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# Supreme Court of the United States

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JOHN F. DAVIS, CLERK

In the Matter of:

Docket No. 243

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 :  
 CITIZEN PUBLISHING COMPANY, ET AL., :  
 :  
 Appellants, :  
 :  
 vs. :  
 :  
 UNITED STATES OF AMERICA, :  
 :  
 Appellee. :  
 :  
 ----- X

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Place Washington, D. C.  
Date January 15, 1969

**ALDERSON REPORTING COMPANY, INC.**

300 Seventh Street, S. W.

Washington, D. C.

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P A G E

Richard J. Mac Laury, Esq., on  
behalf of Appellants

3

Daniel M. Friedman, Esq., on behalf  
of the Appellee

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REBUTTAL:

Richard J. Mac Laury, Esq.

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 -----X  
 4 CITIZEN PUBLISHING COMPANY, ET AL., :  
 5 Appellants, :  
 6 vs. : No. 243  
 7 UNITED STATES OF AMERICA, :  
 8 Appellee. :  
 9 -----X

10 Washington, D. C.

11 January 15, 1969

12 The above-entitled matter came on for argument at  
13 10:40 a.m.

14 BEFORE:

- 15 EARL WARREN, Chief Justice
- 16 HUGO L. BLACK, Associate Justice
- 17 WILLIAM O. DOUGLAS, Associate Justice
- 18 JOHN M. HARLAN, Associate Justice
- 19 WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- ABE FORTAS, Associate Justice
- THURGOOD MARSHALL, Associate Justice

20 APPEARANCES:

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4 Washington, D. C. 20530  
5 Counsel for Appellee

6 - - -





1 In 1920 there were 552 cities having separately owned  
2 newspapers. Twenty years later, in 1940, there were only 181.  
3 By the mid-'60s there were 65, and of these 65 more than  
4 one-third operated under agreements such as the one under  
5 consideration here.

6 Now, the Government claims that this agreement is a  
7 per se violation of Section 1 of the Sherman Act, and the  
8 District Court on summary judgment held that it was in fact a  
9 violation, a per se violation of Section 1.

10 It is our contention that the agreement in substance  
11 and effect was a merger and that the court should have judged  
12 it under the rule of reason and, specifically, it should  
13 apply to this agreement the failing-company doctrine, because  
14 CITIZEN in 1940 was truly in a failing condition.

15 Now, we do not seek here to justify per se  
16 violations. The Government argued the law, and it argues in  
17 its brief here that all we seek to do is to justify per se  
18 violations. I would just like to emphasize to the Court that  
19 that is not our position. We feel the agreement is highly  
20 lawful and would have been found lawful had it been examined  
21 under the rule of reason rather rather than on summary  
22 judgment and under the per se rules.

23 This case involves a typical situation of the  
24 economic conditions experienced by newspapers throughout the  
25 country. In 1940 CITIZEN was in fact a failing company. It

1 had not paid dividends for many years. Its liabilities far  
2 exceeded its assets, and it had been kept alive and able to  
3 pay its bills only by contributions from the stockholders. In  
4 contrast, its competitor, the MORNING STAR, was in good  
5 financial condition. It was a strong competitor. It was  
6 selling more than 50 percent of the advertising in Tucson.

7 Q What were the respective circulations?

8 A The respective circulations in 1939 were  
9 approximately 2,000 apart. The daily circulation of the STAR  
10 was approximately 12,000, the CITIZEN approximately 10,000.  
11 But, in addition, the STAR had a 12,000 circulation of its  
12 Sunday edition, which the CITIZEN did not have.

13 Those figures are approximations, but there has  
14 always been from 1932 on through 1939 a variation of 1,500 to  
15 1,800 to 2,000 difference in its circulation.

16 Now, as I say, in contrast, the STAR was making a  
17 profit and sold 50 percent more advertising than the CITIZEN.

18 Q But the STAR had a Sunday edition.

19 A A Sunday edition.

20 Q Because otherwise the circulations aren't really  
21 that far apart, are they? Except for the Sunday edition,  
22 why wouldn't you think one paper should do as well as the  
23 other advertising-wise?

24 A I think it was due in large measure to the  
25 Sunday edition, but not entirely, Mr. Justice. There was,

1 of course, available to the STAR a combination rate between  
2 Sunday and Monday and Saturday and Sunday. And Sunday being  
3 an attractive advertising day, it did give the STAR an  
4 advantage.

5 Now, in these circumstances CITIZEN had several  
6 choices. It could have ceased publication and shut down its  
7 operation and sold its equipment on the second-hand market. Or  
8 it could have sold out or merged with the STAR.

9 The evidence was undisputed that CITIZEN in that  
10 failing condition could not have been sold to an outside  
11 competitor, because no outside competitor would have wanted to  
12 come in and place itself in the shoes of a failing company  
13 against an established newspaper such as the STAR.

14 Now, it took neither of these courses, but instead  
15 took the third course. That was to enter into an operating  
16 agreement with the STAR, which preserved for the citizens of  
17 Tucson and for these newspapers two separate rival, competing  
18 editorial voices. And it our contention here that was a far,  
19 far more preferable choice, far more preferable course of  
20 conduct than to have merged entirely and shut down this  
21 competing voice of the CITIZEN.

22 So they entered into this operating agreement, which  
23 was premised on the basic economic fact in the newspaper  
24 business that newspapers operate at two levels, at the  
25 journalistic and editorial level and also at the commercial



1 level. By "commercial" I mean running the mechanical equipment  
2 in the press and composing room, the pricing and sale of  
3 advertising, and the circulation and establishment of  
4 circulation prices, as well as the general business affairs  
5 of the two newspapers. That is what I refer to as the  
6 commercial level.

7 The newspapers operated both these levels. The  
8 operating agreement recognized that and provided for what we  
9 refer to as in substance and effect a merger of the commercial  
10 assets, the assets devoted to the commercial functions, as well  
11 as the personnel, the records, and all of the material devoted  
12 and used at the commercial level of these two businesses.

13 On the other hand, the separate identities of the  
14 STAR and CITIZEN were retained, and the agreement specified  
15 that the STAR and CITIZEN would continue to be published  
16 separately. And the Court found that since the agreement,  
17 indeed, the STAR and CITIZEN have continued in rival  
18 composition of the news and editorial material and have  
19 developed into two high-quality newspapers.

20 The agreement was patterned after what we refer to  
21 as the Albuquerque Agreement, which was then in effect and  
22 which is still in effect. It was adopted in 1933.

23 The purpose of the operating agreement was to merge  
24 these commercial functions and assets so as to support two  
25 separate news and editorial voices. To do this the parties

1 really these three things.

2 First, each newspaper acquired a joint interest in  
3 the assets of the other newspaper necessary to produce  
4 newspapers.

5 Secondly, they organized a third corporation, called  
6 Tucson Newspapers, Inc. We refer to it as TNI.

7 Thirdly, TNI then took over the management and  
8 control of these assets. They operated the press room, compos-  
9 ing room, the mechanical equipment. They sold advertising  
10 space in both newspapers. They established advertising rates.  
11 They circulated the newspapers, operated distribution trucks,  
12 and established the circulation rates.

