MONOPOLY IN NEWS

The Sun's Suit Against the Chicago News Trust.

ANKLIN BARTLETT'S ARGUMENT.

Join the News Trust from Preventing Its Members from Buying News from The San -News Shown to He a Commedity and the Action of the News Trust to Se a Vicintion of the Laws of the United States, of New York and of Illinois .- The Trust as the cott The Sun-Conspiracy and Intimidation in Hestraint of Trade-The Br-Low Comdained Of Airendy Beckered Unlawful by One Court-Wrongful Acts of the Trust Cited

Fellowing is the Hon, Franklin Bartlett's argument delivered before Judge E. Henry Lacombe in the United States Circuit Court for the Southern District of New York in support of the complainant's motion for a temporary infunction in the suit brought by THE SUN Printing and Publishing Association against the Associated Press and others, the Associated Press being represented by Gen. Wager Swayne and Wheeler H. Peckham:

Mr. Bartlett--If your Honor please, this is

an application for a writ of temporary injunction against the Associated Press and the Directors of the Associated Press restraining them from preventing the sale by the complainant, THE SUN Printing and Publishing Association, of its news to any newspaper in the United States. Substantially it is an application for a writ of injunction restraining them from interfering in any way with the sale by THE SUN of its news.

We claim that there is no issue of fact. That

is, that the answer concedes enough to entitle us to relief, provided our view of the law be correct. But it may be as well to state the facts as they appear on the pleadings. The substantial averments of the bill of complaint are that the complainant, THE SUN, is a corporation organized and existing under the laws of this State; that the Associ-ated Press is a corporation organized and existing under the laws of the State of Illinois, and it is agreed that the purposes or the objects of the Associated Press, as set forth in its articles of incorporation, are as follows: "To buy, gather, and accumulate information and news; to vend, supply, distribute, and publish the same; to purchase, erect, lease, operate, and sell telegraph and telephone lines and other means of transmitting news; to publish periodicals, to make and deal in periodicals and other goods, wares, and merchandise." It is claimed in the answer that the defendant has not sought to operate or to lease or sell telegraph or tele-phone lines. It is admitted that its principal business is collecting and selling news, although in the answer an evasive plea is set up that it ses not really sell news, but that it supplies news for a compensation, the distinction of which is not very clear to my mind; but we will consider that question later. As to the business of the Associated Press, it is conceded in the fourth paragraph of the answer-and it might be as well to consider the facts as they appear by the answer, that is, as to the material averments of the complaint.

Judge Lacombe—Yes, because if the facts

stand on dispute in the affidavit, they cannot be decided in your favor on a motion for preliminary injunction.

Gen. Swayne—If your Honor please, we have

quite a number of answering affidavits which we will present. They are at the service of the gentleman and will be handed to the Court.

Mr. Bartlett—They have not been served on

me yet, The Court—Well, the contents of the answering affidavits may be stated at the proper time, and after the facts are presented to me then we will have the argument.

THE RIGHT TO SELL NEWS.

Bartlett-My theory of the complaint in it matters not what answering affidavits they put in now, they have conceded enough in their answer to entitle us to relief. There is no dis-pute about the incorporation of the complainant or defendant. The second paragraph of the answer seems to imply an intention to raise the question of our corporate power to sell news. I do not know whether that will be seriously argued or not, as every newspaper throughout the United States is now engaged in selling news to some one, and I do not think that this objection should apply only against THE SUN Printing and Publishing Association and not against any other paper. I do not suppose that that contention is seriously raised. The answer says that THE SUN was incorporated solely for the purpose of printing and publishing a daily newspaper—that is, THE SUN Printing and Publishing Association was— and not for the purpose of at any time or in any way selling the news, and that said complainant is not and was not authorized by law to vend news. I do not know that there is any distincyour news on a printed page or selling it prior to its publication in that special form. I merely

allude to this point en passant.

The third paragraph of the answer admits the purposes of the incorporation of the defendant, the Associated Press, as set forth in the bill of complaint; and this answer has been printed by the defendant, and maybe your Honor would like to follow it ? [Handing a copy of the answer

to the Court.]
The Court.—Yes, if you have an extra copy.
Mr. Bartlett.—Oh, yes, I have a working copy. The fourth paragraph of the answer admits that the principal business of the Associated Press is buying, gathering, and accumulating informa-tion and news, and vending—that is, selling it and that its principal place of business is in the city of Chicago, but that it has property within this district and a resident managing agent, Charles S. Diebl, so I understand no question is raised as to the jurisdiction here. Then there is this denial in the fourth paragraph of the

answer: selling the information and news, so bought, gathered, and accumulated by it, constitutes any part of the business carried on by it; and avers the fact to be that the said information and news, so bought, gathered, and accumulated by it, is sent out and distributed to its own members solely; except in cases hereinafter mentioned, as follows, to wit: First, in two cases it supplies its news to persons or corporations, not actually members, for a small consideration, for publication twolve hours after the use of such news by the members of the Associated Press; second, a certain portion of its news is exchanged with like associations, or with individuals, in foreign countries, and in some case: a weekly or monthly charge is made, in addition to the news furnished by such for-

sign agencies, as a differential rate." Now, it appears from the various exhibits at-tached to the answer, the contracts made in secries A, with the stockholders of the Associated Press. and series B, with other newspapers magners of the Associated Press but not stockholders, that the contracts refer to the gathering and selling of news; so this plea, we shall argue, is simply an evasion.

NEWS AS TRADE.

The Court—It is hardly so much a denial of the fact of selling news as of the fact that it sells broadcast to everybody; it seems rather an averment that its dealings are confined to members of the the association; that is, it does not sell as you sell The SCN to every man who comes along the street with two cents to buy it, but that it only sells to members of its association.

But that it only sells to members of its associa-tion.

