IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 19

THEATRE ENTERPRISES, INC.,

Petitioner,

v.

PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED, RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, UNIVERSAL FILM EXCHANGES, INC., UNITED ARTISTS CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORP., WARNER BROS. CIRCUIT MANAGEMENT CORP., COLUMBIA PICTURES CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

BRUCE BROMLEY,
Counsel for Respondents Paramount Film Distributing Corp., Loew's Incorporated, RKO Radio Pictures, Inc., Twentieth-Century Fox Film Corporation, Universal Film Exchanges, Inc., United Artists Corporation.

FERDINAND PECORA,
Counsel for Respondents Warner Bros. Pictures Distributing Corp., Warner Bros. Circuit Management Corp., Columbia Pictures Corporation.

Of Counsel:

MILTON HANDLER
R. DORSEY WATKINS
J. COOKMAN BOYD, JR.
E. COMPTON TIMBERLAKE
STANLEY D. ROBINSON

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OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported in 201 F. 2d 306. As the case was tried before a jury, there was no opinion in the District Court.

JURISDICTION

Certiorari was granted on May 25, 1953 to review the judgment of the Court of Appeals. 345 U. S. 965. The jurisdiction of this Court rests upon Section 1254 (1) of the Judicial Code, 62 Stat. 928, 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Did the court below err in holding that the trial court properly denied petitioner's motion for a directed verdict on the issue of conspiracy?

2. Did the court below err in holding that the trial court correctly instructed the jury concerning the probative effect of the decrees in *United States* v. *Paramount Pictures, Inc.*?

PRELIMINARY STATEMENT

Petitioner is the owner and operator of the Crest Theatre, a neighborhood motion picture house located in a partially developed district, six miles from the downtown section of Baltimore, Maryland. Petitioner brought suit for treble damages and an injunction, charging respondent motion picture companies with a conspiracy to deny its theatre "first run" pictures.[1]

There is no dispute about the fact that the Crest did not receive a first run. Petitioner's claim that this was the re-

[1]The complaint also contained a second cause of action alleging a conspiracy to discriminate against petitioner's theatre in licensing pictures for exhibition on first neighborhood run in Baltimore. The appeal on this cause of action was abandoned in the court below and the matter is not presented for review in this Court.

sult of a conspiracy, however, was flatly denied by responsible sales executives of respondents, each of whom testified to the business reasons which had prompted his company, acting separately and independently, to refuse petitioner's request for first run product.

After a trial of three weeks, petitioner requested a peremptory instruction requiring the jury to return a verdict in its favor "in such amount as you estimate the plaintiff's loss to have been" (R. 973, 46).[1] Treating this request as tantamount to a motion for a directed verdict, the trial court denied the motion (R. 973), and submitted the case to the jury.

The jury returned a unanimous verdict in favor of all respondents (R. 1120-21).

No motion was made by petitioner either for a new trial or for judgment notwithstanding the verdict.[2]

On appeal the Court of Appeals, after an extended review of the evidence, unanimously concluded that the case presented issues of fact requiring submission to the jury and that petitioner's motion for a directed verdict had been properly denied. The Court considered petitioner's numerous objections to the trial court's charge and held that the instructions to the jury were free of error. Accordingly, it affirmed the judgment entered in favor of respondents on the jury's verdict (R. 75-91).

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[1]The complete transcript of record printed pursuant to respondents' designation is referred to as "R". The symbols PX and DX denote "Plaintiff's (Petitioner's) Exhibit" and "Defendants' (Respondents') Exhibit", respectively. No reference is made in this brief to the incomplete appendices used below which petitioner has designated as its record here, and to which petitioner refers in its brief as "R" in conjunction with the letter "a" after the page number. These appendices contain mere excerpts of testimony which can only be properly evaluated in the light of the record as a whole.

Petitioner's brief will be referred to herein as "Br."

[2]Cf. *Johnson* v. *New York, New Haven & Hartford R. Co.*, 344 U. S. 48 (1952).

STATEMENT OF FACTS

Both in its petition for certiorari and in its brief on the merits, petitioner has presented to this Court an incomplete, inaccurate and distorted statement of facts. Liberally sprinkled throughout the brief is the gratuitous characterization of certain key facts as "admitted" or "undisputed". Many of the facts so characterized are neither admitted nor undisputed. On the contrary, they are sharply controverted or have no support in the record. By coupling these false characterizations with question-begging epithets, petitioner insidiously creates an erroneous and truncated picture of the record which does not reflect the actual facts or the true question to be decided.

The essential question in this case was whether respondents acted separately and independently in denying a first run to the Crest, or whether their refusals sprang from conspiracy. This question was submitted to the jury as a question of fact for its determination. While paying lip service to the settled rule that in determining the correctness of the denial of a motion for a directed verdict an appellate court views the evidence and all inferences therefrom in the light most favorable to the non-moving party, petitioner in reality completely disregards the rule. Thus it ignores or distorts the voluminous proofs submitted by respondents and draws every conceivable inference from the evidence in its *own* favor, without mentioning the contrary inferences which the jury was warranted in drawing in favor of respondents. Petitioner then adds insult to injury by labeling the inferences so indulged by it as "admitted" and "undisputed" facts.

Under the circumstances, in order to place the case in its proper perspective, it is essential to outline in some detail

the substantial body of evidence which compelled the denial of petitioner's motion for a directed verdict and which fully supports the jury's verdict in favor of respondents.

The Theatre Situation in Baltimore

Baltimore is a city having a population of around 950,000 persons (R. 540). Including the surrounding suburbs the total population approximates 1,250,000 (R. 540). There are upwards of 90 motion picture theatres within this area (R. 528, 614). Some are located in the downtown shopping district, including the eight first run downtown houses referred to below; others are scattered throughout the city and its suburbs (R. 528, 614; PX 67, R. 291-92). At the time of the trial five of the eight downtown first run theatres were operated by exhibitors having no connection with any of the respondents.[1] Two of them were operated by Loew's,[2] and one by Warner.[3] The latter three theatres accounted for only 37% of the first run exhibitions in Baltimore (R. 874), and approximately 75% of the playing time of each of these theatres was devoted to the exhibition of its own product (R. 620, 863). Between 22 and 30 neighborhood theatres, many having appointments

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[1]The Hippodrome and Town by Mr. Rappaport; Keith's by Mr. Schanberger; the New by Mr. Mechanic; and the Mayfair by Mr. Hicks (R. 120-21). The diversification of the distribution of the product of the several respondents among the first run theatres is charted on DX 29 (R. 871-74). The facts contained in this exhibit are totally ignored by petitioner; instead it relies wholly on Myerberg's incomplete testimony in stating the facts at page 4 of its brief. The implication that there was any agreement for the division of product among these theatres (Br. 4) is utterly without support in the record. No such claim was made at the trial; no such evidence was adduced.

[2]The Century and Valencia (R. 120-21). Contrary to the innuendo in petitioner's brief (p. 8, fn. 5), respondent United Artists had no interest in either of these theatres. The United Artists Theatre Circuit, Inc., referred to by petitioner, has no connection or affiliation whatever with respondent United Artists.

[3]The Stanley (R. 121).

equal if not superior to petitioner's theatre, and located in more populous areas with a larger draw, exhibited pictures on a first neighborhood run (R. 294, 580, 642, 701, 858, 901).[1] Petitioner's theatre exhibited pictures on this run (R. 167-68). The remaining theatres operated on later runs.

The Crest Theatre

In the latter part of 1946 petitioner's president, Harry D. Myerberg, and his brothers purchased 12 to 15 acres of land located in a corner of northwest Baltimore about six miles from the downtown area (R. 124-25, 292). After building between 50 and 65 homes the Myerbergs decided to erect a shopping center on the site consisting of 15 stores (R. 125, 509-10). The Crest Theatre was included in the center and its construction was begun early in 1948 (R. 127).

A survey of the shopping center in which the Crest is located was made by Dr. Edward Hawkins, Dean of the School of Business and Professor of Marketing of Johns Hopkins University (R. 505, 509). Dr. Hawkins was particularly qualified for this task by reason of his experience as director of a research project on retail shopping centers for the Baltimore City Planning Commission (R. 506). Dr. Hawkins divided shopping centers into three classifications: Primary, secondary and neighborhood.

A primary shopping center has from 60 to 150 stores, including at least one large and several smaller department stores. A center of this type will draw up to a distance of

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[1]Myerberg himself testified that two of these theatres, the Edmondson and Northwood, like his own Crest, received International Awards from a trade magazine for being among the finest theatres constructed in the western hemisphere (R. 435-36, 170-71), and he also grouped the Uptown and Ambassador in the same class as the Crest (R. 418-19).

50 miles (R. 506). There is only one such center in Baltimore—the downtown business district (R. 508).

Secondary centers have 20 to 50 stores, including at least one department store, and draw trade for perhaps five miles (R. 506). There are a number of these secondary centers in Baltimore, such as Edmondson Village, Waverly, Northwood and Belvedere-York Road (R. 508).

A neighborhood shopping center has up to 15 stores, consisting in the main of "convenience stores", such as groceries, restaurants, and personal service establishments, but does not have a department store (R. 506). The Hilltop Shopping Center in which the Crest is located falls into this last category (R. 509-10, 172).

The prospective draw area of the Crest, according to Myerberg's pretrial testimony, was generously fixed at 175,000, allegedly on the basis of a survey which was never offered in evidence (R. 126). At the trial, however, Myerberg reduced his estimate to 105,000 (R. 126). An aerial photograph taken of the claimed draw area, introduced in evidence by respondents, discloses a large wooded tract just west of the Crest, other undeveloped sections to the north and a neighboring cemetery (DX 9, R. 498-502, 453). The only public transportation facility available to serve the Crest is a single bus line running in a north-south direction, with no east-west service whatsoever (R. 298).[1]

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[1]Notwithstanding the uncontroverted testimony that the Crest was located in a small neighborhood shopping center with inadequate public transit facilities, petitioner seeks to create the impression that the Hilltop Shopping Center was a city within a city—a thriving integrated community with a life of its own (Br. 45). Not even an advocate's usual latitude of hyperbole would justify such a description of this third class shopping center. In this connection Mr. Zimmerman testified: "Mr. Myerberg described this very unique character of the Crest territory. He indicated that there was an enormous shift of population, almost like the center of gravity of Baltimore had shifted.