13 The STAR and the CITIZEN each own equal shares in  
14 the third corporation, TNI. And the Board of Directors of  
15 TNI was five in number, three appointed by STAR, in substance,  
16 and two by the CITIZEN. But the management of TNI was  
17 completely separate from the management of the editors and the  
18 publishing people of the two newspapers. They had a separate  
19 management. They had a separate General Manager, a separate  
20 controller, and a separate man who headed the Advertising  
21 Department, with nothing to do with the editorial levels of the  
22 two newspapers. It was a separate operation.

23 We urged the District Court, because this was in  
24 substance and effect a merger or a consolidation, to judge the  
25 agreement under the rule of reason. But this it refused to do.

1 It was the District Court's view that the failing-company  
2 doctrine would have applied in this situation if STAR had  
3 acquired CITIZEN outright and published both newspapers as a  
4 single owner. Thus, the Court ruled, in effect, that the  
5 transaction would not have been unlawful if the newspapers had  
6 gone further than they did and eliminated all news and  
7 editorial rivalry.

8 Now, we do not urge here that the fact this case  
9 deals with newspapers exempts the activities of the papers from  
10 the antitrust laws. But we do urge that the District Court  
11 consider the Sherman Act as requiring the elimination of a  
12 separate and effective editorial voice. And we do urge that  
13 the fact that there was a separate voice, that there were  
14 two editorial voices, in Tucson should have been a factor that  
15 the Court should have taken under consideration in deciding  
16 whether or not this agreement was unreasonable.

17 The benefit to the community deriving from separate  
18 editorial voices is a factor that the Court take into  
19 consideration.

20 We do not claim here that there was a violation of  
21 the First Amendment.

22 Q That argument should have taken into account  
23 that there was another effective editorial voice. Does that  
24 suggest that this is a First-Amendment consideration?

25 A Yes, it is a First-Amendment consideration,

1 because the Court had the choice here of interpreting the  
2 Sherman Act so as to permit two separate editorial voices.

3 Q But you do not suggest that there was any  
4 pressure on it to interpret the First Amendment so as to  
5 prevent a violation of the First Amendment?

6 A We urge the law. We did urge the law that if  
7 the Court---

8 Q Did what it did, it would be violating the  
9 First Amendment?

10 A Yes, but our argument was that here the Court  
11 said it would be perfectly lawful -- you could have put these  
12 two newspapers together and took down one voice, and in that  
13 event the Sherman Act would not have been violated. But it  
14 would have interpreted the Sherman to have been violated if  
15 we kept one voice alive.

16 We argued below that the Court then was interpreting  
17 the Sherman Act so as to violate the First Amendment, or it  
18 deprived the citizens---

19 Q You really are just arguing the importance of  
20 the business to the community.

21 A That is correct.

22 Q You could make the same argument with respect  
23 to any other business if you thought it was very important to  
24 the community.

25 A I think that that is correct. We argue here



1 this is a factor that should have been taken into consideration  
2 under the rule of reason.

3 Q It was decided on summary judgment, wasn't it.

4 A Yes, sir.

5 Q Are there issues of fact?

6 A There was a serious and a genuine issue of fact  
7 on the motion for summary judgment. We filed numerous affi-  
8 davits, and the intent of all of them was that this was a  
9 merger. That was the primary issue of fact, the disputed issue  
10 of fact, which the Court ignored on motion for summary  
11 judgment.

12 Thereafter, this case---

13 Q But technically this wasn't a merger. This was  
14 an agreement for a term of years, wasn't it?

15 A It was an agreement for a term of years. In  
16 addition, the agreement could not have been dissolved except  
17 upon the consent of both parties.

18 Technically, Your Honor, you are absolutely, you are  
19 absolutely correct. It was not technically a merger or a  
20 consolidation, but in terms of the economic realities, it was  
21 a merger. It was a merger. It had no different or no more  
22 effect or less effect upon the commercial market, the  
23 advertising market, than would a full and complete statutory  
24 merger have had.

25 Certainly, we all agree on both sides of this case

1 that the Sherman Act does deal with economic realities and with  
2 substance rather than form.

3 Now, the Government charged that this agreement  
4 constituted price-fixing and profit-pooling and market  
5 allocation and was therefore illegal per se. I believe that  
6 the complete answer to these charges is that the owners of  
7 STAR and CITIZEN are doing nothing today and did nothing after  
8 the agreement was entered into in 1940, did nothing than they  
9 would have been doing had there been a complete merger. And  
10 certainly if there had been a complete merger, both the  
11 editorial and commercial functions -- the Government would be  
12 in no position to -- it would be perfectly clear that the  
13 Government would be in no position to argue that that was a  
14 per se violation.

15 By "price-fixing" all the Government simply means is  
16 that this TNI organization established the price for its  
17 products and services.

18 Q Let's assume, though, that neither company was  
19 in favor of a merger. Had they merged, it may not be a per se  
20 violation. But do you think the Government would have a great  
21 deal of trouble showing a violation of Section 7?

22 A I don't think it would have very much trouble at  
23 all, Your Honor.

24 The very fact that CITIZEN was failing in 1940 and  
25 could not be rehabilitated and reconstituted after years of

1 attempts, the evidence shows that if this agreement is  
2 abrogated today in the respects that the District Court's order  
3 would do so, would cause CITIZEN to fail again, is the reason  
4 we are here. That is the basis for our argument. Without that  
5 fact situation, I don't think we would have a case. It is  
6 because one newspaper would fail without our having taken this  
7 act that we believe the District Court committed error.

8 Q Would it have failed eventually, or would it  
9 not have failed?

10 A In 1940, as I say -- I don't think there is any  
11 question about it -- CITIZEN clearly was a failing company  
12 within the meaning of international---

13 Q And the District Court just found to the  
14 contrary?

15 A I don't believe so, Mr. Justice. The District  
16 Court found in Finding 17 -- or I will say concluded in  
17 Finding 17 -- that CITIZEN was not in 1940 on the verge of  
18 going out of business and that it would not have ceased  
19 publication but for the opportunity offered in this operating  
20 agreement.

21 Now, I do not consider that to be a finding, that  
22 CITIZEN was not a failing company. The evidence was that  
23 Mr. Small, the majority owner of the CITIZEN, was prepared to  
24 finance the losses of CITIZEN for some little time out of his  
25 own pocket. That is in Finding 14.

1 But the evidence also was that he had to find another  
2 source or resources in order to keep CITIZEN alive.

3 Q At that time did he move to Tucson. Did he  
4 devote his full time and attention to the business for very  
5 long?

6 A He had moved to Tucson, I believe, in about  
7 September of 1939 and had given his full time and attention to  
8 the business without a salary for about six months.

9 The Court found---

10 Q Had the paper showed any improvement since he  
11 bought it?

12 A No, the newspaper did not, as a matter of fact.  
13 It continued to fail, to deteriorate.

14 In December of 1939 the current liabilities of the  
15 CITIZEN were \$47,000, and its current assets were \$16,500.  
16 Its total liabilities in December of '39 exceeded total assets  
17 by \$53,000. Its total assets were \$80,000.

18 By March of 1940 its total liabilities exceeded  
19 assets by \$81,000. And its total assets had declined to  
20 \$54,000.

