*. Sufficient economic power was adduced from AP’s position of dominance in the field of news, the uniqueness of the tying product, and the desirability of the tied product to the purchaser. It has been long settled that the activities of AP are interstate commerce.<sup>64</sup> Correspondingly, the arrangement was shown to have an impact upon interstate commerce. The Sixth Circuit thus found AP’s established practice of conditioning the sale of the Ohio Big Cities wire upon continued subscription to three unwanted services a tying arrangement in violation of § 1 of the Sherman Act.

The significance of the instant case does not lie in the application of any new test in the area of tying arrangements. Rather, the decision is significant

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58 The concept of tying arrangements was introduced as early as 1911 in the famous *Standard Oil v. United States*, 221 U.S. 1 (1911). “Rule of reason” was the criterion of legality. This rule was said to be the result of the generality of §§ 1 and 2 of the Sherman Act, a generality which required a standard— which was drawn from the common law. The Court said: “. . . it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law . . .” 221 U.S. at 62 (1911).

59 *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

60 *Ibid.* (dictum).

61 Austern, *Problems and Prospects in Antitrust Policy-I*, in *PERSPECTIVES ON ANTITRUST POLICY* 25 (Phillips ed. 1965).

62 *Id.* at 24.

63 See *supra* note 33.

64 *Associated Press v. N.L.R.B.*, 301 U.S. 103 (1937).

in its extension of the *Northern Pacific* test to a heretofore virgin area of enforcement — the newspaper wire service field. It has been intimated that the court's decision may have been influenced by factors which were not strictly assigned as grounds of decision. A piecemeal inquiry into product separability which seeks to label and compartmentalize distinct products proves unconvincing when we are dealing with an incorporeal product such as news. However, looked at in its totality, it seems clear that AP, by its practices, has become a danger to the free competition sought to be protected by the antitrust laws.

Broad issues of public policy underlie the Sixth Circuit's decision in *Taft-Ingalls*. One of the phenomena of modern-day living is the concentration of ownership in the mass communication media.<sup>65</sup> As the result of concentration and merger, little competition remains in the daily newspaper field. In 1953, the Supreme Court noted in *Times-Picayune* that:

. . . despite the vital task that in our society the press performs, the number of daily newspapers in the United States is at its lowest point since the century's turn: in 1951, 1,773 daily newspapers served 1,443 American cities, compared with 2,600 dailies published in 1,207 cities in the year 1909. Moreover, while 598 new dailies braved the field between 1929 and 1950, 373 of these suspended publication during that period — less than half of the new entrants survived. Concurrently, *daily newspaper competition within individual cities has grown nearly extinct*: in 1951, 81% of all daily newspaper cities had only one daily paper; 11% more had two or more publications, but a single publisher controlled both or all. In that year, therefore, only 8% of daily newspaper cities enjoyed *the clash of opinion which competition among publishers of their daily press could provide*. (Emphasis added.)<sup>66</sup>

Nor has this trend of newspaper merger and closings declined in the thirteen years since *Times-Picayune*. Today, only 55 cities have competing daily newspapers as compared with 552 such cities in 1923; 95% of our cities have no newspaper competition at all.<sup>67</sup>

A free press serves a paramount public purpose — “the dissemination of news from as many different sources, and with as many different facets and colors as is possible.”<sup>68</sup> Concentration and monopoly defeat this goal. Only through less concentrated ownership will the reading public be presented with diverse ideas expressed in a meaningful fashion. As one commentator put it:

Whether this trend to newspaper monopoly at the local level will have the serious adverse long-run social implications that many foresee cannot now be determined. . . . Certainly there would appear to be distinct social advantage in preserving as many independent, competing newspapers as are economically viable — and perhaps more.<sup>69</sup>

65 For a comprehensive study of the newspaper industry and patterns of concentration see Barber, *Newspaper Monopoly in New Orleans: The Lessons for Antitrust Policy*, 24 LA. L. REV. 503 (1964); Comment, *Local Monopoly in the Daily Newspaper Industry*, 61 YALE L. J. 948 (1952). See generally Cellar, *The Concentration of Ownership and the Decline of Competition in News Media*, 8 ANTITRUST BULL. 175 (1963).

