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REGULATION OF BUSINESS—SHERMAN ACT—CONSCIOUS PARALLELISM OF ACTION—Plaintiff attempted to lease first-run films from defendants, major motion picture distributors, for his new theater located six miles from downtown Baltimore in a suburban shopping center. When the defendants, acting separately, refused to make first-run leases to plaintiff, he brought an action for treble damages and an injunction, alleging that he had been injured by a national conspiracy to restrict first-run features to downtown theaters. Plaintiff contended that his showing of conscious parallelism of action on the part of the defendants established an antitrust violation as a matter of law, and that the only question left for the jury was the amount of damages. On certiorari, *held,* the question of whether an antitrust conspiracy should be inferred from conscious parallelism is factual and therefore is properly submitted to the jury. *Theatre Enterprises v. Paramount Film Distributing Corp.,* 346 U. S. 537, 74 S. Ct. 257 (1954).[1]

Section 1 of the Sherman Act declares that conspiracies in restraint of trade are illegal; section 2 condemns conspiracies to monopolize.[2] Because of a desire to strengthen the act,[3] the courts have relaxed the traditional criminal law

[1] The judgment in the principal case was given pursuant to a general verdict for the defendants. Since the trial court had instructed the jury that the plaintiff must prove both (1) that a conspiracy existed and (2) that the conspiracy was an unreasonable restraint on trade in order to recover, it is impossible to know whether the jury's general verdict was based upon a finding of the nonexistence of a conspiracy or whether it thought that a conspiracy existed but that it was not unreasonable. For the trial court's instructions, see Theatre Enterprises v. Paramount Film Distributing Corp., (4th Cir. 1953) 201 F. (2d) 306 at 315. The opinions of the court of appeals and the Supreme Court assume that the verdict was based upon the finding of an absence of conspiracy.

[2] 26 Stat. L. 209 (1890), 15 U.S.C. (1946) §§1, 2.

[3] See United States v. Griffith, 334 U.S. 100 at 105, 68 S.Ct. 941 (1948).

requirements of conspiracy.[4] Although an agreement is required,[5] the agreement need not be express.[6] It is not necessary to prove a specific intent to restrain or monopolize trade in order for the conspiracy to be illegal.[7] Since direct evidence is difficult to obtain, circumstantial evidence from which conspiracy can be inferred is sufficient.[8] Conscious parallelism of action, i.e., the conscious following of a uniform pattern of business behavior by competitors, is evidence from which conspiracy can be inferred.[9] Persons interested in the enforcement of the Sherman Act against oligopolistic industries[10] have urged that conscious parallelism should be held conclusively to establish a conspiracy.[11] It was on this theory that the plaintiff in the principal case contended that the only question for the jury to decide was the amount of damages. But the Court, speaking through Justice Clark, former Attorney General, rejected this contention and stated that whether or not a conspiracy can be inferred from conscious parallelism is a question of fact.[12]

Implicit in the view of the Court is the idea that there are situations in which conscious parallelism is not violative of the antitrust laws. For example, if it is clear that the defendants' similar acts are the only ones which a prudent businessman acting independently would adopt in the same situation, it is doubtful whether antitrust policy would permit the inference of an illegal conspiracy.[13] Surely it is not in the public interest to require the adoption of imprudent business policies in order to gain protection from the contamination of conspiracy.[14] On the other hand, if a prudent businessman clearly would

[4] See the concurring opinion of Justice Jackson in Krulewitch v. United States, 336 U.S. 440 at 445, 452, 69 S.Ct. 716 (1949).

[5] Principal case at 540.

[6] See United States v. United States Gypsum Co., 333 U.S. 364 at 394, 68 S.Ct. 523 (1948).

[7] See Interstate Circuit v. United States, 306 U.S. 208, 59 S.Ct. 467 (1939); American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125 (1946).