21 By June of 1940, just before the operating agreement  
22 went into effect, the total assets of CITIZEN had declined  
23 further from \$54,000 of the previous March to \$47,000.

24 Q Do you think it was in as bad a shape in '36 as  
25 it was in '40 and as bad in '40 as it was in '36?



1           A     No, I think it was in worse shape in 1940 than  
2 it was in 1936.

3           In 1936 Mr. Small and Mr. Johnson acquired the  
4 newspaper from the Hitchcock estate. They acquired it for  
5 \$100,000, which they paid over a period of time. At that time  
6 they put \$25,000 into new capital.

7           The debts of the corporation were at that time  
8 approximately \$7,500. By 1940 the debts of the corporation  
9 were \$109,000, and \$79,000 of this was due to its stockholders,  
10 which represented the new money put into the enterprise by  
11 the stockholders.

12           So, clearly, CITIZEN was steadily declining  
13 financially from 1936 through 1940.

14           Q     There weren't any efforts after 1940 or any time  
15 to find any other buyer for the newspaper?

16           A     There was an effort -- Small bought it as a  
17 losing operation in '36. He understood what its financial  
18 condition was in 1936.

19           Q     But there weren't any efforts to sell it to  
20 anybody else?

21           A     There was not an effort to sell outright,  
22 Mr. Justice. There was an effort by Mr. Small to acquire new  
23 financing from people interested in newspapers and in the  
24 publishing business, people whom he knew. These efforts  
25 failed. It was a very poor season to be investing in

1 newspapers in Arizona at the time.

2 Having failed to attract new investment money, he  
3 then renewed his conversations with Matthews, owner of the  
4 STAR, to enter into or make some kind of an arrangement for  
5 this operating agreement.

6 I might point out here that the undisputed testimony  
7 at the trial was that CITIZEN could not have been sold in  
8 1940 to an outside publisher who had any expectation of  
9 operating a newspaper at a profit.

10 Q Mr. MacLaury, what was the situation as to  
11 CITIZEN in 1965, which, as I understand, was the terminal  
12 date of the joint venture?

13 A In 1965---

14 Q Am I right about the year? In other words---

15 A You are not correct, Mr. Justice, on the  
16 termination date. 1965 was not the termination date. 1965  
17 was the year that the complaint was filed. It still had some  
18 years to run.

19 But the evidence was, in the form of a pro forma  
20 statement prepared by a national accounting firm -- the  
21 evidence was that CITIZEN and STAR as newspapers were healthy  
22 companies making a profit.

23 Q What was the termination date?

24 A The termination date had been set forward in  
25 1953 to 1993, I believe. But there was a provision that even

1 that was the termination date, it couldn't even have been  
2 terminated then except by agreement by both parties. So it  
3 really didn't have a specific termination date unless both  
4 parties at the end of each 25-year period would agree to  
5 terminate it.

6 The evidence was that in 1965 if this agreement  
7 should be abrogated, in the sense that the District Court  
8 ordered it, that CITIZEN would promptly again slump towards a  
9 failing company. For the years '62, '63 and '64, the test  
10 period, the evidence was -- and it was undisputed -- that  
11 CITIZEN would lose on the average of \$75,000 a year, that  
12 STAR was in a far stronger position and would have earned  
13 between \$450,000 and \$500,000.

14 I see my 25 minutes is up, and, if the Court please,  
15 I would like to reserve five minutes for rebuttal.

16 MR. CHIEF JUSTICE WARREN: Mr. Friedman.  
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1 ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.

2 ON BEHALF OF THE APPELLEE

3 MR. FRIEDMAN: Mr. Chief Justice, and may it please  
4 the Court, the District Court found in this case, in Finding  
5 No. 23 at page 74 of the record, that it was the intention of  
6 the parties to the operating agreement to reduce costs and  
7 increase profits by eliminating commercial competition between  
8 the STAR and the CITIZEN, while retaining separate editorial  
9 and news departments.

10 And in the following sentence, Finding No. 24 on the  
11 same page, they speak of what they did in furtherance of their  
12 intent to eliminate competition between the two papers.

13 Moreover, both of the parties conceded at the trial  
14 that this was the purpose of the operating agreement.  
15 Mr. Matthews, who is the owner of the STAR, stated that it was  
16 the purpose of the agreement to end commercial competition  
17 between the STAR and CITIZEN. This is at page 194 of the  
18 record.

19 Mr. Small, Sr., who was the owner of the CITIZEN,  
20 stated the same thing.

21 A Mr. Chambers, who had been the Business and  
22 Advertising Manager of the STAR in 1940 and who had participated  
23 in the negotiations leading to the joint operating agreement,  
24 stated at page 155 of the record, when he was asked whether as  
25 the result of this Tucson Newspapers, Inc., was there any

1 competition remaining between the STAR with respect to the  
2 business aspects, he said, "We tried to make it not so."  
3 I don't think that there was.

4 And then he later, a few pages later, at page 158  
5 of the record -- he was asked whether this arrangement could  
6 have worked if the revenues had been divided on some method  
7 other than a fixed formula, which I will come to in a minute.  
8 He said no, he didn't think it would. He said, "That would  
9 have defeated all of the idea we had for accomplishing this  
10 unification." We were trying," he said, "-- I guess that  
11 competition is a nasty word in this court. But we were trying  
12 to eliminate the competition between the two of us. That's  
13 all."

14 In addition to this testimony at the trial, we have  
15 in this record a rather unusual document, which is Government  
16 Exhibit No. 26, which was a submission that the STAR made in  
17 1947 to the Internal Revenue Service in support of excess-  
18 profits tax relief for the war years. I would like to read  
19 to the Court a couple of things that the STAR said in this  
20 document about the purpose of 1940 agreement.

21 At page 409 they said: "It is obvious that the aim  
22 and purpose of the parties was to destroy every vestige of  
23 the competition that existed on January 1, 1940."

24 Then at pages 420 and 421 they said: "In order to  
25 preserve perpetual elimination of competition the operating



1 agreement provides that neither of these papers will engage in  
2 publication of any other newspaper in Tucson."

3 On the next page, in rather large type at the bottom  
4 of the page, they told what the purpose was, and they said:  
5 "And these two papers, the ARIZONA STAR, did" -- in large  
6 letters, underlined -- "did eliminate all competition from the  
7 local newspaper field on that day."

8 Q What page is that?

9 A 421, Mr. Justice.

10 Finally, I would like to invite the Court's  
11 attention to these little pictures at page 424 of the record,  
12 in which the STAR graphically displays what the result of  
13 this agreement was. At the top of the page we have two hogs,  
14 one labeled "THE STAR" and the other labeled "THE CITIZEN."  
15 At the edges of the picture we have two troughs, one labeled  
16 "Circulation" and one labeled "Advertising."

17 Q At what page is that?

18 A 424, Mr. Justice.

19 The two hogs are chained together at the rear, and  
20 they are pulling. Each one is pulling, one toward "Circulation"  
21 and one toward "Advertising." But, of course, neither can  
22 reach the trough.