Mr. Bartlett—Yes, to 700 newspapers in the United States and to every paper having tele-graph service, except The Sun; that is, it con-trois the whole newspaper business throughout the United States with the exception of The Sun.

The Court—It says that it is but a small pro-portion of the newspapers of the United States, not to exceed one-sixth.

Mr. Bartlett—I have here an affidavit which contains their printed list I will show it to your Honor. contains their printed list I will show it to your Honor.
The Court—I do not know how many papers there are in the United States or whether that printed list comprises one-half or one-sixth or one-twentleth.

Lic. Bartlett—Web, I do not know that it makes any difference in any way, for one-sixth is a very large proportion and includes all the leading papers throughout the country. But we do not stand on the extent of their membership as a ground of relief at all.

The Court—Uh, no, but I was simply finding out what were the admitted facts on which this motion has to be decided. The controverted facts we will not pay any attention to.

Mr. Hartlett—In the fifth paragraph we find an admission that the defendant, the Associated Press, is engaged in interstate trade and commerce—of course, not in that language; and that it distributes its news from the Northern District of Illinois and from the Southern District of New York.

District of Illinois and from the Southern Dis-trict of New York.

The Court—You do not claim that news is a subject of trade and commerce?

Mr. Bartlett—We think it is, your Henor.

The Court—Have you any decision in support of that proposition, Mr. Bartlett! It is rather startling if a telegraph despatch sent from here to New Orleans is a nubject of trade and com-merce. It may be so, but it is rather a startling proposition.

startling if a telegraph despatch sent from here to New Orleans is a subject of trade and commerce. It may be so, but it is rather a startling proposition.

Mr. Hartlett—Your Honor asked for an authority. The pricipal case, or one of the principal cases, upon which the defendants rel will be Matthews vs. Associated Press, in 136 New York, where Judge Peckham wrote the opinion, and where a by-law of the Associated Press was considered in the light of its being in restraint of trade. I will try to find the words. [Referring to book]. There its emstr have been assumed hat the collecting and distributing of news means trade; the Court of Appeals said: "We do not think the by-law improperly tends to restrain trade, assuming that the business of collecting and distributing news would come within the definition of trade."

The Court—Assuming for the purposes of that argument, of course, it is not necessary to express an opinion one way or another.

Mr. Bartlett—Yes, but the Court goes on to decide the case without any reference to that question; of course our contention is that it is trade, and that the language of the Suprome Court of the United States in the case of the United States vs. the Trans-Missouri Freight Association shows that "trade" covers everything. Your Honor may, however, take a different view.

The Court—No, I think, reading that opinion, that it covers everything.

Mr. Bartlett—We think that that decision is a great decision, and has thrown a new light on all this question. The admission in the fifth paragraph of the answer, if your Honor please, is, that "the defeniant transmits its news from the State of New York, and from the Southern District thereof, to its members, being the proprietors and publishers of newspapers in the several other States of the Union;" and then follows a peculiar pies, which we consider immaterial; it says "that it is substantially a mutual organization, having for its purpose the collection and exchange of news at cost. It has never attempted to make any profits or decl

THE WRONG DONE.

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The Court—It would help me a good deal in following the facts as you lay them down if you would tell me in about twenty-five words what the defendant has been doing of which you complain. Does it refuse to sell its news to any members of the association? Is that the wrong they are doing you? Or do they refuse to sell you news? Is that it? What have they done of which you complain?

Mr. Bartlett—They have done this. In the first place they have enacted a by-law which is in restraint of trade.

The Court—What does that by-law say? I do not mean the whole text of it, but what is its effect!

not mean the whole text of it, but what is its effect;

Mr. Bartlett—It inhibits or prohibits any newspaper belonging to the Associated Press, stockholder or member, from buying of or selling to any newspaper declared to be antagonistic. Now we say such a by-law as that is in restraint of trade.

The Court—and it is claimed that your paper is antagonistic.

Mr. Bartlett—Yes; they first enact a by-law, and in the second place they incorporate or repeat that by-law in every contract, and in the third place they declare The Sun Printing and Publishing Association—

The Court—Was that in a contract made with you!

Publishing Association—
The Court—Was that in a contract made with you?
Mr. Bartlett—No, we have no contract, but we are suing as a person injured by a conspiracy or combination to commit a wrongful act against us. We are not in the position of a covenantee suing a covenantor in an action between the two parties to the contract, but we claim that we are the victims of a malicious wrong—a combination or conspiracy to injure us.

Now, what are the successive steps which we claim have been committed by the defendant in the first place, as I have stated, the enactment of the objectionable by-law, which of liself may not amount to anything unless used as against us; the embodiment, in the second place, of that by-law in the various contracts made with newspapers, and in the third place the declaration that The Sun is an tagonistic, or the plaintiff, the owner and proprietor of The Sun, is antagonistic, and, in the fourth place, the commission of certain overt acts in consummation of the consistency or for effecting an unlawful purpose by unlawful means. We claim that the by-law itself is unlawful, and we say that the means exerted against us are unlawful size; and is sy that on the papers and affidavits it is conceded that certain overt acts were committed against us in reference to three newspapers, the St. Louis Philadelphia Record.

Overt acts Complained of the confidence of the Philadelphia Record.

OVERT ACTS COMPLAINED OF.

Gen. Swayne—What overt acts?
Mr. Bartlett—Compelling these papers to cease buying any news of us.
The Court—That is a conclusion. What did they do! Did they send them a notice?
Mr. Bartlett—They cited them to appear and Mr. Bartlett—They cited them to appear and notified them—
The Court—That further dealings with THE SUN would be ground for—
Mr. Bartlett—Suspension, yes, sir.
Gen. Swayne—If they continued to buy of THE SUN, then they could not have of the them.