66 *Times-Picayune v. United States*, 345 U.S. 594, 603 (1953).

67 Cellar, *supra* note 65, at 181.

68 Learned Hand, J. in *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

69 Barber, *supra* note 65, at 503-04.

This pattern of concentration of ownership in local newspapers is a legitimate matter of antitrust concern. Imaginatively and vigorously implemented, the federal antitrust laws can play a beneficial role in retarding the general decline of daily newspaper competition in the major cities of the United States.<sup>70</sup> The result of AP's established practice in the instant case was to force *Times-Star* to terminate operations and sell out to its afternoon competitor, *The Cincinnati Post*. Hence, Cincinnati was left with only one daily newspaper to promulgate the *vox populi*. It is submitted that this is an unhealthy situation. The newspaper ownership concentration problem is serious enough without adding new causes for its further deterioration.

Viewed against the background of rapidly declining competition in the daily news business, such a coercive trade practice as that of AP in only selling its basic news service in a package of four wires became suspect. AP is the chief source of news for the American press. As shown in *Taft-Ingalls*:

The newspaper circulation of members of AP at the 43 principal metropolitan trunk points in the United States comprises 94 per cent of the total circulation of all newspapers in these areas subscribing to news service agencies. They comprise 87% of all subscribing newspapers in these areas. More daily newspapers throughout the nation subscribe to AP than to any other news service.<sup>71</sup>

AP's dominance in the field of news is readily seen. Because of its extensive news coverage, few publishers willingly go without AP service, *whatever the cost*.<sup>72</sup> However, if the price *Times-Star* had to pay for continued AP service was the coerced sacrifice of alternative service from competing wire services, then AP's service is not competing upon its merits. It is submitted that there is no reason in law or policy to limit the concept of tying arrangements to physical products sold in the marketplace. Applying the *Northern Pacific* rationale to *Taft-Ingalls* and denominating the Ohio Big Cities wire as the tying product, it appears that AP's established practice in and of itself unreasonably restrained trade in violation of the Sherman Act. The antitrust philosophy of maintaining competition by eradicating one of its major impediments — restrictive arrangements — can be implemented by declining to enforce a contract which contains such a monopolistic arrangement utilized by a dominant news wire service to foreclose its subscribers from other sources of news, a prerequisite to diversified reporting. "The real culprit [in this case] is exclusionary conduct; if ended, workable competition will prevail — meaning, presumably, that most cities will have at least two contesting publishers."<sup>73</sup> It can be argued that this may well be the long-range impact of the instant case. If, as a result of the Sixth Circuit's holding in *Associated Press v. Taft-Ingalls Corp.*, any future newspaper is saved from selling out to its competitor, thus

70 *Id.* at 547.

71 *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753, 768 (6th Cir.), *cert. denied*, 86 Sup. Ct. 47 (1965).

72 Comment, 61 *YALE L. J.* 948, 969 (1952).

73 Barber, *supra* note 65, at 505.

silencing that "clash of opinion which competition among publishers of their daily press could provide,"<sup>74</sup> it is submitted that the antitrust laws have served a significant social purpose.

*Stephen R. Lamantia*

JURISDICTION — VENUE — § 1401 REQUIRES DIVERSITY ONLY BETWEEN STOCKHOLDER PLAINTIFF AND CORPORATE DIRECTORS AND NOT BETWEEN CORPORATION AND DIRECTORS. — Plaintiffs, citizens of Michigan and New York, brought a stockholder's derivative suit in the United States District Court for the District of Colorado on behalf of Front Range Mines, Inc., a Colorado corporation.<sup>1</sup> Citizens of Colorado and Louisiana (directors of the corporation), as well as the corporation were named as defendants. Plaintiffs brought their suit under § 1401 of the Judicial Code, permitting a stockholder to bring a derivative suit "in any judicial district where the corporation might have sued the same defendants." Defendants moved to dismiss, alleging the court lacked jurisdiction and that venue was improper. Defendants also contended that Front Range, as the real party in interest, should be aligned as a party plaintiff, thus defeating jurisdiction based upon diversity of citizenship. They further contended that since lack of diversity between the Colorado directors and the corporation would have been fatal to the hypothetical suit by the corporation contemplated by § 1401,<sup>2</sup> venue was improper. The United States District Court for the District of Colorado, in denying the motion, *held*: It was proper to treat the corporation as a defendant, thereby precluding dismissal for lack of diversity jurisdiction. It further held that § 1401 does not require diversity of citizenship between the corporation and its directors when both are aligned as defendants. *Dowd v. Front Range Mines, Inc.*, 242 F. Supp. 591 (D. Colo. 1965).