23 Now, at the bottom of the page they tell us what  
24 happened after this agreement. We now have the two troughs  
25 again, "Circulation" and "Advertising," and both the STAR and

1 the CITIZEN are shown as rather fat hogs at this point, with  
2 their snouts down in the trough enjoying the benefits of this.

3 Q What was that exhibit as a matter of issue for  
4 this court. Was it for advertising or for the antitrust suit?

5 A No, this was in response to a provision under  
6 the excise profits tax that they could get relief if they  
7 showed that there was a limitation of competition resulting  
8 from a merger which distorted their earnings during the  
9 base picture.

10 But they have told us as plainly as they can what  
11 their purpose was.

12 Now, how did they accomplish this elimination of  
13 competition? They did it basically through three aspects of  
14 the joint operating agreement. And I want to make it clear  
15 that the Government is not challenging the joint operating  
16 agreement as such. It is only challenging these three  
17 aspects, and the District Court has not struck down the  
18 operating agreement. It has only struck out these three  
19 paragraphs.

20 The first thing they did was they turned over to  
21 this Tucson Newspapers, Inc., which they jointly controlled,  
22 the sole authority to fix prices, that is, to fix the  
23 advertising rates and to fix the circulation rates. Neither  
24 of them after this agreement could fix their own advertising  
25 or circulation rates independently.

1 Now, I would like to suggest to the Court a  
2 hypothetical situation, because I think it illustrates the  
3 basic argument that they are making here.

4 Let us assume we had two newspapers in town and both  
5 of them were losing money and the publishers of both  
6 newspapers got together and said: "Things are terrible. We  
7 are both losing money. The best solution to this problem is  
8 for both of us substantially to increase our rates." They  
9 shook hands on it, and they said: "Fine. We'll do this the  
10 first of next month."

11 Then they decided themselves what the rate level  
12 would be and said: "Well, let's turn it over to a third  
13 person to fix the fix the rates."

14 It seems to me that two things are clear.

15 First, they could not possibly offer any defense to  
16 this as a per se violation. It is clearly per se.

17 Secondly, they could not attempt to justify this  
18 type of arrangement on the plea that this was necessary to  
19 preserve the companies.

20 Q Was any plea of self-incrimination raised in  
21 regard to the picture?

22 A With regard to the picture?

23 Q 424.

24 A No, Mr. Justice, there was no objection taken to  
25 the introduction of this document.

1 Now, there was the next thing that they did, which  
2 they said was essential to this arrangement. They had what we  
3 think was held correctly by the District Court to be a legal  
4 profit-pooling arrangement in here. The proceeds of the  
5 operations of the papers -- what they did was that the Tucson  
6 Newspapers, Inc., received all the revenues, that is, the  
7 revenues from the sales of advertising and circulation.  
8 Then after the expenses of putting out the paper, the revenues  
9 were divided between the two papers, not on the basis of what  
10 each one contributed but according to a fixed formula. That is,  
11 without regard to whether one contributed more or one  
12 contributed less, they divided it up according to a preordained  
13 formula.

14 Q Do you mean they contributed it in the sense  
15 of gross---

16 A Of gross revenues, that's right.

17 Q Did the managing company itself determine what  
18 circulation expenses would be?

19 A Oh, yes. I mean, subject, of course -- these  
20 two companies obviously had basic control---

21 Q Did any sales expenses, like pushing circulation  
22 or pushing advertising or pushing subscriptions -- was that  
23 determined by that company?

24 A That was determined by Tucson Newspapers, Inc.,  
25 because it took over for these two newspapers the circulation

1 and the advertising, the business effects of the thing.

2 Now, this, it seems to us, has the very obvious  
3 effect of deterring the incentive of each paper to take  
4 whatever steps might increase its circulation, because  
5 obviously if one paper decided to try to increase its  
6 circulation, a large part of that immediately flows over to  
7 the other.

8 Finally, although it is not terribly important in  
9 this case -- we are not stressing it -- the third agreement  
10 provision they had was an undertaking that neither of them  
11 would go into any publishing business in Tucson.

12 Now, the question as we see the case is whether  
13 these three restraints, which, it seems to us, are the type  
14 that this court traditionally has treated as per se and the  
15 purpose of which, as the Court found, and the effect of which  
16 was to eliminate all commercial competition between the two  
17 papers, somehow is taken out of the operation of these rules  
18 because of the claim that this was necessary to save a failing  
19 newspaper in 1940.

20 Q What wrong do you think that the antitrust  
21 laws leave for the common fact that newspapers all over this  
22 country as a result of competition are getting smaller and  
23 smaller in number? In New York City, through competitive  
24 factors, we have got a practical monopoly in the newspaper  
25 field, at least in the morning field.



1           Now, do you think that those hard economic facts  
2 find any room for play or recognition under the antitrust  
3 laws? Or does this case have to be judged in terms of  
4 ordinary and conventional antitrust doctrine?

5           A     I would like to make two points in answer,  
6 Mr. Justice.

7           First of all, it seems to us -- and I think Your  
8 Honor has put the case fairly -- but it seems it seems to us  
9 what they are really suggesting in this case is that the  
10 normal antitrust principles that apply to all industries  
11 should somehow be treated somewhat differently because of the  
12 peculiar characteristics of the newspaper business.

13          Q     I am not talking law now. I am talking  
14 economics, I suppose, or practicalities.

15          Here, as a result of all this, you have got a strong  
16 newspaper, one strong newspaper in a small community, which  
17 through this device has preserved competition in ideas,  
18 competition in its editorial policies.

19          A     I would like to make two answers to that.

20          First, there is a disagreement, as we have developed  
21 in our brief, among authorities as to the causes of the  
22 problems of the newspaper industry. Admittedly, there has  
23 been a tremendous failure -- on the other hand, there are  
24 people who believe that perhaps with new technology things  
25 may improve.

1 My other answer is that it seems to me that if there  
2 is to be a special treatment of the newspaper industry, we  
3 think this is basically a problem for the Congress and not  
4 for the Judicial Branch of the Government.

5 Q But the whole antitrust development has been a  
6 judicial development. Everybody knows that.

7 A A judicial development, Mr. Justice, but I don't  
8 think a judicial development of providing special rules  
9 for particular industries.

10 Q What about baseball, for example? That is very  
11 special.

12 A Baseball is an application -- originally the  
13 baseball decision was not a special rule for baseball, but  
14 as the Court then viewed---

15 Q Some years ago we made it into a special rule.

16 A But on the application stare decisis, not  
17 reaching the merits of whether baseball was code but on the  
18 theory that it was not appropriate in the circumstances to --  
19 I would just like to stress here that pleas often made to the  
20 Court, of course, that rules of law should not be changed by  
21 the Court but should be changed by the Congress. But in this  
22 case Congress for two years has had this very problem before  
23 it. There has been pending now in the Congress for two years  
24 various bills that would specifically sanction this type of  
25 agreement for the newspapers.

1 Q But if this one company was not a failing  
2 company---

3 A That is correct.

4 Q Are you conceding---

5 A Oh, no. That is the next point after I answer  
6 Mr. Justice---

7 Q You know you wouldn't need to waste any breath  
8 on these questions, if this record is clear, if the CITIZEN was  
9 not a failing company.