By Myerberg's own admission there were seven neighborhood movie houses in the same competitive area within a mile or two of the Crest location, one of which—the Uptown—is comparable to the Crest in every respect except size (R. 291-92, 297, 417, 418-19).[1] Evidence was adduced that with the addition of the Crest the area became overseated (R. 768-69, 902).

Runs and Clearance

Since the present case relates to the run of the Crest Theatre, a few words in explanation of runs and clearance may be appropriate.

This Court in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 144-45 (1948), defined runs as "successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on." Clearance was defined as "the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres." The District Court upheld the legality of runs and clearances as necessary and reasonable business arrangements,[2] and this ruling was not

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I was very interested to see if there was in effect a new downtown area being created, a second city in Baltimore. If there was that very unique and special situation, of course we might reconsider our decision. Actually, Mr. Brecheen and Mr. Folliard went there and said it was a very nice area, a perfectly nice community, period. But it is a neighborhood area" (R. 562-63).

[1]The Crest had 1600 seats (R. 131); the Uptown had a seating capacity of 1100 (R. 315).

[2]66 F. Supp. 323, 341-42 (S. D. N. Y., 1946). Other discussions of the economic necessity for and the legality of staggered runs and clearances may be found in *Westway Theatre* v. *Twentieth Century-Fox F. Corp.*, 30 F. Supp. 830 (D. Md., 1940), aff'd 113 F. 2d 932 (4th Cir., 1940); *Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 94 F. Supp. 388 (D. Md., 1950), aff'd 189 F. 2d 797 (4th Cir., 1951); and *Fanchon & Marco* v. *Paramount Pictures*, 100 F. Supp. 84 (S. D. Cal., 1951).

challenged on appeal. This Court in its opinion quoted the criteria enunciated by the District Court in determining the reasonableness of a clearance, including:

> "(2) The character and *location* of the theatres involved, including size, type of entertainment, appointments, *transit facilities*, etc.; . . .
>
> "(5) The extent to which the theatres involved compete with each other for patronage; . . .
>
> "(7) There should be no clearance between theatres not in substantial competition" (334 U. S. at 145-46) (emphasis added).

The propriety of runs and clearance is not contested in this litigation. Not only did Myerberg expressly state that he was not attacking runs and clearance as such, but he frankly admitted that if his theatre had received a first run he would have expected the usual 21-day clearance protection over competing theatres (R. 332, 840). Further, he readily conceded that theatres in substantial competition should not have simultaneous runs (R. 315-16). Petitioner's sole claim is that the preferred run that it sought was denied as a result of an alleged conspiracy.

Substantial Competition Between the Crest and Downtown Theatres

Myerberg claimed at the trial that there is no substantial competition between the Crest and the downtown theatres (R. 326-27, 332-33), presumably in order to establish that the Crest should have been awarded a "day and date" first run, i.e., a first run showing simultaneously with an identical showing in the downtown area. This opinion evidence by an interested witness was not supported by any facts and

was directly refuted by a large body of evidence adduced by respondents. In addition, it was plainly inconsistent with Myerberg's initial demands for an exclusive first run for the Crest (see pp. 11-12 and 19-20, *infra*), since an exclusive first run, with a concomitant clearance, is appropriate only between substantially competitive theatres. In the absence of substantial competition, Myerberg's request for an exclusive first run and clearance over the other theatres in the area would have been entirely improper.

The fact is, however, as the proofs overwhelmingly demonstrate, that substantial competition did exist between the Crest and the downtown first run theatres, and the jury was clearly warranted in so finding.

Dr. Hawkins of Johns Hopkins described a survey made by him of attendance at the six leading downtown first run theatres to determine where their patrons resided. The results of this survey clearly show that from the draw area claimed by petitioner, the downtown theatres obtain 16.34% of their patronage. They further show that from the combined Waverly-Northwood-Belvedere areas the downtown attendance is 15.16%, and is 7.89% from Edmondson Village (R. 511-16, DX 10). Thus these outlying districts alone account for 39% of the business done by the downtown first run theatres.

Another patronage survey was made by the management of Warner's Stanley Theatre on varying dates and at both afternoon and evening hours (R. 604). This was done by plotting the addresses of 2,555 patrons on a postal zone map of Baltimore. It developed that 19.5% of the Stanley's patrons lived in postal zone 15, which was wholly within the draw area claimed by the Crest. Addresses located in other postal zones partially within the Crest area

were omitted in making this computation (R. 604-06, DX 16).

Loew's conducted a similar survey of its Century Theatre (R. 853). The 2,673 addresses thus obtained were plotted on a postal zone map of Baltimore (R. 854-55, DX 28). While no attempt was made to allocate any percentage of the downtown draw to the claimed Crest area, DX 28 demonstrates that the Century attracts a substantial number of patrons from every part of the city, including the region surrounding the Crest.

These surveys supplied persuasive support to the testimony of several witnesses for respondents, each having vast experience in the marketing of motion pictures, to the effect that there is substantial competition between the Crest and the downtown theatres (R. 572, 626, 856).

Perhaps the most graphic corroboration of these surveys, and illustration of the effect of lack of public transportation upon movie attendance, was furnished by the 1951 transit strike in Baltimore. "Quo Vadis," one of the most expensive and lavish pictures ever produced, opened at the Century in downtown Baltimore just at the time of the strike (R. 860-61). In every other city in the country the first week of "Quo Vadis" far outgrossed the earlier picture of similar character, "Gone with the Wind." This situation was reversed only in Baltimore, where attendance was materially affected by the strike (R. 861).

Myerberg's Attempts to Obtain a First Run for the Crest and the Reasons for His Failure

Myerberg initially sought an exclusive first run for the Crest, that is, the right to be the first exhibitor of a picture in Baltimore, with 21-day clearance over every other

theatre in that city. In his efforts to obtain first run product, Myerberg separately approached each of the respondents. Acting independently, each turned him down for cogent and compelling reasons.

Thus early in October, 1948, at a time when construction of the Crest was nearing completion, Myerberg conferred separately in Washington with representatives of seven of the eight distributors (R. 128).[1] A week or so later Myerberg sent substantially identical letters—referred to during the trial as the "World Premiere" letter—to each of these seven distributors (R. 138, 141, 142, 143, 145). In this letter he described the Crest as "the finest showcase for films in the State of Maryland" and requested for its opening a "world premiere" consisting of

> "the finest picture available from your company, a first-run film which has received more than the usual pre-exhibition publicity—preferably one which is waited for by the movie-going public with anticipation; one already causing excitement and creating discussion." (PX 1, R. 130-32).

Warner was the recipient of such a letter despite the fact that its Washington district manager, Smeltzer, had previously unequivocally denied Myerberg's request for an exclusive first run on the ground that Warner had its own theatre, the Stanley, in downtown Baltimore, which exhibited its first run product—a position which Myerberg had said he understood (R. 631-33).

Loew's, within a week of its receipt of Myerberg's World Premiere letter, refused an exclusive first run on the ground

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[1]The lone exception was Columbia, which was not approached by Myerberg until November, 1949 (R. 147, 732, 733-34).

that it operated two first run theatres in downtown Baltimore (R. 879).

RKO's decision was made in December, 1948 by William Zimmerman, assistant to the vice-president in charge of distribution, following a personal conference with Myerberg in New York, and after consulting RKO's branch manager and another representative of the company, both of whom had made a thorough inspection of the Crest's location (PX 21, R. 164, 525-30, 562, 580). As Zimmerman explained to Myerberg during their November conference:

> ". . . in marketing our pictures in the large cities, the key cities, we found that it was preferable to license our first run in the downtown area for a number of reasons: First of all, a theatre in the downtown area is centrally located, it is located where the masses of the people are found for their entertainment. It is easily accessible from all areas of the city. It is in the mind of the public, in the minds of the exhibitors, that an important picture has its first run in a large city in the downtown show case. If the picture is shown first run in a large city in a neighborhood house, it is tagged as an inferior picture. So that on subsequent runs, instead of getting large film rental, we get small film rental. We must think in terms, when we are marketing a picture in a large city, like Baltimore, we must think not only of the first run exhibitions, we must think of all the subsequent run exhibitions. . . .
>
> ". . . I think I did mention in that conference, I mentioned the fact, for example, talking of the immediate desirability of a downtown theatre first-run, as against a neighborhood house, is the fact that you get a pretty substantial matinee business in your downtown theatres, because it is your pri-

> mary shopping center, the people are found there, and they come in, they are shopping, and they take an odd hour or so and go into the downtown theatres." (R. 527-29).

Fox's branch manager, Norris, who had seen the Crest on several occasions during various stages of construction, promptly rejected Myerberg's request at their preliminary meeting because the location of the theatre was such that it was suitable for only a neighborhood operation (R. 693-94). Several weeks later Fox's eastern division manager, Moon, who also visited the theatre (R. 707), confirmed this decision in a conference with Myerberg in Baltimore (R. 696).

Paramount wrote petitioner on November 1, 1948 reaffirming an earlier decision by its branch manager, Benson, not to grant petitioner a first run for the reason that "the business and financial interests of Paramount will be served best by the continued exhibition of Paramount pictures first-run Baltimore in theatres situated in the downtown business and shopping area of that city rather than in a theatre located in a suburban area" (PX 35, R. 233-34).

Universal's decision was made after Meyers, its eastern division sales manager, had come to Baltimore for the express purpose of inspecting the Crest (R. 774). On the basis of his inspection Meyers concluded that the theatre was badly located, even for a neighborhood house (R. 768-69).

United Artists, when first approached by Myerberg in October, 1948, had no pictures available for release, having licensed them all through the first of the year (R. 144). Thereafter the company accepted the recommendation of

its branch manager, Price, who had visited the Crest in the interim and decided that the theatre was not suitable for first run exhibition because of its poor location (R. 682-83).