SUN, then they could not buy of the Associated Press; that you must take your choice, either buy of us or THE SUN.
Mr. Barlett—Oh, no, that they would be liable to the provisions of the by-laws, suspension

or fine.

The Court—The provision of the by-laws being in that case that they should not receive any more news from the Associated Press!

Mr. Bartlett—And be subject to suspension,

any more news from the Associated Press!

Mr. Bartlett—And be subject to suspension, yes.

Mr. Peckham—If there is any other fact, Mr. Bartlett, I would I ke you to state it, because the papers and affidavits are very voluminous—I have tried to read them all.

The Court—If that is so, hadn't we better see what the answering affidavits are and then have the argument afterward! I think the underlying broad facts are sufficiently stated, and you may make your argument after we get at the facts from the other side. Unless three is some peculiar fact which you wish to direct my attention to I would now rather have the facts presented by the affidavits which you have not seen, or which have been offered by the other side; then I will hear you upon your argument. As I understand, there are affidavits coming in which you have not yet seen, and of course you proceed with your argument.

Mr. Bartlett—Certainly; but there is one fact to which your Honor's attention should be drawn at this time, and that is that the object of the action on the part of the Associated Press against The Sun's not its own protection. The object is to injure The Sun, and we say the case comes within that line of cases holding that where the object—

The Court—What facts show that, Mr. Bartlett!

RIGHT CLAIMED FOR THE SUN.

RIGHT CLAIMED FOR THE SUN.

RIGHT GLAIMED FOR THE SUN.

Mr. Bartlett—Because each of these newspapers has a contract running nearly a century with the Associated Press, that is, ninety-one or ninety-two years, during the whole corporate life of the Associated Press, that is, ninety-one or ninety-two years, during the whole corporate life of the Associated Press, providing that it shall receive its news from the Associated Press in consideration of the Associated Press in consideration of the payment of such additional sum as may be levied, not exceeding 50 per centum of the stipend sgreed upon. These contracts are subsisting, All of these papers to which we refer in this bill of complaint have these contracts of the St. The news purchased by these papers of The Sun was not the same news as that furnished by the Associated Press. The purchase of the news of The Sun, its special news, in no way affected or lessened the contract price agreed to be paid to the Associated Press; in fact, the purchase of our news did not damage or injure the Associated Press to the extent of one farthing; and yet they say "you cannot buy of the New York Sun. It matters not, the effect upon this corporation, but we decisare The Sun to be antagonistic, and for that reason you cannot pay them any money." Now, I do not know any case anywhere that holds—The Court—I suppose it is conceded that The Sun is not know any case anywhere that holds—The Court—Well, I have been reading The Sun for hard fact.

Mr. Bartlett—No, it is not; we take the position was hostile to the Associated Press for a number of years. But I cannot take Judicial notice of that fact.

Mr. Peckham—Ne; "The Sun shines for all"; it is antagonistic to no one.

Mr. Bartlett—I take the broad position and at the same time the definite position that The Sun does not bring this action because of antagonism; it merely wants to be allowed to exist, to sell its news, when it does not interfere with any other person. We claim the right that any individual has, that any corporation or firm other than The Sun, a Mr. Bartlett-Because each of these newspa

Mr. Bartlett—That is the very troude, there is.

The Court—Do your affidavits show that I
Mr. Bartlett—Yes, sir, they do. These other newspapers happen to be members of the Associated Press; but that is where the personal hostility comes in.

The Court—What I am trying to get at is whether it is hostility personal to The BUN or hostility to all he papers that are not members

of the organization? Is there snything which differentiates its action touching TER SON?

Mr. Bartlett—But they have all the other newspapers throughout the country, every leading newspaper throughout the country.

The Court—The contention is that its membership is but one-sixth of the newspapers.

Mr. Bartlett—Thay have every other leading newspaper in the country. We claim in the first place that that sort of by-law is improper and that it shows upon its face the wrongful intent to injure by discriminating against particular individuals, firms or corporations.

The Court—Is that by-law printed?

DISCRIMINATION AGAINST THE SUN. Mr. Bartlett-Yes, sir; your Honor will find it

Mr. Bartlett—Yes, sir; your Honor will find it at Article XI.—

The Court—Yes, page 43; I have it.

Mr. Bartlett—Page 43; aub-division 8 of Article XI. We claim that that is a very different sort of by-law from a by-law providing that you shall not purchase news of a like association covering a like territory; that it introduces an element of arbitrary judgment, of arbitrary discretion, of wrongful intent, which is absent in by-law of the other character.

Now as to the question which your Honor asked about discriminating against Trms Sux, it appears in our affidavits. In the first place it appears in the bill of complaint in the thirteenth paragraph that the special news referred to in this action was the sole property of Trms Sux Associated Press, or which the Associated Press undertook to furnish its stock-holders or subscribers, and the payment of the stipulated sum to the complainant in no way or manner affected or lessened the aum or sums which the said newspapers were obliged to pay to the Associated Press. That is conceded. Only in the answer the plea is set up, or the claim is made, rather, to be more exact, that it might possibly tend to disrupt the defendant association. It says: "The ultimate effect would be the building up of a rival organization." That, of course, is mere argument; it does not show that. How could paying us a sum of money, not lessening the sum paid them and not interfering with their contract, in any way injure the Associated Press.

The Court—They might find out after awhile that they got more news and better news from you and might cease to belong to the association.

Mr. Francis Swayne—If your Honor will wait went and any agree our affidavits on that point—it

The Court—They might find out after awhile that they got more news and better news from you and might cease to belong to the association.

Mr. Francis Swayne—If your Honor will walt until you hear our affidavits on that point—it is not conceded at all.

Mr. Bartlett—Your Honor asked me if the discrimination against The Sun was set forth in the bill of complaint?

The Court—Yes.