10 A That is correct, and I would like to turn to  
11 that, if I may, right now.

12 Q Do I understand now that you argue on the  
13 assumption of whether this newspaper then became one voice or  
14 two voices? What was it? I mean after the merger.

15 A We say it is not a merger, Mr. Justice.

16 Q As to whatever it was.

17 A There were still two editorial voices. The  
18 two papers, the Court found, continued to operate as separate  
19 editorial voices. We don't question that.

20 Q Were they owned by the same people?

21 A No. They continued to be separately owned, but  
22 they did have this interrelationship between them on the  
23 business level.

24 Q Can we assume, then, that the Government does  
25 not claim and would make no claim that there would be any

1 connection between news policy and this joint commercial  
2 operation.

3 A Well, now, Mr. Justice, we do suggest that we  
4 have in our brief that the likely tendency of this type of  
5 commercial operation may be to inhibit competition in news.  
6 But we don't say that it has here, but there the tendency of  
7 it -- in other words, the people who have this interrelationship  
8 on the business level and who have had removed some of the  
9 incentives for trying to increase their business---

10 Q What do you suppose the managing company would  
11 do if one of the papers because of its news coverage policy  
12 suddenly began to decline in its circulation seriously?

13 A I don't know what they would do. I suppose  
14 they would attempt to persuade that paper to improve itself, I  
15 would think.

16 I would like to come now to this whole question of  
17 the failing company, because that, of course, is the foundation  
18 on which their entire argument rests. They claim in 1940 the  
19 CITIZEN was a failing company. Of course, if that underpinning  
20 falls, it seems to us, so does their whole case.

21 Now, the District Court found -- and this is at  
22 page 72, the second sentence -- it said that at the time they  
23 entered into the operating agreement, Citizen Publishing was  
24 not then on the verge of going out of business.

25 Q Where is it?

1           A     Page 72 of the Appendix, Finding 17, the second  
2 sentence.

3           They said at the time Citizen Publishing was not then  
4 on the verge of going out of business, nor was there a serious  
5 probability at that time that Citizen Publishing would  
6 terminate its business and liquidate its assets unless Star  
7 Publishing and Citizen Publishing entered into the operating  
8 agreement.

9           We think the record fully supports that finding. We  
10 also think that finding does properly embody the so-called  
11 "failing-company" defense in the International Shoe case.

12          Q     What are the facts underlying that. Do you  
13 think that is sustainable on the evidence?

14          A     Yes, we do, Mr. Justice. And I would like to  
15 refer to eight or nine specific items which we think support  
16 it.

17          But before doing that I would just like to say one  
18 thing, because they challenged this in the brief. The evidence  
19 to which I am going to refer was not admitted, of course, on  
20 the motion for the summary judgment. At the time of the  
21 summary judgment it was decided on affidavits. This evidence  
22 came in in course of the trial on the Section 2 issues. It was  
23 offered with respect to intent.

24          However, it seems to us that all the evidence that is  
25 relevant to the failing-company defense was introduced.



1 Q Was there a later motion to set aside the  
2 Section 1 judgment?

3 A Yes, there was, Mr. Justice.

4 Q Was it based on evidence that already at that  
5 time had been taken?

6 A Oh, yes. This was after the record was closed.

7 Q So this is after all this evidence you are  
8 about to talk about was in the record.

9 A It was in the record, and it was before the  
10 Court. It was before the Court, of course, when the Court  
11 made this finding, Finding 17.

12 Q Was there a challenge to the fact that this  
13 was a summary judgment?

14 A Yes, they object. They do object---

15 Q Did they object in the beginning?

16 A Oh, yes, they objected all the way to our  
17 motion for summary judgment. They objected to that.

18 Q I thought the Government had been taking the  
19 position, at least in some cases, that summary judgment was  
20 not proper in an antitrust case.

21 A In some cases we have where we think there are  
22 disputed factual issues. On the other hand, in situations  
23 where we think that on the undisputed facts we are entitled to  
24 judgment, we have supported summary judgment. And Your Honor  
25 in his opinion in the Northern Pacific case upheld the grant

1 of summary judgment there on a tying agreement.

2 There have been a number of cases, of course, in which  
3 summary judgment has been upheld.

4 Q I think that your position is that in view of  
5 the course this case took, the fact that summary judgment was  
6 initially granted on one part of the case is rather  
7 unimportant.

8 A In view of all the evidence---

9 Q Because there was a trial on other issues and  
10 evidence was introduced which was very relevant to this  
11 summary judgment matter.

12 A There are only two items of evidence that they  
13 claim they should have had the right to introduce on the  
14 question of failing-company that was not introduced. We think  
15 neither of those is relevant.

16 First is some statistics to the financial condition  
17 of the CITIZEN in the 1920s. That, it seems to us, is too  
18 remote.

19 Secondly is some statements by various people in the  
20 Tucson area, which were printed in the record, as to the  
21 importance of having two papers in Tucson. Again, it seems to  
22 us, that is irrelevant.

23 Now let me come to the specific issues. I would  
24 like to start with something, because the argument is put in  
25 terms of failing-company is that it was a failing company, and

1 they say -- basically Mr. MacLaury says: "Just look at the  
2 balance sheet. That's enough."

3 Now, "failing-company" is really a shorthand phrase,  
4 we think. "Failing-company" is a shorthand phrase for the  
5 basic concept that when a company is in such serious  
6 condition and has such serious problems that it appears that  
7 it is about to go out of the market anyhow, then its  
8 acquisition by a competitor does not substantially lessen  
9 competition.

10 Q But it is a viable economic unit?

11 A That is correct, Mr. Justice.

12 Q Which is a different question than asking  
13 whether it is viable in the hands of this management.

14 A But I think, Mr. Justice -- I suggest that this  
15 management is willing to keep it going. It is for that time  
16 a viable entity in terms of the purpose of the failing-company  
17 defense; that is, the entity is able to keep going. If the  
18 man is willing to keep it going for awhile, it seems to me that  
19 refutes the claim that its elimination through merger will not  
20 substantially lessen competition.

21 Now let me come to---

22 Q But even if he wasn't willing to keep it going,  
23 it would still---

24 A Surely. Surely. Yes, it would

25 Let me come to these items of evidence.

1 Q It is your position, then, that even though a  
2 corporation might be suffering substantial financial losses,  
3 with no prospect of any change in the downward curve, if all of  
4 its stock happens to be owned by a multimillionaire who just  
5 likes the idea of owning a corporation that publishes a  
6 newspaper and is willing to take those losses, perhaps off-  
7 setting them against other income of his own, that that is no  
8 sense a failing company?

9 A That is correct, Mr. Justice.

10 I would like to point out that there are many of  
11 these situations where the publisher may have hopes of  
12 rehabilitating the paper---

13 Q Your hypothesis, then, is that he has no  
14 hopes---

15 A No hopes.

16 Q He is just stubborn or eccentric or vain or  
17 something and likes to have editorials in the paper praising  
18 him, and even though it loses a million dollars---

19 A That is right, because it continuing as an  
20 operating entity in the market.

21 Now, if I may, I would just like to come to these  
22 items of evidence that we have here.

23 Q But did he contribute to it?

24 A He did, for many years.

25 First of all, the initial overtures about making this

1 arrangement came not from the CITIZEN, which allegedly was  
2 the failing company, but from the other paper, from the STAR.  
3 Now, this is directly in contrast to the International Shoe  
4 case, where the overtures came from the failing company.  
5 It seems to us that this is of some significance because  
6 normally if a company feels that it can't go on, it would take  
7 the initiative.