Columbia, the only distributor not to receive a World Premiere letter (R. 147, 732), was not approached by petitioner until November 1, 1949, after the Crest had been in operation for eight months (R. 733-34). It then received a letter from petitioner's attorney, as did each of the other seven distributors, requesting it to experiment with the Crest as a first run outlet (PX 50, R. 261-62, 281, 732). Following an inspection of the theatre by Galanty, its division manager, Mr. Josephs, assistant to the general sales manager, decided against the experiment in view of the Crest's limited draw area, and the highly satisfactory treatment accorded Columbia pictures in downtown Baltimore over a period of years by Mr. Rappaport in the Hippodrome and Town Theatres (R. 733, 749).

Each distributor produced one or more responsible officials—either the person who made the final decision not to grant the Crest a first run, or the person whose recommendation was acted upon, or both—who flatly denied the charge of conspiracy, and testified that his decision or recommendation was reached separately and independently, without discussion or consultation with any other distributor, and was based on his own belief of what was in the best business interest of his company. For Loew's, such testimony was furnished by Rodgers, its general sales manager and top policy maker in regard to distribution (R. 896, 900), and Adams, its branch manager (R. 877, 890); for RKO, by Zimmerman, assistant to the vice-president in charge of domestic distribution (R. 520, 541), and Brecheen, its branch manager (R. 575, 588); for Columbia,

by Josephs, assistant to the general sales manager (R. 749, 753), and Galanty, division manager covering the Washington, Cincinnati, Pittsburgh and Cleveland branches (R. 731, 739); for Paramount, by O'Shea, its assistant general sales manager (R. 783, 813-14); for Universal, by Meyers, its eastern division sales manager (R. 765, 771); for Warner, by Smeltzer, its district manager (R. 631, 638); for Fox and United Artists, by Norris and Price, their respective branch managers (R. 692, 713; 681, 683-84).

Putting to one side Warner and Loew's, each of which denied petitioner's request for an exclusive first run because it operated its own first run theatre in downtown Baltimore (R. 631-33, 879), the basic reasoning which impelled each of the other distributors to refuse to license the Crest on a first run basis may be summarized as follows: The Crest, no matter how glowingly described, was inconveniently located six miles from downtown Baltimore, in a neighborhood community having a small draw area and serviced by wholly inadequate public transportation facilities; as such it could not compare in grossing ability or exploitation value with any of the downtown theatres, each of which, by reason of its central location in the heart of the city's primary shopping and amusement district, drew patrons from every corner of Baltimore and furnished an ideal "showcase" which not only maximized first run film rentals, but also "established" the picture for the entire area and produced the greatest subsequent run revenue as well (R. 164, 525, 527-29, 549-51, 580, 693-95, 233-34, 462-65, 695, 733, 749, 768-69, 683, 287-88).[1]

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[1]As we have seen, the claimed draw area of the Crest was 105,000 as compared with the downtown theatres which drew from a popula-

As Paramount wrote petitioner's counsel in November, 1949 in rejecting the latter's invitation to experiment with the Crest:

> "That large first run theatres are situate in the downtown business and shopping areas is not the result of accident, but rather due to the careful consideration of various business factors, such as location, transportation, the audience, exploitation and prestige, among others.
>
> "Every community, whether it is a city, town or village, has a hub, which is the center of all activity. . . . In the large cities and towns the large first run theatres are located in the very heart of these centers where are to be found the great masses of the population.
>
> "All highways are designed to reach and all public transportation, subways, trolleys and buses lead to these centers of population.
>
> ". . . The fact that the large first run theatres are situate in the centers of activity where are to be found the great masses of population is valuable not only from the standpoint of attracting first run patronage, but of even greater value from the standpoint of achieving wide spread publicity and prestige for a picture so as to arouse the interest of potential theatre goers where they will see the picture either on first or subsequent run.

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tion of 1,250,000 persons. Petitioner, by lifting a portion of O'Shea's testimony out of context, insinuates that any theatre having a draw of 100,000 is a suitable first run outlet (Br. 7). As a matter of fact, O'Shea testified that he knew of a "tiny community" of 350 people that exhibits pictures first run (R. 813). But this is obviously a far cry from saying that where a distributor is confronted with a choice in a large metropolis such as Baltimore between licensing its first run product to a theatre which draws patronage from the entire city, and one whose draw is only one-tenth as great, it should exercise that choice in behalf of the theatre with the smaller draw.

> ". . . They feel further, based upon their many years of experience, that it is unfair to ask them to conduct the experiment which you urge when all factors are so definite and clear cut as to indicate only one possible result, namely, a loss not only to Paramount but also to your client." (R. 463-65).

The "showcase" theory of first run exhibition is neither a recent development nor peculiar to motion pictures. It had its origin before the advent of motion pictures in the days of vaudeville, when Loew's used to play its "stellar acts" initially in its "flagship or State theatre," and RKO "always played the Palace before they went around to the other theatres in the vicinity" (R. 897). With the inception of motion pictures, at a time when no distributors owned any theatres, it was carried over to this related form of entertainment, and has been followed there ever since (R. 637-38, 674-75). It is also applied to Broadway stage productions (R. 557-58); as one witness testified: ". . . you would never think of opening a legitimate show in the Windsor Theatre, in Flatbush; you would certainly play it downtown first run" (R. 897).

The validity of the "showcase" theory was graphically illustrated by Norris' testimony as to Fox's experience in Richmond, where the company was unable to obtain a downtown outlet for its first run product:

> "I am constantly faced with and embarrassed by the fact that in small towns, in the small communities surrounding Richmond . . . in an area of 50 to 75 miles, where the people are directly influenced by the Richmond newspapers, where they are within the general shopping draw of the City of Richmond,—I find it difficult to obtain a film rental for our pictures that our customers tell me they can afford to pay for certain competitive pictures.

> "They explained their reason for this discrepancy by the fact that some of our pictures are not as valuable to them as pictures from competitive distributors as being that when patrons, people who live in their town and their community and patronize their theatre, attend a theatre in Richmond, which they quite often do in communities of that type, they invariably go to one of the two big downtown theatres to see the pictures, and our pictures never play in either one of those two theatres because we cannot sell them. At least up to this point we have been unable to, and as a result our pictures have less value to us in the smaller communities surrounding Richmond than the pictures playing first run in those big downtown theatres" (R. 712).

Indeed, in an exchange of correspondence between Fox and petitioner's counsel, the latter went so far as to say: "While our opinions differ we can understand your view concerning the advisability of serving a downtown theatre with your first run pictures rather than a suburban theatre" (PX 52, R. 263). And Myerberg himself expressly recognized the "showcase" theory in his World Premiere letter when he bragged that the Crest was the "finest showcase for films in the State of Maryland" and supported his demand for an exclusive first run by representing that the Crest was "advantageously located from a population and transportation viewpoint" (PX 1, R. 130).

Day and Date First Run

When it became apparent to Myerberg that his goal of securing an exclusive first run could not be attained,[1] for

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[1]Myerberg's bland denial that he had ever sought an exclusive first run (R. 841) is overwhelmingly and conclusively refuted by his own letters and the letters of his attorney (PX 1, R. 130-32; PX 12, R.

the reasons we have just explored, he sought in the alternative to license pictures first run from respondents "day and date," or simultaneously, with a downtown theatre—despite the fact, as we have already seen, that the Crest was in substantial competition with the downtown houses. Myerberg himself readily conceded that theatres in substantial competition with one another should not have simultaneous runs, and expressly recognized the necessity for and reasonableness of clearance between competitive theatres (R. 315-16, 473-74). Since Myerberg's fundamental premise in asking for a "day and date" first run was that the Crest was not in substantial competition with the downtown theatres—a premise without foundation in fact—it follows that there was a valid economic reason for the denial of that type of run. The simple explanation for his failure to receive a day and date run thus lies in the existence of substantial competition between the Crest and the downtown theatres, and not in any sinister action on the part of respondents.

Furthermore, there were other highly practical reasons for the refusal of respondents to experiment with multiple first runs, as requested by petitioner. In the first place, the exhibition of pictures on first run day and date in two or more theatres involves problems such as (a) selection of the opening date of the exhibition, (b) determination of the length of the run, and (c) sharing in and control of advertising (R. 759-60, 664-65, 599). Where the theatres in question are operated by different exhibitors, these problems can only be resolved by the concurrence of all exhibitors concerned. Thus in Cincinnati, where Fox tried such a

152; PX 14, R. 154; PX 22, R. 165; PX 30, R. 227-28; PX 31, R. 228; PX 50, R. 261-62; PX 52, R. 263-64). This is but one of the many inconsistencies, contradictions and inaccuracies in Myerberg's testimony which tended to discredit him in the eyes of the jury.

scheme for a short time, the company "had all sorts of difficulties," such as the fact that "some of the theatres only wanted to play the pictures three days, while others would play it for a full week, which was the provision of the contract" (R. 665).

But an even more basic impediment to granting the Crest a day and date first run with a downtown theatre was that in view of the existence of substantial competition, no downtown exhibitor would waive its clearance and agree to such simultaneous showings. Fox soon found this out from a survey of Baltimore and other large cities which was designed to determine the practicability of inaugurating a system of distribution whereby a number of neighborhood houses would play day and date first run with a large downtown theatre (R. 700-01). As a result of this survey, Fox was compelled to discard the idea as unworkable (R. 701-02).[1] Myerberg himself admitted that Schanberger and other downtown exhibitors refused to play day and date with the Crest (R. 838-39). And Norris of Fox testified to similar refusals by Mechanic and Rappaport (R. 718). *None of these exhibitors was made a defendant or named as a co-conspirator, and Myerberg unequivocally stated that he was not claiming that any independent exhibitor in Baltimore was a party to the alleged conspiracy* (R. 837-38). Obviously no distributor could have instituted the type of day and date first run requested by Myerberg without the consent of a downtown exhibitor. Such con-

[1] Petitioner takes a sentence from Norris' testimony out of context in an endeavor to insinuate concerted activity by respondents (Br. 14). All the witness testified was that the plan of multiple first runs being impractical. Fox continued distributing its product on a successive run basis—which was the basis of distribution of other distributors (R. 700-01). In that sense only his company "did what everyone was doing".

sent having been refused, Myerberg's request for a day and date first run was tantamount to a demand for an exclusive first run—a demand to which no distributor would accede for the economic reasons summarized above.[1]

National Policy

In its brief petitioner harps on what it terms the "national policy" of each distributor to confine first run showings of its films in urban areas to the downtown theatres. Its thesis is that if there is such a national policy, the conclusion inevitably follows that there is a conspiracy as a matter of law. Manifestly, individual policy, whether nationwide or not, is not synonymous with concerted action. Yet petitioner bridges this crucial gap without supporting proof of any kind, indulging in its usual device of conjuring up fictitious admissions.