Mr. Bartlett—It is set up in the fifth paragraph. "The Associated Press permits and allows such newspapers to buy or purchase any special news which may be offered for sale by the proprietors or publishers of any newspapers other than the plaintiff, The Sun Priviting and Publishing Association. It is stated in the answer that they do not affirmatively permit them to do it, but in our moving affidavits it is set forth that the Herald, the World, the Morning Journal, the Times, and the Tribune, for example, are allowed to sell their special news, and the by-laws of the Associated Press show that papers other than those declared to be antagonistic are allowed to sell their special news.

The third paragraph of Article XI., entitled "Duty of Members," says: "The news which members 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 in its origin, but which has originated through deliberate and individual enterprise on the part of the newspapers first securing the same. Such original news shall be held to be individual and special to that newspaper."

The particular by-law we object to is subdivision 8 of Article XI., because we know to our cost the meaning of the word antagonistic, that is, as used in the denunciatory resolutions of the Associated Press, but I take it that the third paragraph divices all news into two classes, that which originates through deliberate and individual enterprise, on the part of the newspaper, and, second, that which is spontaneous, but which hese mis to eayer all the rest of news. I think the facts are now stated on bea

TWO NEW APPIDAVITS.

The Court—All the facts are now stated en both sides, and I will hear argument.

Mr. Bartlett—Let me ask your Honor to what extent you are going to consider the affidavits they have put in. They are very voluminous, and I have only just seen them.

The Court—Of course, if a fact material and essential to the granting of relief is really in dispute upon the affidavits, relief does not go by way of preliminary injunction; that is a matter which is relegated to final hearing, where the several affiants can be subjected to cross-examination; but of course there are a great many issues of fact which are always raised on motions of this kind by affidavits which are not material or essential to the determination of the main question. It is not necessary to bother yourself to answer such parts of the affidavits as are not materially necessary to the determination of the question one way or the other, and really it is hardly worth while to answer those points that are essential, because as soon as there is a conflict on the face of the affidavits, then the Court won't act in granting a preliminary injunction, but will have to wait until final hearing.

Mr. Bartlett—Our moving affidavits have been printed through the kindness of the other side, and your Honor will have them before you. I submit two other affidavits: I suppose there is no objection. I suppose I have the right to bring in affidavits on the hearing, as they bring in theirs without service.

The Court—Let us see what the affidavits are. Possibly there will not be any objection.

Mr. Bartlett—One of these affidavits which I now have is from the editor-in-chief of the Inter Ocean averring that the service has been cut off, showing the continued hostility of the Associated Press.

Gen. Swayne—There is no objection to that, Mr. Bartlett—And the other is an affidavit of

about that, General?

Gen. Swayne—I will reply when my time comes.

Mr. Bartlett—Well, I did not understand your position exactly about that. Now as to restraint of trade. Or grounds for making this application are twofold. In the first place, that the bylaw, its embodiment in the contract, and the overt acts altogether amount to and each one separately amounts to a restraint of trade which is unlawful under the laws of the United States and unlawful under the laws of the State of New York, and also unlawful under the laws of the State of New York, and also unlawful under the laws of the State of the State of Illinois, as stated in the bill of complaint. All these are unlawful under the laws of the United States and under the laws of the State of New York. Again, that a malicious wrong in the nature of a boycott, or of the same general character at any rate, an oppressive wrong which is unlawful at common law, has been committed by the defendants against this complainant. That is, they have gone too far. That whether the acts be in ordinary restraint of trade or not, that no such malicious wrong can be sustained. But we are not obliged to blead any appeals statute of the State of New York or of the United States, and is any event your Honor must take into consideration the existing statutes of the United States, which refer to every

thing coming within interstate trade and commerce, and also you must take into consideration the decision of the Supreme Court of the United States. All of these questions, in fact, in suits of this character involving such issues, come within the general topic restraint of trade, and will be found referred to in all text books on restraint of trade. This is in answer to the theory of Gen. Swayne, that I ought to have pleaded the act of 1890 if I wished to refer to it or rely upon it in this suit. I do not apprehend that such is the rule of law.

We claim, is the first place, that the by-laws and the concessed facts show that the Associated Press is a monopoly or combination, unlawful and in restricted facts also that such that the hylaws with the state of the continuation of trade, and asside from the by-laws to which I have drawn your Honor's attention, that is, section 8 of Article XI., I call your Honor's attention to the provisions of the certificate of membership, found at page 39 of the answer, serica A, which gives the holder of the certificate, of the stockholder's certificate, series A, a with provides that no new membership shall be created in his city, or such additional territory contiguous thereto, as may be specified in his contract, without the consent in writing of all the holders of certificates of series A in such city and additional territory.

Cates of series A in such city and additional territory.

THE ARROCIATED PREES A MONOPOLY.

And in connection with the by-law I call the attention of your Honor to the de ision of Judge Thayer in the case of the Minneapolis Trifouse Company, appellant, vs. the Associated Press, appellee, where the oblino concludes:

"If we had not reached the conclusion heretofore announced that the bill of complaint was properly dismissed, we should then feel compalied to consider a further question which is not touched by the brief nor by the oral arguments, and that is whether a court of equity should in any event undertake to specifically enforce and perpetuate a monopoly of the news by limiting the service of news reports to a single newspaper in a large city and placing it within the power of the proprietor of such newspaper to prevent other newspapers from having access to the same sort of information. The fact that counsel have not seen fit to raise or discuss this question, and the fact that the bill was dismissed on other grounds, renders it unnecessary to consider it or to express an opinion thereon.

It seems to me that implies that the Court thinks that the Associated Press, its various contracts and all the conceded facts show that it is a monopoly, an unlawful monopoly in restraint of trade, and we say that under the decision of the Supreme Court in the case of the United States against the Freight Association, the by-law to which I have referred, are unlawful and come within the inhibition of the Sherman Anti-Trust act of July 2, 1890, and I call your Honor's attention to the opinion of that Court.