[8] See United States v. Masonite Corp., 316 U.S. 265, 62 S.Ct. 1070 (1942); Bigelow v. RKO Radio Pictures, (7th Cir. 1945) 150 F. (2d) 877, revd. on other grounds 327 U.S. 251, 66 S.Ct. 574 (1946). See also Pevely Dairy Co. v. United States, (8th Cir. 1949) 178 F. (2d) 363, cert. den. 339 U.S. 942, 70 S.Ct. 794 (1950), in which the view is expressed that the inference will be permitted in a criminal proceeding only when that is the only possible inference that can be drawn. Cf. Bordonaro Bros. Theatres v. Paramount Pictures, (2d Cir. 1949) 176 F. (2d) 594.

[9] See United States v. Griffith, note 3 supra.

[10] To the effect that the motion picture industry is oligopolistic, see TNEC MONOGRAPH No. 43 (1941).

[11] See 3 STANFORD L. REV. 679 at 680 (1951).

[12] ". . . this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." Principal case at 541.

[13] See United States v. Borden Co., (D.C. Ill. 1953) 111 F. Supp. 562. The situation might be different where a monopoly or an attempt to exercise monopolistic power is involved. See William Goldman Theatres v. Loew's, (3d Cir. 1945) 150 F. (2d) 738, cert. den. 334 U.S. 811, 68 S.Ct. 1016 (1948); Interstate Circuit v. United States, note 7 supra.

[14] See CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION, 6th ed., c. III (1950).

not adopt the particular practices were he acting independently, a court then might be justified in finding that conspiracy has been proved as a matter of law.[15] But if it is not clear that an independent and prudent businessman in the same situation either would or would not adopt the parallel practices, conspiracy would seem a permissible[16] but not necessary[17] inference from the fact of conscious parallelism. The principal case seems to present the last alternative: it is not clear that a prudent businessman would follow the Baltimore practices of the defendants in order to maximize his returns from a copyrighted product in the absence of a conspiracy; nor is it clear that these practices would have been adopted only if there were a conspiracy. The plaintiff alleged that his new theater was at least equal to the downtown theaters in every way and that the defendants must have conspired or they would not have refused his lucrative offers for leases of first-run films. On the other hand, the defendants argued that the downtown theaters had a greater drawing power, that downtown showings were better to exploit and advertise new films, that the downtown exhibitors had been satisfactory customers of long standing, that concurrent "day and date" showings would be impracticable since plaintiff was in competition with downtown theaters, and that plaintiff's offers and guarantees must have been in bad faith.[18] On these facts, the jury found that the parallel behavior was motivated by prudent business policies individually arrived at rather than by an underlying agreement among competitors. It is submitted that the Court properly refused to hold that the conscious parallelism by itself established an illegal conspiracy.

Arthur M. Wisehart, S.Ed.

[15] In Ball v. Paramount Pictures, (3d Cir. 1948) 169 F. (2d) 317, cert. den. 339 U.S. 911, 70 S.Ct. 568 (1950), the appellate court reversed the finding of the trial court that there was no conspiracy where defendant refused plaintiff first-run films even though he offered higher rental fees than competing theaters. The point is emphasized that defendants' behavior would not constitute good business judgment in the absence of a purpose to restrain trade or monopolize. Evidence that first-run treatment of an individual theater was discontinued after an exhibitor in which the defendant distributor had a financial interest moved out and a new exhibitor came into the theater might persuade the court that a conspiracy exists. See Dipson Theatres v. Buffalo Theatres, (2d Cir. 1951) 190 F. (2d) 951 at 954, cert. den. 342 U.S. 926, 72 S.Ct. 363 (1952).

[16] United States v. Paramount Pictures, 334 U.S. 131, 68 S.Ct. 915 (1948).

[17] Dipson Theatres v. Buffalo Theatres, note 15 supra.

[18] The contentions made by the respective parties are set forth in Theatre Enterprises v. Paramount Distributing Corp., note 1 supra.