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[1]Norris summarized Fox's position as follows: "I cannot sell a day and date run without taking into consideration two different exhibitors, and I cannot sell a day and date run without selling at least two exhibitors. Otherwise, it cannot be day and date. I did not want to sell the Crest Theatre exclusive first-run, because, for obvious reasons, it is not a suitable first-run showcase for pictures. I could not sell it a day and date run, because I couldn't get another suitable theatre to go with it" (R. 720-21).

There being substantial competition between the Crest and the downtown theatres, clearance and the granting by any distributor of an exclusive first run were entirely lawful under *U. S.* v. *Paramount Pictures, Inc., supra.* But even if a downtown exhibitor had waived its right to clearance protection in favor of the Crest, other neighborhood theatres with equal or better appointments, location and seating capacity would have insisted upon a day and date first run also. The practical difficulties adverted to in the text would thus have been immensely compounded. Moreover, multiple first runs mean the abandonment of exclusive first run and clearance, the abandonment of the "showcase" theory of distribution, and raise the danger of a substantial diminution of subsequent run revenue. This was the view of the witnesses whose testimony was accepted by the jury. That the jury had the right to accept this testimony is indisputable.

Thus it asserts (Br. 25): Respondents "also admitted that their decision to deny first-run to the Crest resulted from the application of their national policy to confine first-run exhibition to downtown theatres and had no necessary relationship to the particular circumstances involving the Crest Theatre."[1] Not only was there no such admission, there was no such evidence. The witnesses did not testify that their decisions resulted from any rigid application of a national policy, without regard to the particular circumstances of the Crest. On the contrary, as we have already shown, the testimony was that the individual decisions of the distributors were specifically based on the particular circumstances of the Crest, notably its location, limited draw area, and inadequate public transit facilities.[2]

The evidence makes it perfectly plain that the goal of each distributor was to distribute its films in such a manner as to produce the greatest return. Each distributor individually believed that it would maximize its total revenue by licensing pictures for exhibition initially in a "showcase" theatre located in the downtown area of a city. It was felt that such a theatre, conveniently located in the heart of the main shopping and amusement district at the focal point of converging transportation facilities, would not only yield the greatest first run revenue, but by appropriate exploitation would also enhance the subsequent exhibition value of the films. There is nothing strange about the fact that each company pursued this objective wherever it did busi-

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[1]Like statements appear at pp. 10, 12, 29, 35-36 and 40 of petitioner's brief.

[2]In so far as it is suggested that it was the national policy of any distributor to have the films of its competitors, and not merely its own, exhibited first run in downtown theatres (Br. 17), the short answer is that there is not a scintilla of evidence to that effect.

ness, and in this sense it had a "national policy". However, the pursuit of this objective never hardened into an undeviating practice on the part of any individual distributor, much less concerted action on a nationwide or any other scale by all distributors. Special local conditions often made it necessary or expedient for a particular distributor to license its pictures in a different manner (R. 673, 763, 569).

Sometimes, for example, a distributor was simply unable to secure a downtown outlet for first run exhibition, as in the case of Fox in Roanoke[1] and Richmond (R. 711-12), and for a time in Cincinnati (R. 664-65). Under the circumstances, Fox did what it considered to be the next best thing in those cities and licensed two or more suburban houses to play first run simultaneously[2] (R. 711-12, 665). RKO had similar experiences in Roanoke, Richmond and Norfolk (R. 580-82), and on occasion Fox and Columbia

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[1]Fox's branch manager, Norris, testified (R. 714-15): "As a matter of fact, Mr. Rome, I lived in Roanoke for seven years, which was my home, and I represented Twentieth Century-Fox in that area. The operator of the American Theatre was one of the best friends I had and have in the City of Roanoke, personally. We played golf together, we played bridge together, were members of the same club. I explained to Mr. Hines on many, many occasions that I had dedicated my business life to the proposition of selling him at least one picture for his American Theatre before I died. At this point I still haven't sold that picture." The American Theatre is the only acceptable first run outlet in Roanoke (R. 714).

[2]Fox's multiple run experiment in Cincinnati was not successful and continued only until the company was again able to license first run in a downtown theatre (R. 665).

RKO experimented with a day and date first run with a neighborhood theatre in Wichita, a city of about 150,000 with relatively few subsequent run theatres, where the "penalty" was not "too strong revenue-wise" (R. 540). The results indicated that "where you play your picture first-run downtown, your overall revenue in the area is better than when you play a picture in a first-run suburban area, or day and date with downtown" (R. 540-41).

found themselves in that position in Washington, D. C. (R. 708-09, 736). However, no such shortage of first run houses existed in downtown Baltimore. In Baltimore each of the distributors was able to achieve its business ideal of licensing all of its films on an exclusive first run basis to one or another of the downtown "showcase" theatres.

In an effort to impugn the honesty of the business reasons advanced by each distributor to justify its refusal to grant petitioner a first run, petitioner in its brief points to a number of other instances outside of Baltimore in which some of the respondents granted a neighborhood theatre first run product. This is nothing more than a broadside attack on the veracity of respondents' witnesses—a question which the jury passed upon after hearing the particular respondent involved in each of these exceptional cases explain the peculiar local factors which prompted its action.

In Washington, D. C., for example, the Ontario Theatre was located only 2½ miles from the center of town in the heart of an extensive apartment area having considerably more population than the area of the Crest Theatre, and superior transportation facilities (R. 244, 247, 610, 636-37, 710). Even so, the Ontario was not a success in the exhibition of pictures on an exclusive first run (R. 709-11, 736-39, 796-97, 805).

As for Hollywood and Los Angeles proper, they "are practically two separate cities" (R. 750-51, 903-04, 553).

In the case of Boston, Loew's plays its own theatre in the Back Bay section day and date first run with its downtown outlet, but Back Bay is "a different community entirely" (R. 904).[1]

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[1]Petitioner relies on the theatre situations in Washington, D. C., Los Angeles and Boston, to support its categorical and all-inclusive statement that first run showings in neighborhood houses in the cities

The Opening of the Crest

The Crest opened on February 26, 1949 and continued thereafter as a first neighborhood run house playing pictures approximately 21 days after the conclusion of the downtown run (R. 167-68). Pictures were made available to the Crest at the same time that they were licensed to the more than twenty other first neighborhood run houses in Baltimore (R. 641, 706, 768-69, 252, 294).

Petitioner's Offers to Four of the Respondents

Petitioner's discussion of its offers is typical of its unfair method of stating the facts. Among the "admitted" and "undisputed" facts set forth by petitioner in its brief on the merits (pp. 25, 35), and its version of the first question presented for review (Petition, 23-i), is the statement that "Petitioner was willing to pay and had offered to pay by certified check film rentals equal to or greater than those actually received by respondents from their existing first-run accounts in Baltimore"—the implication being that offers of such film rentals were made to all the respondents and were uniformly rejected by them.

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in which such occurred "had proved successful" (Br. 17-18). As we point out in the text, all of these cities involved wholly distinguishable, peculiar local conditions. Moreover, there is no support in the record for the plain implication of petitioner's statement that all the distributors licensed their films in the same manner throughout the country. The record, on the contrary, demonstrates striking diversity in this respect. (*Kansas City:* R. 809, 689, 663-64; *Richmond:* R. 806, 864, 580-81, 712, 735, 766-68; *Norfolk:* R. 684, 806, 735, 581, 642; *Cincinnati:* R. 644-45, 810; *Roanoke:* R. 806, 581, 684, 711, 735.)

Actually, petitioner made offers to *four* of the respondents,[1] proposing the licensing to petitioner of eight different pictures on a first run basis. No such offers were made to the other respondents.[2]

At the trial these four respondents adduced persuasive evidence that petitioner's offers were not made in good faith and that there were sound business reasons for their rejection. The issue of petitioner's lack of good faith was submitted to the jury (R. 1106), and there is ample evidence in the record to support a finding in respondents' favor. At no point in its brief does petitioner make any mention of this significant evidence or of the fact that the jury passed upon the issue.

The evidence shows that petitioner, through its counsel, wrote Columbia on December 20, 1949 stating that "for the exclusive first run exhibition in Baltimore" of "Jolson Sings Again," petitioner would post a $10,500 guarantee against 40% of gross "in the form of a certified check if this is deemed desirable" (PX 30, R. 227-28). The offer could not possibly have been made in good faith since "Jolson Sings Again" had already been exhibited first run in Baltimore, and this first run had concluded some two months before the bid was made (R. 751).

Columbia was not the only company which had reason to view petitioner's offers as insincere. Petitioner, again through its counsel, made an offer to Paramount for an

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[1] Paramount, Columbia, RKO and Universal.

[2] A partial retreat from its untenable position is made by petitioner in another passage of its brief: "Myerberg made specific offers to Universal, RKO, Columbia and Paramount, for particular pictures for first-run exhibition. These offers included substantial guarantees of film rental and a readiness to post certified checks. Such offers were either rejected or ignored" (Br. 9). The text makes clear that specific guarantees were not offered or certified checks tendered in each case.

