Michigan Law Review

Volume 50 | Issue 6

1952

CONSTITUTIONAL LAW-COMMERCE CLAUSE-FREEDOM OF PRESS-AMENABILITY OF NEWSPAPER TO SHERMAN ANTI-TRUST ACT

William K. Davenport
University of Michigan Law School

CONSTITUTIONAL LAW—COMMERCE CLAUSE—FREEDOM OF PRESS—AMENABILITY OF NEWSPAPER TO SHERMAN ANTI-TRUST ACT—Until a competing radio station appeared on the scene in 1948, defendant newspaper was the only medium for mass advertising available in the Lorain, Ohio area. In an effort to regain its monopoly position and eliminate the radio station as a competitor, defendant inaugurated a policy of refusing to accept custom from advertisers who employed the services of its rival. Both the newspaper and the radio station received news

dispatches, advertising copy, payments, and other materials from sources outside Ohio, but neither had any appreciable audience beyond the borders of the state. In a civil action brought by the United States under sections 1 and 2 of the Sherman Act,[1] the district court enjoined defendant from continuing its attempted monopolization.[2] On appeal to the Supreme Court, *held,* affirmed. Defendant's activities came within the scope of the federal commerce power. Furthermore, the First Amendment gives newspapers no immunity from injunction under the anti-trust laws. *Lorain Journal Co. v. United States,* 342 U. S. 143, 72 S.Ct. 181 (1951).

Under the present broad interpretation of the commerce clause a newspaper which receives news, advertising, and payments from sources outside the state is clearly within the compass of federal regulation, even though its end product is distributed only locally.[3] It is not enough that a monopolist be deemed in interstate commerce, however, to convict him under section 2 of the Sherman Act; it must also be shown that he has sought to monopolize a part of that commerce.[4] The Supreme Court in the principal case succeeded in bringing defendant newspaper under the language of this section by reliance on the well-established "stream of commerce" theory,[5] conceiving of defendant's boycott as an attempted monopolization of "part" of the interstate flow of news and advertising, namely, its Lorain, Ohio outlet.[6] If perhaps a trifle strained in its reasoning, this analysis at least serves to bring local monopolists under federal control where the thing monopolized moves across state lines. The Court summarily rejected defendant's contention that the injunction against him was a prior restraint on freedom of the press and hence unconstitutional under the First Amendment, doubtless finding a clear distinction between an injunction against

[1] 26 Stat. L. 209 (1890), 15 U.S.C. (1946) §§1, 2. The principal case ignores the §1 charge and concerns itself only with liability under §2.

[2] United States v. Lorain Journal Co., (D.C. Ohio 1950) 92 F. Supp. 794; noted in 3 ALA. L. REV. 376 (1951).

[3] United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 64 S.Ct. 1162 (1944); Stafford v. Wallace, 258 U.S. 495, 42 S.Ct. 397 (1922). The district court assumed for purposes of its decision that defendant had only a local monopoly, deciding that it was nevertheless subject to federal regulation because of its destructive effect on the (interstate) radio station.

[4] The relevant portions of §2 state that "every person who shall monopolize, or attempt to monopolize, or . . . conspire . . . to monopolize any part" of interstate commerce is in violation of the act. 26 Stat. L. 209 (1890), 15 U.S.C. (1946) §2. The Supreme Court discussed only the attempt aspect of the complaint, although conspiracy was also charged. The district court, in an interesting dictum, indicated that concerted action between a corporation and its officers acting on its behalf is sufficient ground on which to base a conspiracy charge. This seems anomalous inasmuch as a corporation can act only through its agents, but is in keeping with recent cases which have held that a parent corporation and its subsidiary can be found guilty of a conspiracy under the Sherman Act. See United States v. Yellow Cab Co, 332 U.S. 218, 67 S.Ct. 1560 (1947); United States v. New York Great A. & P. Tea Co., (7th Cir. 1949) 173 F. (2d) 79; note, 11 FED. B.J. 130 (1951).

[5] Stafford v. Wallace, supra note 3; Binderup v. Pathe Exchange, 263 U.S. 291, 44 S.Ct. 96 (1923).

[6] On the concept of monopolization of a "part" of interstate commerce, see United States v. Yellow Cab Co., supra note 4.

publication as such and one merely aimed at the monopoly practices of a publisher. Newspapers have previously been held liable for violation of the anti-trust laws,[7] as well as for contempt of court,[8] libel,[9] and taxes.[10] Hence the decision of the Supreme Court is in keeping with the settled principle that "the publisher of a newspaper has no special immunity from the application of general laws."[11]

William K. Davenport

[7] Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co., 293 U.S. 268, 55 S.Ct. 182 (1934).

[8] Toledo Newspaper Co. v. United States, 247 U.S. 402, 38 S.Ct. 560 (1918).

[9] Robertson v. Baldwin, 165 U.S. 275, 17 S.Ct. 326 (1897).

[10] Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444 (1936).

[11] Associated Press v. NLRB, 301 U.S. 103 at 132, 57 S.Ct. 650 (1937). See also Associated Press v. United States, 326 U.S. 1, 65 S.Ct. 1416 (1945).