A stockholder's derivative action is a suit by a stockholder to enforce a corporate cause of action. The corporation is always an indispensable party,<sup>3</sup> and the relief granted is against a third person in favor of the corporation.<sup>4</sup> It is frequently argued that since the ultimate interest of the corporation and the stockholder plaintiffs is similar, the corporation should be realigned as a plaintiff. The practical effect of this, in many cases, is to destroy diversity jurisdiction.<sup>5</sup> However, it has been settled in federal courts that if a corporation is under control which can be considered antagonistic to the plaintiffs,<sup>6</sup> it is per-

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74 *Times-Picayune v. United States*, 345 U.S. 594, 603 (1953).

1 Hereinafter referred to as *Front Range*.

2 § 1401 allows the stockholder the privilege of suing in any district that the corporation would have used if it had sued the same defendants. This leads first to the hypothetical determination of what district could be properly used by the corporation for its own suit if it had brought one.

3 *Davenport v. Dows*, 85 U.S. (18 Wall.) 626 (1873); *Greenberg v. Giannini*, 140 F.2d 550 (2d Cir. 1944); *Philipbar v. Derby*, 85 F.2d 27 (2d Cir. 1936).

4 *Price v. Gurney*, 324 U.S. 100 (1945).

5 *WRIGHT, FEDERAL COURTS* § 276 (1963).

6 Antagonism is present "whenever the management refuses to take action to undo a business transaction or whenever . . . it so solidly approves it that any demand to rescind would be futile . . ." *Smith v. Sperlberg*, 354 U.S. 91, 97 (1957).

missible for the court to grant a "special dispensation" by not realigning the corporation as a party plaintiff, regardless of its ultimate interest.<sup>7</sup>

The court, in *Dowd*, properly aligned Front Range as a defendant for diversity purposes since "the Board of Directors has not met in recent years because of the impossibility of obtaining a quorum."<sup>8</sup> It was also clear to the court that the Board "would not if it could do so, authorize the present action."<sup>9</sup> As a result, the corporate interests could only be protected by the stockholders bringing suit on behalf of the corporation.

Section 1391 (a), the general statute fixing venue in diversity cases, provides: "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."<sup>10</sup> Prior to 1936, this statute also set the proper venue for stockholder's derivative suits. Use of this statute presented no problems as long as the corporation and the directors resided in the same state since the stockholder could then sue where all the plaintiffs or defendants resided. However, if the directors resided in another state, the plaintiff stockholders could not use federal courts because venue could not be laid under the general venue statute as to the directors. In the alternative, if the plaintiff sued in the directors' district, venue would then be improper as to the corporation which was an indispensable party.<sup>11</sup>

In 1936, Congress sought to eliminate these problems by providing a specific statute — § 1401 — for a stockholder's derivative action.<sup>12</sup> Under this special statute, "Any civil action by a stockholder on behalf of his corporation may be prosecuted in any judicial district where the *corporation might have sued* the same defendants."<sup>13</sup> (Emphasis added.) The section gave stockholders another chance to obtain proper venue in a derivative action, although this method was not an exclusive one since the stockholders were still able to sue in their own district under the general venue statute.<sup>14</sup>

In *Dowd*, the corporation, aligned as a defendant, was domiciled in Colorado while the plaintiffs were citizens of New York and Michigan. The defendant directors resided in Colorado and Louisiana. The main question presented was: when a stockholder brings a derivative suit in the district of the corporation's domicile against various corporate directors who reside in and out of the corporation's district, is double diversity<sup>15</sup> required by § 1401 so as to defeat venue in that district? Or, is it enough that there is diversity between the plaintiff stockholder and the defendant directors?

7 *Koster v. (American) Lumbermen's Mut. Cas. Co.*, 330 U.S. 518 (1947); *Venner v. Great Northern Ry.*, 209 U.S. 24 (1908); *Doctor v. Harrington*, 196 U.S. 579 (1905).