The Court—Almost everything is within that inhibition, of course.

Mr. Bartlett—Your Honor has probably read with a great deal of interest this very able work of Albert Stickney where he struggles hopelessly against these two decisions, that of the People against Sheldon in the Court of Appeals in this State and that or the United States against the Trans-Missouri Freight Association. In speaking of these cases he sa

THE RIGHT TO SUE. have no property interest; your property has not been injured," and Judge Peckham said that it was not necessary that the United States should have a pecuniary interest. The United States District Attorney could bring the action. But he did not say that a private party could not bring the action, and I think the whole intendment of the concluding part of his onlinion is that it merely authorized it, merely empowered the United States District Attorney in the District to bring such an action, but that such power was not necessarily restricted. "It is also freading from opinion largued that the United States have no standing in court to maintain this bill; that they have no pecuniary interests in the result of the litigation or in the question to be decided by the court." In other words, that the hill should have been brought by a private party. Fo the only question discussed was the power of the District Attorney to bring it. The opinion goes on to say:

"We think that the fourth section of the act invests the Government with full power and authority to bring such an action as this, and, if the facts be proved, an injunction should issue. Congress, having the control of interstate commerce, has also the duty of protecting it, and it

Peasibly there will not be any objection.

Mr. Bartiett—One of these affidavits which I now have is from the editor-in-chief of the Interior, the working the continue of the Mr. We think that the fourth section of the Australia remedy by injunction as more efficient than any other civil remedy. The subject is fully and ably discussed in the case of in re Debs, 153 U. S. 564."

I do not think that it is necessary to draw your Honor's attention in detail to the various parts of the opinion of the Supreme Court of the United States in the Freight Association case.

The Court—I am reasonably familiar with it. Mr. Bartlett—But I might call your attention to one or two passages, where the Court say:

"When the set prohibite contracts in restraint of trade or commerce, the plain meaning of the language used includes contracts which relate to either or both subjects. Both trade and commerce are included so long as each relates to that which is interstate or foreign. Transportation of commodities among the several States or with foreign nations falls within the describition of the words of the statute with regard to that subject, and there is also included in that language that kind of trade in commodities among the States or with foreign nations which is not confined to their mere transport-tion. It includes their purchase and sale. " "While the statute prohibits all combinations in the form of trusts or otherwise, the limitation is not confined to that form alone. All combinations which are in restraint of trade and commerce are prohibited, whether in the form of trusts or in any other form whatever. " "When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade and commerce among the several States, &c., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is an unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

NEWS HELD TO BE A COMMODITY.

which has been cimitted by Congress.

As I have this language which I endeavored to find before in Mr. Stickney's book, I will read it. On page 174 of his book on State control of trade and commerce he says:

"On reflection, it is difficult to imagine a merchant above the grade of a retail dealer who is not within the condemnation of this language of the statute.

Now I suprehend that under that decision of the Supreme Court everything is covered—trade of any sort, commerce of any sort, business of every sort, and if collecting or selling news is not business, what is it I lift is not a commodity, what is it I one might as well say that the telephone and telegraph lines do not conduct any business.

The Court—Yes, rou are probably right there, My impression at first was against that proposition; but as I think of it, I think it is trade and commerce.

Mr. Bartlett—Is it possible that this enormous business which has been grasped by this great corporation is not trade and commerce?

The Court—Yes; it is trade, of course, as much trade as selling a book. The very Senate that passed the law did not know what the words meant when they put them in. They said they would have to leave it to the Court to define them.

Mr. Bartlett—I have often thought when I

would have to leave it to the Court to define them.

Mr. Bartlett—I have often thought when I have been sitting in the House of Representatives that the various members of the House did not know what they were doing.

The Court—They said with great frankness, in passing this act, that they did not know. The Chairman of the Judiciary Committee in the Senate was asked what was the meaning of the word "monopoly" and the meaning of the word "monopoly" and the meaning of the words "restraint of trade," as used there, and he said, "We don't know. The courts will have to inform us of that when the act gets there."

THE GREATERT OF TRUSTS.

he said, "We don't know. The courts will have to inform us of that when the act gets there."

THE OREATEST OF TRUSTS.

Mr. Bartlett—I have in this affidavit the names of all the papers who at one time were members of the Associated Press, and I think it is averred that they are unly about one-sixth of the newspapers in the United States; still they are all the leading papers and all the papers that have any telegraphic service; and the very papers that day after day denounce trusts and monopolies in this city and other cities have combined with other parties to form a more widespread, all-embracing trust and monopoly then any of those trusts and monopolies upon which they animadverted. The question is, is this monopoly so powerful that one newspaper, one individual, one firm, one corporation has no rolled against its oppressive measures?

Now we will assume that dealing in news, solling news, is trade or commerce. It is conceded on the pleadings that the defendant's news was sent from the Northern district of New York all over the Union, and there are other statements here, other parts of the answer admitting the same facts; that is, where it is stated that the asswapapers whose proprieters are

members of the Associated Press are situated in different cities and in different States of the Union and that "The news thus gathered by employees is transmitted by the wires of the various telegraph and telephone companies to the members of the association."

The Court—That is probably not trade. Do not misunderstand me. I did not mean to indicate that I was now of opinion that what the defendants did, as Judge Swayne defined it, was trading. I do not suppose that is trading, where they form a combination or coparinership or association and employ agents to gather news for themselves and use it. But what they are interfering with is the sale of the news you gather. I do not mean to imply it is trading for individuals to form an association and get men to gather news and use it and exchange their own news, although they may pay for it by some system of charging it back and forth and equalizing. Of course, the question is not whether they are trading or not, but whether they are trading and that person agrees to buy it and you send it, it is just the same whether you send it over the telegraph wire or whether you print it in a book or newspaper and send it. It is a trading act.