8 Now, in the International Shoe case this court found  
9 that the controlling purpose of International Shoe in  
10 acquiring the McElwain Company, the failing company there, was  
11 to get additional plants for its business which it could not  
12 then quickly hope to make. And its discussion of what it was  
13 holding as to the acquisition of the company in those  
14 circumstances would not violate Section 7 it put in as a  
15 qualification, in the passage which the Appellant themselves  
16 quoted in their brief, at page 41, that the purpose of the  
17 competitor there was not -- and I quote -- "not with a  
18 purpose to lessen competition." And that, of course, is  
19 exactly the opposite of the purpose the District Court found  
20 was involved here.

21 Now, initially, in 1936, Small purchased only a  
22 25-percent interest in the paper. Over the next three years  
23 he increased his share in the paper from 25 to 85 percent.

24 It has been suggested that he made attempts to  
25 finance the paper and that they were unsuccessful in this



1 interval. The record shows, at pages 205 to 206, that these  
2 attempts -- here merely spoke to three people he knew, a  
3 retired man, a man who had just moved to Arizona and asked  
4 him wouldn't he perhaps like to put some money into the paper,  
5 and they refused. When those three people refused to do so,  
6 Mr. Small decided to move to Tucson from Chicago.

7 What the District Court found -- what he testified  
8 was that he decided to come out himself. At page 206 of the  
9 record he said: "I felt that I could carry the deficit for  
10 some little time."

11 There is nothing to indicate that when this  
12 operating agreement was entered into that Mr. Small had any  
13 intention of liquidating the CITIZEN. There is no indication  
14 he tried any steps to improve its financial condition. There  
15 is nothing to show he made efforts to try to sell it to others.

16 Now, as to the financial condition of the paper, it  
17 is true that the CITIZEN for a number of years had been losing  
18 money. However, between 1938 and 1939, just before the time  
19 that Mr. Small came out or during this period, the paper's  
20 condition improved. Its circulation between those two years  
21 went up 22 percent. Its deficit was reduced. Its advertising  
22 had gone up. And its operating revenues had gone up.

23 The Appellants chide us and say we have made an  
24 unfair comparison, because they say 1938 was the worst year of  
25 the CITIZEN and we shouldn't compare it with 1939. But, of

1 course, it seems not unlikely perhaps that this was the  
2 turning point in the CITIZEN. And this was the situation.  
3 This was the situation that the CITIZEN was faced with when it  
4 decided to enter into this operating agreement.

5 In other words, it was at this point that Mr. Small  
6 when these improvements seemed to be developing that he  
7 decided to come out to Tucson to play a more active role in  
8 the paper and, as he said, to carry it along for a little  
9 while.

10 And, finally -- oh, one other thing that I might  
11 mention, that there has been reference to the balance sheet,  
12 that a substantial portion of these liabilities, as  
13 Mr. McLauray has indicated, belongs to stockholders.

14 Finally, as to the present condition, as to the  
15 present the claim is a pro forma earning statement, in which,  
16 we point out, were some deficiencies. But it seems to us the  
17 answer to all of this argument, that the CITIZEN was equally  
18 certain to fail again if it was now required to terminate  
19 these profit-pooling, price-fixing and diversion-of-market  
20 provisions of the agreement, is the District Court's three  
21 findings at page 98 to 99, Findings No. 190 to 192, which says  
22 that the joint printing and distribution of the STAR does not  
23 depend upon these provisions, that the restoration of  
24 competition requires that they have separate advertising and  
25 circulation.

1           Finally, Finding 192 of the Court says: "It is  
2 impossible to predict with any substantial degree of  
3 completeness what the operating results of either newspaper  
4 will be in a competitive situation."

5           Q     What does that mean? Does that mean that it is  
6 impossible to predict whether or not both newspapers may  
7 survive? Or do you think that the only question is it is  
8 impossible to predict which one of them will die?

9           A     No, I think it is impossible to predict how  
10 well they will do. In other words, you cannot say---

11          Q     Do you mean that it may be that the District  
12 Court contemplated that perhaps both could survive in the  
13 market?

14          A     I think so. The District Court certainly said  
15 that he could not make a prediction, that if these provisions  
16 were cancelled---

17          Q     At least the Government doesn't agree that in  
18 the Tucson market there was only room for one newspaper? The  
19 only question was which one was going out of business.

20          A     That is right. We don't agree with that,  
21 Mr. Justice.

22                 Therefore, it seems to us that this evidence to  
23 which I referred -- and I will declare one other thing. It is  
24 rather interesting that although the CITIZEN allegedly was  
25 failing in 1940 and, presumably, under their theory would have

1 gone out of business, the STAR was willing to give the  
2 CITIZEN a very substantial share of the operating agreement.

3 Q What was the circulation of both newspapers in  
4 1965 as compared with 1940?

5 A About 3-1/2 times as much.

6 Q Each of them?

7 A Each of them. They had roughly the same  
8 circulation in 1965, about 40,000 each.

9 Q That roughly corresponded with the size of the  
10 community, with the growth in the community?

11 A I don't know that.

12 Q That's all right.

13 A I don't know that.

14 As I say, although the publisher testified that the  
15 reason he was so generous was that he wanted to preserve two  
16 operating voices in Tucson, it seems that one can  
17 legitimately ask whether perhaps he wasn't also anxious to  
18 avoid the possibility that this new man coming in might create  
19 a very serious competitor for him or might perhaps sell the  
20 paper to someone else who would be in a position to be a more  
21 vigorous competitor.

22 So what you have here is that these two people got  
23 together and attempted to solve the financial problems of the  
24 paper by eliminating all competition between them.

25 We think the District Court was fully justified in

1 its finding that in 1940 CITIZEN was not on the verge of going  
2 out of business and there was not a serious probability at that  
3 time that CITIZEN would be liquidated and dissolved unless it  
4 entered into this agreement.

5 Now, I would like just very briefly -- we have  
6 developed it in our brief -- in my remaining time to say  
7 something on the claim if the Court disagrees with us and  
8 thinks that this finding is not supported by substantial  
9 evidence---

10 Q Which finding is that?

11 A The finding that they were not a failing  
12 company.

13 In other words, if the Court were to think that the  
14 District Court was clearly erroneous -- and we think he was  
15 correct -- but if the Court should disagree with this, I would  
16 like just briefly to indicate or sketch to the Court the  
17 reasons we think the District Court still properly condemned  
18 these restraints as per se illegal.

19 The attempt is to analogize this to a partial merger.  
20 Of course, as I have indicated, we are not challenging the  
21 operating agreement but only parts of it.

22 MR. CHIEF JUSTICE WARREN: You may have a few more  
23 minutes. Counsel may have the same additional time.

24 MR. FRIEDMAN: Thank you.

25 A merger basically is a single transaction which has



1 some obvious anti-competitive effects. That is, if competitors  
2 combine, it eliminates the competition between them.