"extended first run" of "Samson and Delilah." The offer included a guarantee of $35,000 against 50% of gross (PX 48, R. 255). Myerberg, admitting that guarantees are related to expected gross receipts, testified that the $35,000 guarantee "was not picked out of the hat", that the picture would have played at the Crest for eight to ten weeks, and that it would have grossed well over $80,000 (R. 395).

On cross examination, however, he conceded that in order to have grossed over $80,000 the Crest would have had to play to 80,000 or 90,000 of his estimated 105,000 population in the area (R. 409). He claimed that he had penciled notes in his files which he had made prior to the submission of the offer and stated that he would produce those notes (R. 410). The following morning he testified that he had examined the notes but had forgotten to bring them with him. He stated that he was "mistaken" on the $80,000 gross; that the figure indicated by his notes was actually $50,000; and that instead of an eight to ten week run, the picture would have played for only five weeks (R. 449-50). Myerberg never did produce the penciled notes.

Here again, then, it is obvious that Myerberg was playing fast and loose with figures and that his offer was not made in good faith.

For a first run of "Hamlet" petitioner offered Universal 50% of the first $7,850 of gross receipts and 65% of any excess, with a "reasonable" guarantee to be negotiated (PX 28, R. 769, 777). Universal rejected the offer because it considered "Hamlet" to be a highly specialized picture suitable only for exhibition in a small art theatre catering to a limited class of theatre-goers (R. 770; see also R. 902-03). The picture was actually licensed first run downtown to

the Little Theatre, an independent 300-seat specialty house, where it played for seven weeks and brought Universal a film rental of $7,872.82 (R. 778).

Three other offers by petitioner were rejected because they were deemed insufficient in comparison to downtown potentials (R. 529-30, 752, 754-55, 793, 818). In each of these cases the distributor's judgment was confirmed by the fact that the film rental received from first run exhibition in a downtown theatre exceeded petitioner's bid.[1]

The remaining two offers, both to Paramount, though in excess of what the company later earned downtown,[2] were regarded as far beyond the power of the Crest to fulfill (R. 788, 793), and the record shows that where negotiated minimum guarantees are not actually earned the exhibitor generally seeks, and frequently obtains, a rebate from the distributor (R. 530, 709-11, 737-38, 256). Moreover, in evaluating any offer for first run product, the distributors considered not only the first run film rental offered, but also

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[1]RKO rejected an offer for "Joan of Arc" which would have given it 55% of the first $8,000 grossed and 65% of any additional gross (PX 20, R. 163, 529). The offer did not contain a specific guarantee, but invited negotiations for a "reasonable" guarantee. By licensing the film first run to the independent Town Theatre, RKO netted approximately $21,000 in film rental (R. 530).

Columbia refused a $7,000 guarantee against 40% of the gross for an exclusive first run of "All the Kings Men," winner of the Academy Award, and an alternative $4,000 guarantee against 40% of the gross for the picture on a day and date basis (PX 31, R. 752, 754). The film, though somewhat of a box office disappointment in Baltimore because of a premature release date, nevertheless netted Columbia $7,182.52 playing first run downtown (R. 754-55).

Paramount declined a $10,000 guarantee against 40% of the gross for "Sorrowful Jones" (PX 45, R. 249-50, 793) and realized $10,053 in rental from Keith's (R. 256).

[2]Petitioner offered $12,500 and $10,500 for "Top o' the Morning" and "The Heiress," respectively (PX 47, R. 252; PX 48, R. 255). Each of these films produced a rental slightly in excess of $4,000 playing first run in downtown Baltimore (R. 256).

the potential subsequent run revenue to be derived from the picture, and each distributor felt that its subsequent run revenue would be enhanced by first run exhibition and exploitation in a downtown "showcase" theatre (R. 464, 527-28, 552-53, 567-68, 643-44, 695, 712, 743; PX 47, R. 251-53).[1]

Petitioner's Claimed Injury

The only evidence indicating that petitioner sustained injury because of its inability to obtain first run product was Myerberg's unsupported opinion testimony. When examined before trial Myerberg denied any knowledge of how the damage figures in the complaint were computed, stating, "The computations were made by my attorney, were left entirely up to him" (R. 378, 380-81). Despite this initial confession of ignorance, at the trial Myerberg suddenly blossomed forth as an expert on the subject and testified as to how he had calculated what the Crest would have earned as a first run house. At the outset Myerberg made it clear that in his opinion the Crest would have made the same profit on an exclusive first run as it would have made playing day and date with a downtown theatre (R. 364-

[1]In this connection it may be noted that although the first run film rental received by Paramount for "Top o' the Morning" and "The Heiress" was only a little over $1,000 in each case, this was supplemented by subsequent run rentals of $9,961 and $9,097, respectively (R. 256).

The $15,000 offer at the trial for "Diplomatic Courier", referred to at page 9 of petitioner's brief, was clearly stage play. The Court characterized the incident as a "sort of behind-the-scenes affair and did not have anything to do with the case. I did not object to it, but I do not think present-day bargaining has anything to do with the issues in the case" (R. 758-59). Contrary to petitioner's contention, respondents did not reject its check when it was tendered in the course of the trial. The record discloses that the court directed petitioner to conclude its business negotiations outside the courtroom (R. 759). There is no evidence that petitioner ever resumed the negotiations.

365). He then proceeded to make two separate computations of petitioner's damages.

First, he took the gross admissions which the Crest actually received from exhibiting "The Stratton Story" on first neighborhood run over a four-day period (R. 365, 368). He then calculated what this gross would have been at first run downtown admission prices, assuming an undiminished audience at those prices (R. 367). Next, Myerberg went on to suppose that the Crest would actually have increased its patronage by 25% on first run product (R. 367)—an increment which he plucked out of thin air without a semblance of evidentiary support. The result of this four-day experience, with Myerberg's adjustment for first run admission prices, plus the extra 25%, was then projected on a yearly basis to arrive at an annual gross (R. 367; PX 92, R. 1150). This of course presupposed—again without supporting evidence—continuity of films of the calibre of "The Stratton Story" for an entire year (R. 429-30). According to these compounded speculative assumptions, the Crest would have grossed $436,800 during the first year of its operation (PX 92, R. 1150), or approximately $30,000 more than was grossed over the same period by Warner's Stanley Theatre (R. 607), which was located in the heart of downtown Baltimore and had ten times the draw area (R. 506, 508, 540, 126) and twice the seating capacity of the Crest (R. 131, 121).

In his alternative computation Myerberg baldly assumed that at first run downtown prices the Crest would have played to a capacity house ten times a week throughout the year (R. 368-69; PX 93, R. 1151). How Myerberg divined the figure ten, he never bothered to explain. Since the amount of damages arrived at by this method was roughly the same as that calculated under the first method, con-

ceivably Myerberg obtained the figure by working backwards.[1]

Respondents countered this testimony with evidence showing that if the Crest had received a first run it would have lost as much or even more than the $12,000 it lost playing first subsequent run (R. 348-49). At the trial petitioner attempted to make much of the fact that in Washington, D. C., the Warner Theatre, located downtown, played certain pictures day and date with the Ambassador Theatre, which was two and one-half miles away but in a heavily populated apartment district having a much larger draw area than the Crest. The ratio of seats between the Warner and Ambassador theatres in Washington and the Stanley and Crest in Baltimore is about the same (R. 608). During the same period in which damages were claimed by the Crest, the gross of the Ambassador Theatre in Washington was 48.5% of the gross received at the downtown Warner (R. 609-10). Despite opinion evidence that the Crest in Baltimore would not have grossed 48.5% of the Stanley's gross playing day and date (R. 610), petitioner was given the benefit of the doubt by applying the same percentage to the Crest in order to determine its prospective gross receipts (R. 610-11). After deducting from this gross figure the expenses which, according to Myerberg, the Crest would have incurred as a first run house,[2] the theatre was left with a loss of $11,911.33 (R.

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[1]Under his first theory Myerberg claimed approximately $205,000 in damages (PX 92, R. 1150); under his second, $215,000 (PX 93, R. 1151).

[2]Myerberg testified that there would be little increase in the Crest's operating expenses (other than film rental) if it played pictures on first run rather than first neighborhood run, and that the only substantial increase would be for advertising (R. 350). In his pretrial deposition he estimated the increase in advertising expenses at $100-$200 per week "at the outside" (R. 452). At the trial he changed his estimate to $500-$600 per week (R. 289, 450). This represented an upward revision of $20,000 per year on a single item of expense.

611; DX 19, R. 1165). This same method of computation, applying a percentage of 47% based on the experience of the two Washington theatres over a six-year period, disclosed that the Crest would have lost $15,872.83 during the claimed damage period (R. 612-13; DX 21, R. 1172).

The results of these arithmetic comparisons afford striking corroboration of the opinions of respondents' witnesses that the Crest, because of its poor location and limited draw area, could not have operated profitably as a first run theatre (R. 865-66, 787-88, 644).

SUMMARY OF ARGUMENT

I.

The central issue in this case was whether respondents, in refusing to grant a first-run to petitioner's Crest Theatre, acted separately and independently or pursuant to a conspiracy. That is an issue of fact.

Since the essential facts relating to that issue, as well as the inferences therefrom, were in sharp conflict, the trial court was under a clear duty to deny petitioner's motion for a directed verdict and submit the case to the jury. In determining the correctness of the trial court's action in this respect, an appellate court must view the evidence and all inferences therefrom in the light most favorable to respondents.

In an attempt to circumvent this rule, petitioner distorts the record. It gratuitously characterizes, as "undisputed" and "admitted", matters which were either vigor-

ously controverted or which are not contained in the record at all. Respondents' proofs are either ignored or blandly dismissed as irrelevant. The more glaring distortions are discussed at pages 41 to 46, *infra*.

The actual record, as distinguished from petitioner's fanciful version of it, discloses a firm evidentiary basis for the jury's verdict on the issue of conspiracy.

Responsible officials of respondents, having knowledge of the facts, denied the claim of conspiracy, testified that they had arrived at their respective decisions concerning the Crest Theatre separately and independently, and explained the business reasons which had prompted their action.