Mr. Bartiett—The only point to which I was then about to refer was that if collecting and selling news be trade, then this is a question of interstate trade and commerce. Now I do not agree with the contention of Gen. Swayne that it makes any difference whether this is a mutual association or not; I claim that their acts are just as illegal and just as wrong. I take the old case of Hooker & Woodward va. Vandewater, in the fourth of Denio, where the proprietors of various lines of boats combined to ether and of

ment was a conspiracy to commit an act injurious to trade, contrary to 2 R. S. 691, section S, and was illegal and void."

THE ATTEMPT TO GRUSH THE SUN.

I take it that a corporation claiming protection by reason of the theory of mutual organization cannet avoid liability for the wrongful acts of its directors and that it is just as liable to the rules of law as though it had no mutual relations, or alleged mutual relations. Now does this need any argument I We will say on July 2, 1890, such was the law of the United States; that is, the old law had been changed that an unreasonable restraint of trade was illogal, that a reasonable restraint was valid—that had been abrogated. The rule of law, as far as it affects Federal courts and interstate trade and commerce, had been changed; a new rule was established long prior to the filing of this bill of complaint or the commencement of this suit in equity. Can it be doubted that the provisions of the by-laws to which have referred are in restraint of trade Your Honor is aware that it matters not what the effect of the restraint of trade may be; whether that effect is good or bad. The question is, on its very face, does not that by-law come within the rule of the Supreme Court of the United States; Does not the by-law which gives a veto power to any newspaper enjoying the rights under contract series A, we will say in Minneapolis, St. Louis, or New York, to keep out another paper, is not that in restraint of trade? Do not those two by-laws tend to show a combination, a desire to create monopoly, as Judge Thayer says, in regard to this very by-law? The gentleman says that our position is different. A paper that buys and collects its ewn news at a cost of hundreds of thousands of dollars is told that it stands in a commercial or mercantile position when compared with an association embracing all the great newspapers throughout the country. It seems to me that the commercial spirit, the mercantile spirit—not wasing those words in their better sense, but using them in the

priminal under the statutes and under the de-cisions of our courts? In reference to that ques-tion I refer to Section 168 of the Penal Code: AN UNLAWFUL COMBINATION.

cisions of our courts? In reference to that question I refer to Section 188 of the Pennal Code:

AN UNLAWFUL COMBINATION.

"If two or more persons conspire (subdivision 6) to commit day act injurious to the public health, to public morals, or totstade or comm rec, or for the perversion or obstruction of justice, or of the due administration of the laws, each of them is guilty of a misdemeanor."

And I say, taking the decisi n of The People against Fisher in the 14th Wendell, the case of Hooker & Woodward vs. Vandewater in the 4th Denio, 349, the case of Stanton against Allen in 5 Denio, 434, and three cases in the Court of Appeals, that there cannot remain, after an examination of those cases, any foubt in the mind of the Court as to the unlawfulness of this combination shown by the papers.

The first case in the Court of Appeals is Arnot vs. The Pittston and Elmira Coal Company, reported in 68 N. Y., 558. The question was as to the validity of a contract made between the Butler Colliery Company and the defendant.

The Court—They would not sell their coal to anybody except one man.

Mr. Bartlett—Yes. And the opinion cites all of the earlier cases to which I have referred. It holds "that a combination to effect such a purpose is faimical to the interests of the public; and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal, is too well settled by adjudicated cases to be questioned at this day."

Now we come to the case of the Poople vs. Sheldon. But let me first refer to the case of Mathews against the Associated Press. That will be referred to by the distinguished counsel for the defendant. That was a case brought by Matthews to have a certain by-law of the Associated Press of the State of New York declared legal. That by-law restrained a member from buying news of any association covering a like territory—a like associated Press nave always said. "Oh, we are all right; we have this decision of Matthews against the Associated Press nave always said. "Oh, we ar

clared by the directors to be antogonistic."

EFFECT OF THE BY-LAW.

Mr. Bartlett—Yes, it leaves it open to blas, to prejudice, to iil will and to malice—not necessarily the personal malice of the drams, but the legal malice, the malice in the eye of the law, for which all of us lawyers care far more than for the malice of the drama.

Now this case in 136 New York was decided in January, 1893, and the by-law then considered was:

"No member of this association shall receive or publish the regular news despatches of any other news association covering a like territory and organized for a like purpose with this assignation.

and organized for a like purpose with this assiciation."

Now, as I conceive it, that by-law is far less objectionable than the one now und: "consideration.

The Court—As I understand this section, the members of the association cannot purchase the news that they themselves gather; they cannot exchange the news that they themselves gather, and the reason to transpire news through the common medium of the Associated Press, and there is a provision that your Honor spoke of by which they cannot sell spontaneous news, that is, I suppose, news that does not transpire—breathe out to the public generally.

Mr. Bartlett-They can furnish to other pa-Mr. Bartlett—They can furnish to other papers spontaneous news, but their special news, that is, the product of their deliberate and Individual enterprise, they have a right to sell.

The Court—They cannot sell to members of the association without express permission and written consent of the Board of Directors, can they? It says:

"No member shall furnish news to any other person, firm, or corporation engaged in the business of collecting or transmitting news except with the written consent of the Board of Directors."

rectors."
Gen. Wager Swayne—That means a news agency, not a newspaper. It never had any other significance.
The Gourt—Then, except for the declaration

of antagonism, they could go and buy from anybody.

Gen. Wager Swayne—That is all there is to it.

Simply a question of self-defence.

The Court—That is the weak part of your bylaw, I think, because that leaves it so much to
the individual determination of the Board of
Directors.

Mr. Peckham—It cannot be any worse than
the sotual provision in the by-law against the
thing to be done. All that the directors can do
is to bring it up to the level of the by-law, under
the New York case.