3 On the other hand, it may have some benefits. It may  
4 lead to an improvement of the structure of the operating  
5 assets. It may lead to some useful economies.

6 So it is impossible in a merger to separate out  
7 the anti-competitive and the pro-competitive things. What we  
8 have to do is make an overall judgment as to whether or not  
9 the total effect of the merger may be substantially to lessen  
10 competition.

11 But this is a very different kind of a thing. This  
12 is a very different kind of beast. Here what we have is this  
13 agreement with separable provisions. You can just put your  
14 finger on these provisions and see the provision for price-  
15 fixing obviously eliminates competition, the provision for  
16 profit-pooling obviously eliminates competition, the provision  
17 that they will not engage in any other publishing business  
18 obviously eliminates competition. We think those can be  
19 tested under the traditional per se rules and found illegal.

20 Conversely, the provisions for joint printing, for  
21 joint distribution, these are things which can also be tested,  
22 and these are plainly not illegal. They do not restrain  
23 competition. Therefore, for that reason the Government has not  
24 challenged.

25 And it seems to us -- once again, if I may come back

1 to what I have said earlier, basically this is a plea by the  
2 Appellants for special rules for the newspaper business. I  
3 think if you had this kind of situation.

4 Q If this was a failing company, they are not  
5 asking for special rules, are they?

6 A They still are, I think, Mr. Justice, because  
7 they urge that this is a merger. It seems to me, even  
8 assuming if this were failing, we suggest this is not like a  
9 merger.

10 Q If this were a failing company in every full  
11 sense of that term, then these two companies could have  
12 legitimately merged?

13 A That is correct.

14 Q Then a fortiori, I suppose the argument runs  
15 they could do something less than that.

16 A That's where we part company with them,  
17 Mr. Justice. We part company with them because we think that  
18 in the merger field you have to look at the merger as a whole  
19 body. You have to look at it as a whole body, whereas this  
20 type of thing, we do not think can be analogized to a merger  
21 because we think here you can separate out the good and the  
22 bad and there are very different considerations which are  
23 applicable.

24 Q Well, here you have got -- here you can look at  
25 the whole thing, too, and the result is that you have got a

1 stronger newspaper with the basic thing thing of competition  
2 in the things that newspapers are supposed to provide, namely,  
3 ideas.

4 A Except, Mr. Justice, the two are very  
5 interrelated. The two are very interrelated in that sence.  
6 It is not, it seems to us, the same thing as though you had the  
7 two of them combining into one business.

8 Q The difference is that here as a result of  
9 what was done you have two newspapers. You have more  
10 competition provided here or left open than you have in the  
11 mergers.

12 A You have immediately more, but there are  
13 countervailing considerations, which we suggest---

14 Q What are those?

15 A The effect of a combination leaving the market  
16 open for someone else to come in. Here what you have are these  
17 two papers being kept going with this agreement which  
18 restrains competition. This, in effect, is pretty completely  
19 occupying the market, and it has occupied the market by means  
20 of this elimination of competition.

21 It just seems to us, if the problems of the news-  
22 papers are such that there should be relief in this situation,  
23 we think there is this bill which is before Congress. We  
24 oppose the bill, but we think that that is the appropriate  
25 place for redress in this situation.

1 Q What the Judge ordered, was it not, the  
2 separateness of the advertising department and the circulation  
3 department---

4 A Yes.

5 Q Is that where they do their business?

6 A That is where they do their business.

7 Q Is that where they make or lose their money?

8 A In a sense, it is, Mr. Justice. That is where  
9 they make or lose their money. But, of course, how well they  
10 are going to do on advertising depends on circulation. How  
11 well they are going to do on circulation depends on how good  
12 their paper is.

13 Q He ordered, as I understand it, the parts of the  
14 business where they do their business, which is what the  
15 Antitrust Law was aimed at.

16 A What he has done, Mr. Justice, is this. They  
17 have not appealed from the finding that the merger of the  
18 two papers -- they actually merged in 1965 -- they have not  
19 appealed from that. And they agree that divestiture is  
20 appropriate.

21 Now, what the Court did in addition to ordering  
22 divestiture of the two papers -- the Court went on and said  
23 that in such divestiture they had to modify the operating  
24 agreement to eliminate these three provisions which resulted  
25 in the joint business activities.

1 Q What he actually found, as I read it, is that  
2 he let them combine in these two -- that the situation is  
3 wide open to effected as to whatever the policy of the paper  
4 is.

5 A I think that is right.

6 Thank you.

7 MR. CHIEF JUSTICE WARREN: Mr. MacLaury

8 REBUTTAL ARGUMENT OF RICHARD J. MAC LAURY, ESQ.

9 ON BEHALF OF THE APPELLANTS

10 MR. MAC LAURY: If the Court please, we do not ask  
11 here for a special rule for newspapers. We suggest here that  
12 where there has been a partial merger or a partial consolida-  
13 tion of the assets and the personnel of two firms which  
14 preserves to that community competition which otherwise would  
15 fail, that that rule should apply regardless of the business  
16 that we are talking about.

17 Q Competition in what?

18 A Competition, Mr. Justice, between the news and  
19 editorial composition between the two newspapers.

20 Q What about the competition in seeking  
21 advertising and selling advertising?

22 A The competition---

23 Q And circulation.

24 A The competition in seeking advertising,  
25 circulation and pricing -- there is no competition under this



1 arrangement, just as there would be under any merger.

2 We suggest that the owners of STAR and CITIZEN are  
3 not doing a thing here in this operation that they wouldn't  
4 be doing under a complete and total merger. The only thing  
5 that they have done is that they have saved this benefit to  
6 the community of two rival, high-quality newspapers, as the  
7 Court found.

8 Q Does each one say what they want to, but if  
9 each one agrees with one another, there will be no competition  
10 between them in the circulation and the other departments.  
11 That would be suppressed.

12 A That is the situation today. But, Mr. Justice,  
13 I would not agree that it has been suppressed, because in  
14 1940, although these witnesses testified, as laymen, the owners  
15 of STAR and CITIZEN, that they intended to eliminate  
16 competition -- as I say, that was the testimony of laymen --  
17 they were not thinking of testimony as an economist would or  
18 an antitrust lawyer would. They were not thinking of effective  
19 competition. What they were talking about was the end of a  
20 long, hopeless struggle between these two newspapers, which  
21 had finally ended in one of them being a failing condition.

22 Q I will ask this because I want to get the  
23 argument. How can you say it is not suppressed insofar as  
24 advertising and distribution are concerned when they are as  
25 one?

1           A     I would like to answer that by first going to  
2 1940 and then 1965, if I may, Mr. Justice.

3           Q     All right, but you would still get to the  
4 question whether or not he made his findings, whether when  
5 they are one in their advertising and circulation, that you  
6 have not completely suppressed circulation in those two  
7 departments.

8           A     There is no---

9           Q     The money coming in and going out---

10          A     There is absolutely no question, Mr. Justice,  
11 that after this agreement there was no competition whatsoever  
12 on the circulation or advertising level.

13                 I just simply want to add, Mr. Justice, that before  
14 1940 there wasn't effective competition in the antitrust sense  
15 on that level, because the only thing that kept CITIZEN in the  
16 market was not the earnings that it derived from competing with  
17 STAR but the monies that were put into that newspaper out of  
18 Mr. Small's pocket out of his resources from other areas.