It was established that the Crest was situated in a third-class shopping center, in a partially developed section of Baltimore, six miles from the business and entertainment center of the city; that the population in its prospective draw area was less than 10% of that of the downtown theatres; and that it was served by a single bus line running north and south only.

It was further established, by overwhelming evidence, that the downtown theatres were in substantial competition with the Crest. That being so, clearance was entirely appropriate. The choice confronting each distributor, therefore, narrowed down to granting a first-run either to a centrally located downtown theatre or to the Crest.

Each distributor, acting separately and independently, exercised that choice in favor of a downtown theatre for the following reasons: The Crest, by reason of its inaccessible location and limited draw area, could not approximate the grossing potentials of any of the first-run down-

town theatres and was not a suitable "showcase" in which to exploit a picture so as to maximize total film rentals from both first and subsequent runs; the downtown theatres, on the other hand, by reason of their centralized location and a draw that was co-extensive with the city of Baltimore itself, were best suited not only to maximize first-run film rentals, but also to "establish" the picture for the entire area and thereby produce the greatest subsequent run revenue as well.

The cogency of these business reasons, coupled with respondents' denials, completely refuted any inference of conspiracy and fully justified a conclusion that each distributor acted independently in response to elementary concepts of good business in exercising its clear legal right to select its own first-run customers.

In arguing that there was no question to be submitted to the jury, petitioner equates conscious uniformity of action with conspiracy. None of the cases cited by petitioner upholds its sweeping and novel theory. Uniform action, when fully explained and the claim of conspiracy denied by responsible officials having knowledge of the facts, as here, does not constitute conspiracy as a matter of law.

II.

The decrees in *United States* v. *Paramount* were admitted in evidence over respondents' objections. The Government litigation related to facts occurring in 1945 and prior years. A decree was entered in 1946 enjoining the defendants in the *Paramount* case from conspiring with

respect to runs and clearances. Those portions of the decree became effective upon their affirmance by this Court in May, 1948.

The facts upon which the present claim is based occurred several years after the *Paramount* trial and at a time when the injunction was operative. Thus, the damage period in this case runs from February, 1949, when the Crest opened, to March, 1950, when the complaint was filed.

Obviously, the alleged wrongdoing upon which the present action is predicated was not distinctly put in issue or necessarily determined in the Government suit. Hence there would be no estoppel between the parties as to the existence of a conspiracy during petitioner's claimed damage period, and the decrees in the *Paramount* case were not admissible as *prima facie* evidence under section 5 of the Clayton Act to prove such a conspiracy.

Nor were the decrees admissible under section 5 as *prima facie* proof of a 1945 conspiracy from which the later conspiracy charged in the complaint might be inferred, since the doctrine of estoppel does not permit an adjudication of a fact in one litigation to be used in a subsequent litigation as proof of an intermediate fact from which an ultimate fact may be deduced.

Since the conspiracy adjudged in the *Paramount* case with respect to runs and clearances was effectively enjoined from and after May, 1948, there can be no presumption of continuance of that conspiracy after that date. On the contrary, there is a presumption that the decrees have been observed.

As the decrees should not have been admitted in evidence at all, the trial judge's instructions on the *Paramount*

case could not have deprived petitioner of any advantage to which it is entitled under section 5. But even if the decrees were admissible, the trial judge accorded petitioner the maximum benefit to be derived from section 5 when he instructed the jury that the excerpts of the decrees selected by petitioner were *prima facie* evidence of the conspiracy found in the Government suit, and that the jury might consider this evidence together with all the other proof in determining whether there had been a conspiracy in Baltimore during the claimed damage period.

Petitioner's complaint that these instructions required it to prove the issue of conspiracy *de novo* is without substance. Manifestly, nothing adjudicated in the *Paramount* case obviated the necessity of proving a conspiracy during the period of petitioner's business existence. Indeed, petitioner's counsel at the trial conceded that he had to adduce independent evidence of conspiracy after petitioner went into business. Petitioner's present theory, that having offered the decrees in evidence its sole evidential burden was to prove impact and damage, is clearly untenable in view of the differences between the two actions.

The judge correctly refused petitioner's requests for instructions on the *Paramount* case, as they were either improper, repetitious or adequately covered. Moreover, no appropriate objection, as required by Rule 51 of the Federal Rules of Civil Procedure, was taken by petitioner. Hence the propriety of the refusals is not subject to review here.

The Court of Appeals properly held that there was nothing detrimental to petitioner in the trial court's instructions on the *Paramount* case.

ARGUMENT

POINT I

PETITIONER'S MOTION FOR A DIRECTED VERDICT WAS PROPERLY DENIED AND THE EVIDENCE FULLY SUPPORTS THE JURY'S VERDICT IN RESPONDENTS' FAVOR.

The existence of a conspiracy is an issue of fact.[1] Petitioner nevertheless is asking this Court to disregard the jury verdict, to find that there is no evidence in the record from which a jury might reasonably conclude that there was no conspiracy, and to hold respondents guilty of conspiracy as a matter of law.

A. The Scope of Appellate Review

It is settled law in the federal courts that in passing upon a motion for a directed verdict, the trial court must assume "that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them"; it must submit to the jury any issues that "depend

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[1] *U. S.* v. *Oregon State Medical Society*, 343 U. S. 326, 330-32 (1952); *U. S.* v. *National Asso. R. E. B.*, 339 U. S. 485, 495-96 (1950); *U. S.* v. *Yellow Cab Co.*, 338 U. S. 338, 341-42 (1949); *American Tobacco Co.* v. *U. S.*, 328 U. S. 781, 809-10 (1946); *Gary Theatre Co.* v. *Columbia Pictures Corp.*, 120 F. 2d 891 (7th Cir., 1941); *Chorak* v. *RKO Radio Pictures*, 196 F. 2d 225 (9th Cir., 1952); *Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 189 F. 2d 797 (4th Cir., 1951); *Lawlor* v. *Loewe*, 187 Fed. 522, 527 (2d Cir., 1911).

on the credibility of witnesses, and the effect or weight of evidence". *Gunning* v. *Cooley,* 281 U. S. 90, 94 (1930). The motion must be denied unless the "evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict". *Brady* v. *Southern R. Co.,* 320 U. S. 476, 479 (1943).[1]

As is pointed out in *Berry* v. *United States,* 312 U. S. 450, 453 (1941), this "exclusive power of juries to weigh evidence and determine contested issues of fact" is derived from their status as "the constitutional tribunal provided for trying facts in courts of law". For the Seventh Amendment not only preserves the right to trial by jury, but "discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of re-examination existing under the common law, and to that end declares that 'no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law' ". *Baltimore & C. Line* v. *Redman,* 295 U. S. 654, 657 (1935).

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[1]See also, *Lavender* v. *Kurn,* 327 U. S. 645, 653 (1946); *Tennant* v. *Peoria & Pekin Union Ry. Co.,* 321 U. S. 29, 35 (1944); *Lumbra* v. *U. S.,* 290 U. S. 551, 553 (1934); *Wilkerson* v. *McCarthy,* 336 U. S. 53, 57 (1949); *Corsicana National Bank* v. *Johnson,* 251 U. S. 68, 72 (1919); *Noble* v. *U. S.,* 98 F. 2d 441, 442 (8th Cir., (1938); *Lloyd* v. *Thomas,* 195 F. 2d 486, 489-90 (7th Cir., 1952); *Roche* v. *New Hampshire Nat. Bank,* 192 F. 2d 203, 205 (1st Cir., 1951); 5 Moore's Federal Practice, § 50.02[1], pp. 2313-15 (2d ed., 1951).

In *U. S.* v. *W. T. Grant Co.,* 345 U. S. 629, 634 (1953), this Court, in reviewing the refusal of the court, without a jury, to grant an injunction, stated: "But the Government must demonstrate that there was no reasonable basis for the District Judge's decision." A like burden rests on petitioner. It cannot rely on any conflicting inferences in its favor; it must demonstrate that there was *no reasonable basis* for the verdict.

Thus the weight of the evidence is not before this Court.[1] The sole question here is whether, viewing all of the evidence and the inferences in the light most favorable to respondents, there is evidence in the record supporting the verdict, thus justifying submission of the case to the jury.[2]

Petitioner has made no effort to bring its case within these accepted rules.

B. The Claim of Conspiracy

The central issue of fact in this case was whether each distributor acted separately and independently in refusing a first run to the Crest, or whether they acted in concert. Absent conspiracy, the antitrust laws do not restrict the right of distributors to select their own first run customers. "It is the right, 'long recognized,' of a trader engaged in an entirely private business, 'freely to exercise his own independent discretion as to the parties with whom he will deal.'" *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565, 573 (1924), and cases cited. See also, *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 312 (1923).

(1) *Petitioner's Distortions*

In an effort to convert the pivotal issue of conspiracy into a question of law, petitioner has presented the case to this Court as though all the pertinent facts were either "admitted" or "undisputed". This it does by misstating

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[1] *Phoenix Railway Co.* v. *Landis*, 231 U. S. 578, 581 (1913); *Troxell* v. *Delaware L. & W. R. R. Co.*, 227 U. S. 434, 444 (1913); *N. Y., L. E. & W. R. Co.* v. *Estill*, 147 U. S. 591, 617 (1893).

[2] *Lumbra* v. *U. S.*, 290 U. S. 551, 553 (1935); *Gunning* v. *Cooley*, 281 U. S. 90, 94 (1930); *Ewing's Lessee* v. *Burnett*, 36 U. S. 41, 50-51 (1837); *Noble* v. *U. S.*, 98 F. 2d 441, 442 (8th Cir., 1938); *Kraus* v. *Reading Co.*, 167 F. 2d 313, 314 (3d Cir., 1948); *Shell Oil Co.* v. *State Tire & Oil Co.*, 125 F. 2d 971, 972 (6th Cir., 1942).

the record; by indulging only those inferences favorable to itself and ignoring the conflicting inferences favoring respondents; and by dismissing respondents' proofs as irrelevant.