Mr. Bartlett—That was a very different case.
Matthews was a newspaper editor who wanted
to have the service of the United Press as well
as of the Associated Press, and Judge Peckham
said that these associations covered like territory, and so they came within the prohibition of
the by-law, and the by-law was reasonable. The
question was whether it was a reasonable. The
question was whether it was a reasonable. The
strain of trade or not, and he refers to cases
like the Diamond Match Company vs. Roeber
and Leslie vs. Lorillard—

The Court—He dissented in the Roeber case,
didn't he!

Air, Bartlett—Yes—in which the strictness of
the rule seemed to have been somewhat relaxed.

The views announced in this Matthews case
seem to have been abandoned by the learned
Justice in his later decision in the Supreme
Court of the United States.

The Court—That was construing that Federal
statute.

UNLAWFUL RESTRAINT OF TRADE.

Mr. Bartlett—We say that this Matthews case has no application. The by-law differ, the other by-law was less objectionable, and it is not necessary to decide whether such a by-law would be proper or not. We are considering a different, by-law. And I say further that this decision by the Court of Appeals in the Matthews case, 136 New York, cannot be reconciled with the decision of the same court in 139 New York, in the People vs. Sheldon, and with the decision of the same court in 140 New York, where Judge Haight rendered the oninton. If you will examine Mr. Stickney's book you will see that he expresses his admiration of this docision, but he la unable to approve the views of the same court in the two other cases to which I have just referred.

Another point, your Honor please. Take the Trans-Missouri Freight Association. The decision in the Matthews case is admired, especially by the dissenting Judges. That is, they take the same view which would seem to have been taken by Judge Peckham in the Matthews case. They said the question is not whether it is in restraint of trade, but whether it is in restraint of trade, but whether it is in restraint of trade, but whether it is an unlawful restraint of male will restraint of land, and that restraint of trade really meant only an unlawful restraint of trade could not whether it is an unlawful restraint of the decision, aside from holding the Sherman Anti-Trust act had no application whatsoever to common carriers. So far as to this decision of Judge Peckham in the Matthews case, let me add one word. It was a very different case. There was a member of the Associated Press suing the association. We do not stand in that position. We are an oppressed outside party and we have made no covenant or agreement with the Associated Press suing the association. We do not stand in that position of agreement with the Associated Press suing the same of the decision of the decision case and consider the Peaal Code, which has existed in this State ever since the year 1830. Take the ea

There is practically no competition in the country.

I will take the Sheldon case on another point. We claim that a conspiracy or combination in the eye of the law has been established by the admitted fact that the directors made this by law or continued it up to the present time and by the fact that it was inserted through the action of the directors in the various contracts made, and further that the overet acts admitted are sufficient. The first head note in the Sheldon case says that if the agreement be illegal and one overt act is shown, that is sufficient to establish the conspiracy: "Where an unlawful agreement is shown and some act is proved showing that the particle of the directors, and all that sort of the Swayne devoted some time to explaintly." We gen. Swayne devoted some time to explaintly, and of a wrengful and malicious act from a legal standpoint. That is, we are not going into the question of combination and consulracy, and of a wrengful and malicious act from a legal standpoint. That is, we are not going into the question of the motives which animated or inspired these directors. If a man says to me: "I desire to stop you from practicing law; I desire to stop you from practicing law; I desire to stop you from practicing law; I desire to deprive you of your right to earn the means of subsistence." It would not make very much difference to me what his intent or motive was, if he proceeded to act on that theory and to carry out his design to crush me. That is, the practical result would be the same to me, and I should not care very much whether he was only guilty of legal malice, malice in the eye of the law because of having done something unlawful, or whether he was inspired by personal animosity. That would be one not even an academic question for hypothesis or conjecture.

"The question here," said Judge Andrews in the Sheldon case, "does not turn on the point whether the agreement between the retail dealers, one upon which the law affixed here is a conjecture. The substitution of the cases

which I have reteried, the conceinds acts of the defendants were injurious to trade and commerce.

Let us see about Illinois. An action was brought the other day by the Chicago Inter Ocean. In the moving supers you will find an affidavit of Mr. William Peun Nixen, one of the owners of the Chicago Inter Ocean, and that sets forth the notice served by the Associated Press, upon the Chicago Inter Ocean, and it sets forth the complaint made by the Chicago Herald to the Board of Directors of the Associated Press, which reads: "The following have been declared antagonistic: The Sun Prin ing and Publishing Association of New York. THE NEW YORK SUN, the Laffan News Bureau of New York." The defendants say in their answer or in their affidavits that among others the complainant has been declared to be antagonistic. They include the various names under which we exist. We are THE BUN Printing and Publishing Association or we are the Laffan News Bureau, or we are THE NEW YORK SUN, and the fact that we make up the three in varying aspects, and that we are denounced under three different names, is urged to show that they have not discriminated against the complainant. Now, if your Honor please, the Chicago Inter Ocean filed a paper in the Supreme Court of Illinois against the Associated Press.

THE BY-LAW DECLARED ILLEGAL.

The Court-As a member of the Associated

THE BY-LAW DECLARED ILLEGAL

The Court—As a member of the Associated Press!

Mr. Bartlett—Yes, as a member. And Judge Waterman made a decision which is right in part and wrong in part. In the main it helps, because we are not a member of the Associated Press; so use do not depend upon the decision of Judge Waterman, A considerable part of the opinion of the learned Judge is devoted to the question whether the Associated Press was a corporation the business of which was impressed with a public duty like the business of a common carrier. He decides that such is not the case, because there is no statute declaring it to be so. I doubt whether that is the test. He goes o osay, substantially, that the non-user of the right of eminent domain, or the right to operate a telephone and telegraph line, makes it a test. That may be. I believe, however, that the articles of incorporation are the true test. But, as I said, we do not depend upon that point as to the duties impressed upon the Associated Press, Passing from that question, there were two other points decided by Judge Waterman. One was the point as to the divisibility of the contract, in which he proceeds to overrule all the English decisions and the Supreme Court of the United States and the law writers and to decide that a contract cannot be divided—a new rule in reference to contracts alleged to be in restraint of trade—and I shall refer to that matter later. I do not remember that the words "divisibility of the contract is divisible appears anywhere in my bill of complaint. But we will argue that as a sort of side issue, very briefly, because I do not propose to detain your Honor with collateral issues.