8 *Dowd v. Front Range Mines, Inc.*, 242 F. Supp. 591, 594 (D. Colo. 1965).

9 *Ibid.*

10 28 U.S.C. § 1391(a) (1964).

11 See note 3, *supra*.

12 This statute was carried forward, with some changes not here material, as § 1401 of the Judicial Code. See revisor's note, 28 U.S.C. § 1401 (1964).

13 28 U.S.C. § 1401 (1964).

14 The stockholder also was given the benefit of extraterritorial service upon the corporation, but only when using § 1401 and not § 1391. See *Greenberg v. Giannini*, 140 F.2d 550, 552 (2d Cir. 1944).

15 Diversity not only between the stockholder and defendant directors, but also between the corporation and its directors.

This section has been given many different interpretations by federal courts. It is clear that the 1936 amendment deals strictly with venue and does not enlarge the subject matter jurisdiction of a district court.<sup>16</sup> In *Lavin v. Lavin*,<sup>17</sup> the plaintiff stockholders and the corporation were citizens of the same state, but the defendant directors resided in another. The court held that § 1401 did not dispense with the jurisdictional prerequisite of diversity between the plaintiff and the defendant corporation, but pointedly refrained from resolving the question of whether the statute required diversity between the corporation and its directors.<sup>18</sup>

One of the first cases construing § 1401 as requiring double diversity was *Sale v. Pittsburgh Steel Co.*<sup>19</sup> There, a New York citizen brought a derivative suit in Pennsylvania against a Pennsylvania corporation and citizens of Ohio and Pennsylvania. The court held venue was improper as to the Ohio defendants because the corporation could not have sued them in Pennsylvania since there was no diversity jurisdiction between the corporation and the Pennsylvania defendants.<sup>20</sup> Under this interpretation, the plaintiff stockholder can lay venue under § 1401 only when the corporation, on whose behalf he is acting, has both venue and jurisdiction to sue in the district wherein the action is brought.

In *Schoen v. Mountain Producers Corp.*,<sup>21</sup> on the same facts as those in the *Sale* case, the district court held that in the hypothetical corporate suit to which § 1401 refers, there would have to be diversity of citizenship between the hypothetical corporate plaintiff and the defendants before such a suit could even be brought, aside from any question of venue.<sup>22</sup> On appeal in the Third Circuit, the plaintiff contended that § 1401 dealt only with venue, and that it was wrong to read it as imposing the jurisdictional concept of diversity of citizenship.<sup>23</sup> While affirming the district court's interpretation of the statute, the court stated:

In the first place the language of the statute itself is quite clear and unambiguous. It does not say . . . that a stockholder's derivative suit may in every case be brought in the district in which the injured corporation resides. . . . What it does say is that the stockholder may bring his suit on behalf of the injured corporation in any district in which suit against the other defendants "might have been brought by such corporation." Whether a corporation may bring a suit in a given district certainly depends just as much upon whether the district court of that district would have jurisdiction of the subject matter as upon whether the district is one in which the venue statute authorizes suit to be brought. . . . It is true . . . that this construction of the statute imports a jurisdictional

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16 *Tucker v. National Linen Serv. Corp.*, 188 F.2d 265 (5th Cir.), *cert. denied*, 342 U.S. 828 (1951); *Braunstein v. Devine*, 136 F. Supp. 156 (D. Mass. 1955); *Tucker v. New Orleans Laundries*, 90 F. Supp. 290 (E.D. La. 1949), *aff'd*, 188 F.2d 263 (5th Cir.), *cert. denied*, 342 U.S. 828 (1951).

17 182 F.2d 870 (2d Cir. 1950).

18 *Ibid.*

19 57 F. Supp. 283 (W.D. Pa. 1944).

20 *Ibid.*

21 170 F.2d 707 (3d Cir. 1948).

22 *Schoen v. Mountain Producers Corp.*, 76 F. Supp. 554 (D. Del. 1948).