Using broad strokes of the brush to cover up a deficiency in proof, petitioner represents as established facts that in denying petitioner a first run, respondents disregarded the particular circumstances of the Crest Theatre, and mechanically applied in Baltimore a joint national policy to confine first run product to downtown houses; that this common policy could only be effectuated by common action on the part of all the distributors; that the business reasons assigned by respondents for denying the Crest a first run were not their real reasons, as is attested by the "fact" that had the Crest been owned by any of the respondents it would have received a first run despite its neighborhood location, and by the further "fact" that petitioner's offers of rentals, equal to or higher than those obtained by the downtown theatres, were rejected; and that the underlying economic motivation for both the national policy and its local application in Baltimore was the desire of respondents to protect their investments in downtown theatres.

Not a single one of these fancied facts was admitted or undisputed. On the contrary, each of them is completely refuted by the record.

It becomes important for us to discuss these misstatements at the outset in order that the Court have a clear picture of the true question presented for decision.

Thus petitioner asserts:

1. Respondents "also admitted that their decision to deny first-run to the Crest resulted from the application of their national policy to confine first-run ex-

> hibitions to downtown theatres and had no necessary relationship to the particular circumstances involving the Crest Theatre" (Br. 25, 35-36).

Witness after witness testified that a physical inspection of the Crest was made by them; that their decisions were specifically based on the particular circumstances of the Crest, notably its poor location, limited draw area, and totally inadequate public transit facilities.[1] There was no testimony that the decision of any company resulted from a rigid application of a national policy unrelated to the particular circumstances involving the Crest Theatre. Indeed, one witness indicated that if there had in fact been a shift in the "center of gravity of Baltimore" to the area in which the Crest was located, as Myerberg had represented, petitioner might have been accorded access to first run product (R. 562-63).

Petitioner's statement thus was neither "undisputed" nor "admitted". The jury was plainly entitled to find that the particular circumstances of the Crest were carefully weighed by each distributor, and that the Crest was denied first run on the merits.[2]

Petitioner asserts:

> 2. "Respondents admitted . . . that each knew that the common policy of all could not be maintained in the absence of common action by all of them" (Br. 24, 36-37).

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[1]See pp. 13 to 16, *supra*.

[2]Moreover, even if each distributor had automatically applied a national policy without reference to the particular circumstances of the Crest, an issue of fact would still remain for the determination of the jury as to whether such application resulted from a concert of action.

There was no such admission; there was no such evidence; and petitioner makes no effort to document its statement by any reference to the record.

It is self-evident that any distributor could have granted the Crest a first run without affecting any other distributor in the slightest. Indeed, Fox actually conducted a survey of the theatre situation in Baltimore in order to determine the feasibility of instituting day and date first runs between one or more neighborhood theatres and an independent downtown theatre. Fox ultimately had to reject the idea as unworkable because no downtown theatre would agree to waive its clearance protection over any other theatre in the same competitive area (R. 700-02, 718). The significant point, however, is that Fox seriously contemplated instituting a novel method of distribution in Baltimore and that it was thwarted not by any other distributor, but by independent downtown exhibitors who exercised their clear legal right to clearance and who, according to Myerberg's own concession, are not charged with participating in the alleged conspiracy (R. 837-38). Furthermore, the record affirmatively discloses that the various distributors employed different methods of first run distribution in numerous cities throughout the country (*Kansas City:* R. 809, 689, 663-64; *Richmond:* R. 806, 864, 580-81, 712, 735, 766-68; *Norfolk*: R. 684, 806, 735, 581, 642; *Cincinnati*: R. 644-45, 810; *Roanoke:* R. 806, 581, 684, 711, 735). In the face of this evidence petitioner's statement that each respondent knew that common action was required by all is bared as a complete myth.

Petitioner asserts:

3. "Respondents admitted that had the Crest . . . been owned by one of the respondents in its present loca-

> tion, it would have been afforded an opportunity to compete for first-run product" (Br. 35).

This reiterates the statement made by petitioner in the first question presented for decision in the petition for certiorari (p. 23-h). Both statements are completely unfounded. Since the testimony by respondents' witnesses indicated that the question of ownership of the Crest would not have made any difference (R. 828-29, 653-54; cf. R. 856-57, 866), the statement is neither factual nor undisputed but sheer invention.[1] What the record does indicate is that first-run product would have been made available to the Crest if it had been located downtown (R. 550-51, 589, 759, 771-72, 828), rather than in an inaccessible corner of Baltimore having one-tenth the drawing power of any of the downtown theatres.

Petitioner states:

> 4. "The undisputed evidence disclosed . . . that petitioner was willing to pay and had offered to pay by certified check film rentals equal to or greater than those actually received by respondents from their existing first-run accounts in Baltimore" (Br. 25).

This categorical assertion, which is another holdover from the petition (p. 23-i), is not supported by the record. Petitioner conveniently overlooks the evidence showing that

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[1]Nor is there any basis in the record for petitioner's watered-down statement that Smeltzer "hinted that the Crest even in its present location might have been able to license first-run day and date pictures if Warner had owned it" (Br. 7, 40). Smeltzer's answers to the question whether the Crest would have been granted a day and date first-run if it had been owned by Warner were, "I don't think so" (R. 653), and "I am not positive we would play day and date" (R. 654). And when further pressed as to whether he would have any "doubts" about the matter, his answer was "Yes" (R. 654).

these offers to four—not all—of the respondents were made in bad faith for the purpose of promoting a lawsuit and not with an honest intention that they be accepted; that the issue of whether petitioner acted in good faith was expressly submitted to the jury; and that there were substantial business reasons for the rejection of these offers.[1]

5. From the foregoing false premises petitioner concludes that the business reasons advanced by respondents are not to be credited and that the real economic motivation underlying the Crest's inability to obtain a first run was that respondents feared the competition to their own first-run houses from the Crest and other neighborhood theatres throughout the country (Br. 43). Even if there were any substance to petitioner's unfounded factual premises, at most the question as to respondents' motivation was susceptible to conflicting inferences.[2] The evidence adduced by respondents afforded solid support for the inference that the Crest was denied a first run by each distributor on the merits. Moreover, there was ample testimony that the showcase

[1]See pp. 27 to 30, *supra*.

[2]Petitioner purports to find something incriminating (Br. 13) in the testimony of Warner and Loew's to the effect that if the Crest had been granted a day and date first run with the downtown Stanley or Century, neighborhood houses comparable or superior to the Crest would have demanded and have had to be accorded similar treatment, with the result that the business of the downtown theatre would be diluted to a point where its continued operation would no longer be profitable (R. 626, 641-42, 901, 907). But one of the cardinal purposes of having successive runs and clearance is to avoid diminution of overall film rentals by spreading them too thin over a number of theatres in the same competitive area, to the inevitable injury of all concerned (R. 673-74). It is to prevent precisely such an intolerable situation that theatres in substantial competition, as Myerberg admitted, should not have simultaneous runs. Since such competition existed in Baltimore between the downtown theatres and the Crest, it is hardly suprising that these witnesses were not anxious to cast aside the clearance protection of their theatres.

theory of first run exhibition was prevalent in show business long before the advent of motion pictures, and that it was applied to motion pictures from their very inception—long prior to any affiliation between a distributor and exhibitor (R. 637-38, 674-75, 897). In view of the jury verdict, it is the inference in favor of respondents, rather than the one drawn by petitioner, that must be accepted. It was clearly within the province of the jury to determine respondents' true motivation.[1]

(2) *The Actual Record*

The actual record, as distinguished from petitioner's fanciful version of it, discloses a firm evidentiary basis for the jury's verdict on the issue of conspiracy.

As to the claim of conspiracy with respect to refusing petitioner a day and date first run with a downtown theatre, the overwhelming evidence of substantial competition between the Crest and the downtown houses, coupled with Myerberg's admission of the simple economic truth that theatres in substantial competition should not have simultaneous runs,[2] fully warranted a finding that in denying petitioner this type of run each respondent was guided by an elementary principle of motion picture distribution, and was not carrying out any collusive agreement. When to this

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[1]Similarly, petitioner asserts that "each respondent followed a course of conduct over a period of years with the deliberate purpose and intent of excluding petitioner and others similarly situated from a substantial part of the market" (Br. 36). There is no evidence supporting this assertion and no record references are given. It is pure argument based on an inference that petitioner urged the jury to draw and that the jury rejected.

[2]As stated by the District Court in *United States* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323, 342 (S. D. N. Y., 1946): ". . . exhibitors would find extremely perilous the acceptance of licenses for the exhibition of films without assurance by the distributor that a nearby competitor would not be licensed to show the same film either at the same time or so soon thereafter that the exhibitor's expected income . . . would be greatly diminished."

proof is added the evidence showing the necessity of obtaining the consent and cooperation of all interested exhibitors in order to play day and date, and the admittedly non-conspiratorial refusal of any independent downtown exhibitor to operate on such a basis, this finding becomes unassailable.

The question is therefore narrowed to whether there was any evidence upon which the jury could reasonably have concluded that there was no concerted action by respondents in denying petitioner an exclusive first run.

Both Warner and Loew's frankly told Myerberg at the very outset that his request for an exclusive first run could not be entertained as they were licensing their product to their own first run downtown houses. In *Dipson Theatres, Inc.* v. *Buffalo Theatres, Inc.*, 190 F. 2d 951, 960 (2d Cir., 1951), where it was claimed, among other things, that two distributors had conspired to favor theatres in which they had a large financial interest, Judge Augustus Hand, in an opinion affirming a judgment for the distributors, stated:

> "Officers of both Loew and Paramount testified that it was the policy of each to favor theatres in which they had an interest, all other things being equal. This was to be expected, and the fact that they did so is no evidence that they conspired to do so jointly rather than doing so individually."[1]

Surely the jury in the instant case was entitled to reach the same conclusion as that reached by the trial court and the Court of Appeals for the Second Circuit in the *Dipson* case.

