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Monopoly -- Divestiture as Remedy for Vertical Integration of Motion Picture Companies

A recent bill,[16] intended to give taxpayers an outlet for avoiding this double tax,[17] died when the Senate of the Eightieth Congress failed to pass it before adjournment. It is indeed possible that the instant decision and its many recent counterparts may force Congress to act soon with a similarly designed bill.

MONOPOLY—DIVESTITURE AS REMEDY FOR VERTICAL INTEGRATION OF MOTION PICTURE COMPANIES

An anti-trust action under the Sherman Act [1] was instituted in 1938 against the eight leading motion picture companies and their subsidiaries.[2] The complaint alleged that these companies, through their integration of production, distribution and exhibition of motion pictures, had conspired in restraint of trade and had formed a concerted monopoly, discriminatory in nature. The Government sought divestiture [3] and other equitable relief against further violation of the Sherman Act and injunctive relief against specific unfair and discriminatory practices.[4] The lower court's opinion [5] was that a system of competitive bidding by exhibitors, separately for each picture and theatre, would eliminate block-booking [6] and blind selling [7] and render divorcement unnecessary. Upon appeal by both sides the Supreme Court remanded the case for a determination of the effect of vertical integration in the industry and

16. H.R. 6712, 80th Cong., 2nd Sess. § 129 (1948) (proposed Revenue Revision Act of 1948).

17. H.R. REP. No. 2087, 80th Cong., 2nd Sess. 15 (1948); 1 RABKIN AND JOHNSON, FEDERAL INCOME GIFT AND ESTATE TAXATION 1318 (1947 ed.); Freeland, *supra* note 13.

1. 26 STAT. 209 (1890), as amended, 50 STAT. 693 (1937), 15 U.S.C. §§ 1, 2 (1946).

2. The defendants were: Paramount Pictures, Inc.; Paramount Film Distributing Corp.; Loew's, Inc.; Radio-Keith-Orpheum Corp.; RKO Radio Pictures, Inc.; Keith-Albee-Orpheum Corp.; RKO Proctor Corp.; RKO Midwest Corp.; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Warner Bros. Circuit Management Corp.; Twentieth Century-Fox Film Corp.; National Theatres Corp.; Columbia Pictures Corp.; Columbia Pictures of La., Inc.; Universal Corp.; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corp.

3. Divestiture and dissolution are commonly used remedies for anti-trust violations. While there is some distinction between the two there is no definite rule of application. The courts apparently use that remedy which they deem most appropriate. Generally, divestiture is forcing a corporation to sell or otherwise dispose of some portion of its holdings. Dissolution consists of splitting the entire corporation into its component parts.

4. Five of the major companies (Paramount Pictures, Inc.; Loew's, Inc.; Radio-Keith-Orpheum Corp.; Warner Bros. Pictures, Inc.; and Twentieth Century-Fox Film Corp.) entered into a temporary consent decree with the Government in 1940 under the terms of which a status quo was maintained for three years and an arbitration system was established. Although the consent decree lapsed before the issuance of the District Court's opinion in 1946 the "majors" continued to comply with its provisions.

5. United States v. Paramount Pictures, Inc., 70 F. Supp. 53 (S.D.N.Y. 1946). See also United States v. Paramount Pictures, Inc., 66 F. Supp. 323 (S.D.N.Y. 1946).

6. "Block-booking is the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period." United States v. Paramount Pictures, Inc., 334 U.S. 131, 156 (1948).

7. "Blind-selling is a practice whereby a distributor licenses a feature before the exhibitor is afforded an opportunity to view it." United States v. Paramount Pictures, Inc., 334 U.S. 131, 157 n.11 (1948).

for reconsideration of the potentially applicable remedial measures.[8] *Held,* that the industry's vertical integration, together with other practiced abuses, required divorcement of the defendants' exhibition business from that of production and distribution. *United States v. Paramount Pictures, Inc.,* 85 F. Supp. 881 (S.D.N.Y. 1949).

Federal anti-trust acts vest in the Government the right to bring suit to dissolve an unlawful combination.[9] Courts may decree dissolution of such combinations;[10] but whether they do so rests largely in the court's discretion [11] in view of the particular facts of the case.[12] An important consideration is whether the public interest will best be served by breaking up the unlawful combination and, if not, the courts will generally refuse the Government's request for this extreme measure.[13] Dissolution is a remedy and not a penalty,[14] and the less severe remedy of injunction is preferable where it will be adequate.[15] But injunctive relief is usually inadequate where an illegal combination has persistently interfered with the free flow of commerce.[16] The inadequacy of injunctions and propriety of divestiture has been recognized in Sherman Act cases against the motion picture industry.[17]

The major question in the instant case was not the guilt or innocence of the defendant companies in violating the Sherman Act, but the finding of a suitable remedy to prevent future violations. Exhibitor defendants had acquired over a period of years "distinct . . . spheres of control" [18] and, in so doing, a relationship grew up in which there was a decided absence of competition.[19] Where there has been a tendency to use an affiliation for an unlawful purpose the courts must be assured that there will be no future opportunity to do so

8. 334 U.S. 131 (1948).

9. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

10. *E.g.,* Hartford Empire Co. v. United States, 323 U.S. 386 (1945); United States v. Crescent Amusement Co., 323 U.S. 173 (1944); United States v. Reading Co., 253 U.S. 26 (1920); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

11. United States v. American Can Co., 234 Fed. 1019 (Md. 1916), *appeal dismissed,* 256 U.S. 706 (1921).

12. United States v. United States Steel Corp., 251 U.S. 417 (1920); United States v. Union Pacific R.R., 226 U.S. 61 (1912), 226 U.S. 470 (1913).

13. United States v. United States Steel Corp., 251 U.S. 417 (1920); United States v. Borax Consol., 62 F. Supp. 220 (N.D. Cal. 1945); United States v. American Can Co., 234 Fed. 1019 (Md. 1916), *appeal dismissed,* 256 U.S. 706 (1921).

14. United States v. Aluminum Co. of America, 148 F.2d 416 (2nd Cir. 1945); United States v. Borax Consol., 62 F. Supp. 220 (N.D. Cal. 1945).

15. United States v. Great Lakes Towing Co., 217 Fed. 656 (N.D. Ohio 1914), *appeal dismissed,* 245 U.S. 675 (1917).

16. United States v. Corn Products Refining Co., 234 Fed. 964 (S.D.N.Y. 1916), *appeal dismissed,* 249 U.S. 621 (1919).

17. United States v. Crescent Amusement Co., 323 U.S. 173 (1944).

18. Bertrand, Evans and Blanchard, *The Motion Picture Industry—A Pattern of Control* 15 (TNEC Monograph 43, 1941). See Brady, *The Problem of Monopoly,* 254 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 125 (Nov. 1947).

19. United States v. Paramount Pictures, Inc., 85 F. Supp. 881, 892 (S.D.N.Y. 1949). See Brady, *op. cit. supra* note 18, at 131 (". . . the American movie industry is a small coterie of vertically integrated, horizontally co-ordinated, and monopolistically inclined corporations. . . . The members of the group 'compete' with one another in somewhat the same way as do the several branches of the General Motors Corporation").

again.[20] Here, divestiture was found to be necessary, rather than to intrust an already monopolistic industry with the management of a competitive bidding system or burden the court with its detailed and extensive supervision.[21]

The success of the Government in the recent maze of anti-trust actions gives rise to a belief that the next decade will witness a tremendous growth of this type of litigation.[22] The Paramount cases should and will form an important basis for future actions against allied industries such as radio, television, professional athletics, and other entertainment fields. These industries are inherently monopolistic because they are based on the development of individual talent to a point at which it becomes irreplaceable. Should divestiture prove successful as a remedy against the motion picture industry there may be a more extensive use of this remedy in dealing with other anti-trust violations in the entertainment industries.

PROCEDURE—COUNTERCLAIM COMPULSORY IN REPRESENTATIVE SUIT ALTHOUGH CLAIM AGAINST PLAINTIFF REPRESENTATIVE IS PERSONAL IN NATURE

Plaintiff, employer of the deceased, brought a wrongful death action against the defendant as assignee of the decedent's widow. The action was brought in a representative capacity under the Florida Workmen's Compensation Act which permits a widow to assign her right of action for her husband's wrongful death.[1] From a judgment for the plaintiff, the defendant, who had failed to counterclaim in the initial suit, brought a separate action against the employer as such for damages. The employer's motion to dismiss was sustained on the ground that the issues had been fully adjudicated in the former action. On appeal from the order dismissing the action, *held;* order affirmed, since the Florida statute[2] requires the defendant to file counterclaim in the original action for any damages sustained from the same transaction. *Newton v. Mitchell,* 42 So.2d 53 (Florida 1949).

The defendant, upon appeal, contended that the statute requiring one to counterclaim for damages arising out of the occurrence sued upon in the initial suit should only apply to defeat his action had he subsequently sued the plaintiff in the latter capacity as the assignee of the widow's right, that

20. United States v. Crescent Amusement Co., 323 U.S. 173 (1944).
21. United States v. Paramount Pictures, Inc., 334 U.S. 131, 163 (1948); United States v. Paramount Pictures, Inc., 85 F. Supp. 881, 895 (S.D.N.Y. 1949).
22. The baseball industry has already been attacked by private individuals for violations of the anti-trust laws. Martin v. Chandler, 85 F. Supp. 131 (S.D.N.Y. 1949); Gardella v. Chandler, 79 F. Supp. 260 (S.D.N.Y. 1948). It is not inconceivable that the government may also take some interest in the competitive conditions in that industry.

1. FLA. STAT. § 440.39 (1941).
2. FLA. STAT. § 52.11 (1941).