19          Q     But that wasn't all of it. They were getting  
20 some advertising money.

21          A     They were getting some.

22          Q     And some circulation money.

23          A     They were getting some, but it was not  
24 sufficient to keep that company viable.

25          Q     But then they didn't have the faculty or the

1 to control themselves with reference to that business, that  
2 part of the business.

3 A After this operation agreement, that is  
4 correct, Your Honor.

5 Now, I would like to address myself to another point  
6 here, and that is Solicitor General's contention here that the  
7 Court found that CITIZEN was not a failing company -- we submit  
8 to the Court that the District Court made no such finding.  
9 Such a finding under the theory on which this case was tried  
10 would have been entirely superfluous and irrelevant, because  
11 the Court eliminated from this trial any and all Section 1  
12 issues, and at the end of the trial, Mr. Justice---

13 Q Was there a finding on Section 7?

14 A There was a finding on Section 7.

15 Q Could there have been if there were a failing  
16 company in the case?

17 A The Section 7 issue, Mr. Justice, related only  
18 to the year 1965. It was an acquisition by CITIZEN of STAR  
19 stock in 1965. We do not contest---

20 Q But didn't you claim -- if your claim was that,  
21 in effect, there was a merger in 1940---

22 A Yes.

23 Q ---that merger would have been subject to  
24 Section 7?

25 A Yes, but it was not challenged under Section 7.

1 It was challenged only under Section 1. The 1940 transaction  
2 was challenged only under Section 1.

3 Q I know, but you would have to get by the failing-  
4 company -- To claim that there was a merger in 1940, you would  
5 have to get by Section 7.

6 A If they had challenged it under Section 7, yes,  
7 but actually the burden on the Government in pleading this  
8 case under Section 1 was far greater than it would have been  
9 had they challenged it under Section 7. They did not challenge  
10 the 1940 operating agreement under Section 7.

11 So at the close of the trial, after we had had a  
12 great deal of testimony on the question whether there was a  
13 violation of Section 2 -- and the primary issue there was one  
14 of intent to apply a power over the market and to relief. We  
15 put in a great deal of testimony, including testimony and  
16 evidence concerning the failing condition of CITIZEN, so as to  
17 show that these people really had no intention to monopolize  
18 but that their intent was to rehabilitate these two newspapers.

19 Now, Section 1 was not in the case at that time.  
20 It had been eliminated by summary judgment. And at the close  
21 of the trial we moved, not quite in terms stated by the  
22 Solicitor General, but our motion was that the Court reopen  
23 the trial and set aside its summary judgment on Section 1 and  
24 permit the Government to adduce evidence on that issue and  
25 permit us to rebut that evidence and also to apply to that

1 evidence all of the evidence that we had adduced under  
2 Section 2.

3 Now, the Court denied that motion and refused to  
4 set aside its ruling on summary judgment that Section 1 was  
5 in violation. So it is not, I think, a proper statement of  
6 the record to say that the Court considered in a Section 1  
7 context all of the evidence on the failing company doctrine.

8 Q Do you think that there was a necessity for the  
9 Court to conclude that in 1965 neither paper was failing in  
10 order to find that there was a violation of Section 7?

11 A No, I do not, Your Honor. I think this, that  
12 in 1965 the Court needed only to find that if the operating  
13 agreement should be abrogated, then one company would---

14 Q Yes, but there was a finding of a Section 7  
15 violation.

16 A Yes, Your Honor. The Section 7 violation I  
17 haven't argued here at all. The Section 7 violation which was  
18 charged was an acquisition by CITIZEN of the stock in STAR  
19 in 1965.

20 Q I understand that.

21 A We do not contest that violation.

22 Q But neither company was failing at that time.

23 A No, neither company was failing at that time.  
24 We do not contest that rule.

25 Q Then if it is taken apart, if the companies were



1 separated right now, they wouldn't be failing companies.

2 Q No, the companies at the journalistic level --  
3 and we have asked this court to reverse the Section 1 issue  
4 and permit us to sell, permit CITIZEN to sell STAR promptly, as  
5 we had always advised the Government that, in the first place,  
6 that was what we intended to do when we acquired it. CITIZEN  
7 has no intent and no desire to retain STAR. It was their  
8 intent at the time they acquired it to promptly dispose of it.  
9 So we raise no issue there. The only issue we raise on the  
10 1965 transaction is that if this court should sustain the  
11 District Court's ruling on abrogating the main clauses of the  
12 operating agreement, so that CITIZEN then would be likely to go  
13 into a failing condition, that CITIZEN owners be given the  
14 option of disposing of either STAR or CITIZEN, because the  
15 whole game has been changed.

16 That is the same option that the Government recently  
17 gave in a consent decree to the Gannett Newspapers in  
18 Rockford, Illinois, where the Gannett Newspapers acquired a  
19 radio. And in consenting to dispose of one or the other the  
20 Government agreed that the newspapers could have their choice,  
21 to dispose of either the radio station or the newspaper.

22 In closing I would like to state again that I am  
23 satisfied and that on examination the Court will be satisfied  
24 that because of the conflict between the findings of fact in  
25 No. 14, Finding 14 and Finding 15 of the financial condition

1 of CITIZEN that it could not have meant that by Finding 17, by  
2 its conclusion in Finding 17, that CITIZEN in 1940 was not a  
3 failing company. All it intended to do was to say that  
4 Mr. Small was willing to continue at that time to reach down  
5 deeper in his pocket to continue to finance that failing  
6 company.

7 Q Mr. MacLaury at what stage of the game were  
8 these findings made, after all the evidence was in on the  
9 Section 2---

10 A Yes, Your Honor, about one year after the  
11 case was tried, nine months afterward.

12 I might add to that that Finding 17 was not proposed  
13 by the Government and was not proposed by the defendants. It  
14 was a finding arrived at by the Court on which it heard no  
15 argument.

16 Q This was quite a bit litigated, the Section 2  
17 claim.

18 A Just the Section 2 issue and the Section 7  
19 issue.

20 Q Because there had been a summary judgment on  
21 the Section 1 issue?

22 A That is correct, Your Honor.

23 Q Mr. MacLaury, I didn't quite understand what  
24 you said. If the Court should sustain the District Court in  
25 abrogating those provisions to the operating agreement, then

1 this would be a new ball game, and there ought to be the  
2 opportunity afforded you either to dispose of CITIZEN or  
3 dispose of the STAR. Is that correct?

4 A That is correct.

5 Q Now, if we sustain the District Court as to  
6 the provisions of the operating agreement, what now precludes  
7 your having that option, the divestiture?

8 A Because the District Court's Order orders the  
9 owners of CITIZEN to dispose of STAR and does not give them  
10 that choice, that they must dispose of STAR.

11 Q I see. Then what you are asking is that  
12 CITIZEN be afforded the opportunity to CITIZEN or of STAR?

13 A That is correct, Your Honor.

14 MR. MAC LAURY: Thank you.

15 (Whereupon, at 11:55, the hearing in the above-  
16 entitled matter was concluded.)  
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