The Court—Hit is a side issue, what is the use of arguing it at all!

Mr. Bartlett—I will show your Honor in three or four minutes that sulp a word you expurgate the objectionable by-law from our contract our contracts will not remain." Morely in that view I shall allude to the question.

The Court—Hit was a more and you expurgate the objectionable by-law from

leave it.

Mr. Bartlett-Now, Judge Waterman was

right on one point.
The Court—That is consoling. What was

The Court—That is consoling. What was that?

Mr. Frank Swayne—He dismissed their bill.

Mr. Bartlett—That was his decision, that the by-law, the objectionable by-law, is in restrains of trade, and his decision was flatfooted.

The Court—That is subdivision 8.

Mr. Bartlett—Yes; he dismissed the bill, Why? Because he said that the illegality and unlawfulness of that one provision in the contract affected the whole contract and made is void, so that neither party would have relief as against the other. Of course he was mistaken on that point. But the main importance of the decision, as affecting the case on argument, is that it is a decision of the Supreme Court of the State which incorporated this defendant, that the by-law in question is unlawful. The Judge says:

"By the rule of the common law, an agree-

the by-law in question is unlawful. The Judge says:

"By the rule of the common law, an agreement in general restraint of trade is illegal and void, but an agreement which operates in partial restraint of trade only, is good, provided it is not unreasonable and there be a consideration to support it; the reasonableness or unreasonableness of the contract is not a mater to be left to the jury, but is a question of law for the court."

THE INTER OCEAN DECISION.

Of course, the question as to general restraint of trade, or partial restraint of trade, hardly arises on this argument, except it may be said that the character of this monopoly is shown by the unlimited time—that is, unlimited in so for the country of the cou be said that it is clear that the nature of the business, the transmission of news by telegraph and telephone all over the country is a business in which the public has an interest, and if it were a question res nord, or resintegra, not governed by any statute laws or any decisions, I do not, think a court ought to build up a combination or mosopoly which tends to crush out all competition in such an industry. Judge Andrews said in the Sheldon case, speaking of the combination:

"The organization was a carefully devised scheme to prevent competition in the price of coal among the retail dealers, and the moral and material power of the combination afforded a reasonable guarantee that others would not engage in the business in Lockport except in conformity with the rules of the exchange."

AN ORGANIZATION TO PREVENT COMPETITION.
Now, what is the Associated Press I it is well known that it is an enormous concern, and practically it has crushed out other organizations, There is practically no competition in the country.

I will take the Sheldon case on another point. We claim that a conspiracy or combination in the eye of the law has been established by the admitted fact that the directors made this bylaw or continued it up to the present time and

duce the price of merchandise or commodities.

3. To prevent competition in the menufacture, making, transportation, sale or purchase of merchandise, produce or commodities.

"SEC. S. Any contract or agreement in violation of the provisions of this act shall be absolutely void, and not enforceable either in law or in equity."

lutely vold, and not entorcome sense in equity."

Then he cites the act of July 2, 1890, the Sherman Anti-Trust act of Congress, and quotes from the opinion of the Supreme Court of the United States in the case of the Trans-Missouri Freight Association. After discussing the xeneral rule that competition is the life of trade. o which he gives his approval, the learned Judge says:

which he gives his approval, the learned Judge says:

"Whatever news may have been before the invention of printing, it is to-day a commodity having a salable value, in the collection, transportation and sale of which many persons are engaged, depending thereon for a livelihood, and employing a large amount of capital. The contract entered into between the complainant and the defendant binds the complainant not to furnish its special or other news to and not to receive news from any person or corporation which shall have been declared by the Board of Directors of the defendant. Such a contract is clearly in restraint of trade, and as it by its terms contemplates the collection and transportation of news within a radius of sixty miles of Chicago it embraces interstate commerce. No reason is given for the existence of such provision in restraint of trade, except that thereby competition with the defendant is prevented, and the complainant is prevented from buying news by means and from sources which it could otherwise lawfully avail itself of. It is urged the the defendant in its collection of news covering the entre country, and having the field exclusively to itself, could and would furnish news at a much less rate than it would otherwise be enabled to do. Buch insistence, if sufficient, would render inoperative all the statutes against trusts, combinations, and contracts in restraint of trade, as well as the rules of the common law. The clause of the contract restraining trade being illegal, what remedy, if any, has the complainant upon the agreement as entered into i"

We consider that decision of importance as showing the view taken by the Supreme Court of Illinois of this particular by-law, a decision that the by-law is in restraint of trade, not only under the Federal statute to which the Court of Illinois.

MALICIOUS ACTS AGAINST THE COMPLAINANT. I have considered thus far the unlawfulness of says: Whatever news may have been before the

the invilidity, alinough the moral evidence might be very convincing."

Now, I cally our Honor's effective Poole with the Milk Exchange, where he mention which the Course approval the People vs. Sheldon, and to Arnot vs. the Pittston and Elmira Coal Company and to the other cases to which I have referred, that is, to the cases in the 14 Wendell and in 4 and 5 benio, and vs. the Pittston and Elmira Coal Company and to the other cases to which I have referred, that is, to the cases in the 14 Wendell and in 4 and 5 benio, and vs. the vicinity of the coal company and the vicinity of vici