23 *Schoen v. Mountain Producers Corp.*, 170 F.2d 707 (3d Cir. 1948).

element into a statute relating to venue but there is nothing to prevent Congress from drawing a venue statute in such terms and we think that in this instance it did so.<sup>24</sup>

It can readily be seen that if diversity of citizenship must exist both between the corporate defendant and all its directors, and between the plaintiff stockholder and all the defendants, it will be practically impossible for the plaintiff stockholder to sue the defendants anywhere in federal courts since diversity of citizenship will never exist between the corporate defendant and all other defendants when, as in *Dowd*, there are defendant directors residing in the corporation's district.<sup>25</sup>

The history of § 1401 discloses that it was directed to the problem posed when the corporation and its directors were residents of different states. Although its immediate goal was thus to remedy this specific situation which did not raise the issue of double diversity, its policy was the facilitation of stockholder's suits by bringing together both the injured corporation and the alleged wrongdoers in one action.<sup>26</sup> The literal construction given the section in the *Sale* and *Schoen* cases contracted the operation of a provision which was designed to relax venue restrictions. This undesirable construction has been rejected by most, if not all, of the later cases that have interpreted § 1401.<sup>27</sup>

The first case to apply § 1401 solely as a venue statute by refusing to impose the requirement of double diversity was *Saltzman v. Birrell*.<sup>28</sup> While discussing § 1401 the court said:

The clause under examination presupposes the existence of federal jurisdiction. Nothing in the statute suggests the need of double diversity. Such a construction would not execute the policy of the statute which is designed to facilitate the bringing of stockholders' suits. The words, "may be brought in any district," have a venue, rather than a jurisdictional connotation. The language is manifestly concerned with the choice of a district, a problem which does not arise until a jurisdictional basis already exists.<sup>29</sup>

In view of the many problems created by construing the statute as requiring double diversity when directors reside in and out of the corporation's district, the better construction interprets § 1401 as pertaining solely to venue and not as imposing any jurisdictional requirements.<sup>30</sup> This construc-

<sup>24</sup> *Id.* at 711.

<sup>25</sup> *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). See Note, 32 NEB. L. REV. 443 (1952-1953).

<sup>26</sup> ". . . this proposed legislation relates solely to venue in that class of stockholders' suits brought under the diversity of citizenship jurisdiction of the Federal courts wherein a stockholder of one corporation brings the suit on behalf of the corporation against another corporation incorporated in another State." H.R. REP. No. 2257, 74th Cong., 2d Sess. 1-3 (1936).

<sup>27</sup> *Glicken v. Bradford*, 204 F. Supp. 300 (S.D. N.Y. 1962); *Industrial Waxes, Inc. v. International Rys. of Cent. Amer.*, 193 F. Supp. 783 (S.D. N.Y. 1961); *Clay v. Thomas*, 185 F. Supp. 809 (S.D. N.Y. 1960); *Beury v. Beury*, 127 F. Supp. 786 (S.D. W.Va. 1954); *Montro Corp. v. Prindle*, 105 F. Supp. 460 (S.D. N.Y. 1952); *Citrin v. Greater New York Indus.*, 79 F. Supp. 692 (S.D. N.Y. 1948); *Saltzman v. Birrell*, 78 F. Supp. 778 (S.D. N.Y. 1948).

<sup>28</sup> 78 F. Supp. 778 (S.D. N.Y. 1948).

<sup>29</sup> *Id.* at 784.

<sup>30</sup> See cases cited note 27, *supra*.



tion is supported by Professor Wright<sup>31</sup> and by the fact that the statute was placed in the venue section of the Judiciary Revision Act of 1948.<sup>32</sup>

The stockholder's problem of finding a suitable forum state, when confronted with a factual situation such as *Dowd*, is easily solved by applying § 1401 without a double diversity requirement. When the courts construe it as requiring double diversity and deny venue, they are in effect closing the federal courts to aggrieved stockholders, and allowing the temptation to exist for directors to mismanage corporate affairs without the threat of a derivative suit. This construction is not called for by the language of the statute, and policy considerations militate for the opposite interpretation. The orthodox interpretation by *Dowd* concerning alignment and venue preserves the effectiveness of the derivative action as a means for interested stockholders to oversee corporate affairs.

— *Clifford A. Roe, Jr.*

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31 WRIGHT, FEDERAL COURTS § 73 at 277 (1963).

32 28 U.S.C. ch. 87 (1964).