The remaining distributors, none of whom had any interest in the downtown theatres in Baltimore, rejected peti-

[1]Significantly, Judge Hand also wrote the original opinion of the District Court in *United States* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323 (S. D. N. Y., 1946), and the further opinion of the Court, 85 F. Supp. 881, upon remand after the decision of this Court in 334 U. S. 131.

tioner's request for an exclusive first run for different reasons. Basically, each of them felt that by reason of its remote location and limited draw area the Crest could not approximate the grossing potentials of the first run downtown theatres and that it was not a suitable "showcase" in which to exploit a picture so as to maximize subsequent run film rentals. Located in a partially developed community six miles from the heart of the downtown amusement and primary shopping center, inconveniently situated from the standpoint of the movie-going public, possessing only meager shopping facilities, serviced by a single bus line and having a draw area which Myerberg himself confined to 105,000, the Crest was obviously ill-suited to replace any of the downtown theatres as a first run house—theatres which because of their centralized location had a draw area co-extensive with the city of Baltimore itself, or over ten times that of the Crest. In the light of these readily observable facts, it is hardly surprising that experienced distributors, each of them motivated by the same desire to maximize its revenue, were not convinced by Myerberg's blithe assertion that the Crest was "the finest showcase for films in the State of Maryland" (R. 131).

In view of this testimony, together with respondents' denials of concerted action, the jury had every right to find that the refusal of each distributor to select the Crest as its exclusive first run outlet in preference to a downtown theatre, sprang not from a conspiracy but from an independent exercise of sound business judgment.[1]

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[1]Despite all this evidence, petitioner still has the temerity to state:

> "This is not a case in which the alleged conspirators offered evidence that they acted independently from some motive unrelated to restraint of trade. On the contrary, respondents not only knew that their common course of conduct would un-

(3) Relevancy of Business Reasons

Petitioner, however, after giving a distorted summary of the business reasons assigned by the witnesses for the action of their respective companies (Br. 38-39),[1] makes the astounding contention that this evidence was entirely irrelevant (Br. 26, 39, 43). Petitioner thus states (Br. 26): "Since evidence showing merely that respondents had a common business purpose for excluding petitioner from the first-run market is irrelevant to a showing that they did not conspire to do so, there was no relevant evidence from which the jury could have drawn an inference that respondents did not conspire." Petitioner's *ipse dixit* that the evidence is irrelevant does not make it so. The argument defies common sense and is contrary to authority and reason. The cases draw a basic distinction between individual and joint refusals to deal. *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565, 573 (1924).[2]

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reasonably restrain competition, but by their explicit admission, they deliberately intended to restrain the trade of independent neighborhood theatres. Their defense was merely that it was convenient and economically profitable to do so." (Br. 42)

Since petitioner's distortions and misrepresentations are so patent, there is no need to make any further comment on this extraordinary assertion.

[1]Petitioner endeavors to create the impression that it failed to receive first-run product because, among other reasons, the distributors practiced rigid favoritism toward long standing customers (Br. 41-42). As shown by testimony which petitioner itself elicited, had the Crest been located in the downtown amusement center, it would have been granted access to first-run films irrespective of the nature of relationships with existing customers (R. 550).

[2]See also, *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919); *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85, 99-100 (1920); *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 721-723, 728-729 (1944); *Dipson Theatres, Inc.* v. *Buffalo Theatres, Inc.*, 190 F. 2d 951, 957 (2d Cir., 1951); *Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 189 F. 2d 797, 798-799 (4th Cir., 1951); *Westway Theatre* v. *Twentieth Century-Fox F. Corp.*, 30 F. Supp. 830, 836-837 (D. Md., 1940), aff'd 113 F. 2d 932 (4th Cir., 1940).

As proof of their defense that each distributor acted separately and independently, respondents explained the reasons for the refusal of each distributor to grant a first run to the Crest. Not only were such explanations relevant, but in *Interstate Circuit* v. *United States*, 306 U. S. 208, 225-26 (1939), the Court held that the failure to give such testimony warranted an adverse inference by the trier of the facts against the defendants.[1] If petitioner's contention were correct, no distributor under any circumstances would ever be justified in rejecting a demand for a first run even by theatres with antiquated appointments, inferior location and inadequate seating capacity, so long as the other distributors responding to the same reasons acted the same way.[2]

Petitioner, assuming that a conspiracy had been proved, then argues that business necessity, good intentions, or economic motives constitute no justification (Br. 42, 39). This argument, of course, begs the question. The testimony as to the reasons animating each distributor was not offered in excuse of conspiracy; rather it was offered in

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[1]See also, *Dipson Theatres, Inc.* v. *Buffalo Theatres, Inc.*, 190 F. 2d 951, 956 (2d Cir., 1951); *Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 189 F. 2d 797, 799 (4th Cir. 1951); *Fanchon & Marco* v. *Paramount Pictures*, 100 F. Supp. 84, 100, 103-104 (S. D. Cal., 1951).

[2]Petitioner blows hot and cold. Evidence that respondents were seeking to maximize their revenue from the rental of their films is said to be irrelevant. Yet the rejection of petitioner's offers is deemed highly relevant and, indeed, weighty evidence of conspiracy (Br. 40). If apart from relevancy, petitioner is attacking the honesty of the business reasons and the credibility of the witnesses, the short answer is that was a question for the jury—a question which the jury resolved against petitioner.

disproof of conspiracy and was clearly relevant for that purpose.

(4) *The True Question Presented*

What, then, is the real question for decision presented by this record?

The question is not whether consciously uniform action is admissible as evidence of conspiracy, for proof of such action was admitted and fully considered by the jury; nor whether such evidence, without more, would have entitled petitioner to go to the jury on the issue of conspiracy, for that issue was submitted to the jury.

Nor is the question whether proof of consciously uniform action, in the absence of any explanation, and in the absence of direct denials of conspiracy by responsible officials of respondent companies, would have justified a directed verdict in favor of petitioner, for this record contains the explanations of respondents' witnesses and their denials of concerted action.

The sole question presented, thus, is whether consciously uniform action, although fully explained, and the claim of conspiracy denied, is nevertheless of such potent probative force that the issue of conspiracy may not as a matter of law be submitted to the jury.

Both authority and common sense require a negative answer to this question.

There is no basis either in the words of the Sherman Act, its legislative history or its construction over a period of more than six decades for treating consciously uniform action in and of itself as a violation of law, without regard

to the context and reasons for such action. What the statute interdicts is not uniformity, even though conscious, but uniformity resulting in a restraint of trade which is the product of a collusive understanding. It is immaterial whether such understanding is denominated conspiracy or concerted action. Either label necessarily means joint, planned, united, associated, collective action—a group scheme for cooperative law-breaking or a partnership in unlawful purposes. This is the meaning consistently accorded the statutory terms "combination" and "conspiracy" by this Court since the enactment of the statute.[1] No case holds that conscious uniformity, when fully explained (as it was here) as the result of separate, individual and unassociated action, is itself the equivalent of conspiracy or concerted action. No case dispenses with the need for showing collusion.[2] On the contrary, the cases without deviation hold that mere uniformity, conscious or otherwise, is not the substantive equivalent or conclusive proof of conspiracy, as contended by petitioner.

Cement Mfrs. Protective Asso. v. *United States,* 268 U. S. 588 (1925), and *Maple Flooring Mfrs. Asso.* v. *United States,* 268 U. S. 563 (1925), are square holdings that proof of conscious price uniformity does not establish conspiracy as a matter of law.[3]

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[1] *United States* v. *Kissel,* 218 U. S. 601, 607-608 (1910); *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 465-66 (1921); *American Column & Lumber Co.* v. *U. S.,* 257 U. S. 377, 399 (1921); *U. S.* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 253-54 (1940); *U. S.* v. *U. S. Gypsum Co.,* 333 U. S. 364, 394 (1948).

[2] Collusion, of course, may be proved by circumstantial evidence. *American Tobacco Co.* v. *U. S.,* 328 U. S. 781, 809-10 (1946).

[3] In the *Cement* case the Government sought to curb certain practices of a trade association, including the dissemination among its members of information relating to the production, price and transpor-

In *Chorak* v. *RKO Radio Pictures*, 196 F. 2d 225 (9th Cir., 1952), the plaintiff objected to the clearance and run given his theatre and charged the distributors with conspiracy. The trial court, without a jury, upheld the reasonableness of the clearance and found no conspiracy. The Court of Appeals affirmed, stating (pp. 230-31):

> "Judge Harrison thus had before him a most revealing record and it convinced him that all of the clearance negotiations and arrangements of the distributor-appellees resulted from nothing more than common business solutions of identical problems in a highly competitive area. So viewed, he concluded

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tation costs of cement, charging that the purpose of these practices was to control the price of cement. There was no claim or evidence of any agreement to fix prices; but instead, the government relied on proof of substantial price uniformity in support of its charge of conspiracy. The District Court granted an injunction, but this Court reversed in an opinion by Mr. Justice Stone, stating (p. 606):

> "We realize . . . that uniformity of price may be the result of agreement or understanding, and that an artificial price level, not related to the supply and demand of a given commodity, may be evidence from which such agreement or understanding, or some concerted action of sellers operating to restrain commerce, may be inferred. But here the government does not rely upon agreement or understanding, and this record wholly fails to establish, either directly or by inference, any concerted action other than that involved in the gathering and dissemination of pertinent information with respect to the sale and distribution of cement to which we have referred, and it fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action."

Similarly, in the *Maple Flooring* case, 268 U. S. at 585-86, this Court drew a critical distinction between "concerted action," which "constitutes a restraint of commerce and is illegal, and may be enjoined," and the exchange of statistical information among members of a trade association having a stabilizing effect on price, which, in the absence of proof of concert of action, was held to be perfectly legal. See also: *United States* v. *International Harvester Co.*, 274 U. S. 693, 708-09 (1927).

> that the totality of circumstances required the conclusion that the conspiracy charged in the complaint was not established by the evidence. . . .
>
> "If it can be said that somewhat parallel business practices were revealed by the record, it is certain that these facts wholly failed to achieve a significance which convinced the experienced trier of the facts that they were the product of any sort of concerted action among the distributors. He dealt with a record of conflicting claims on the conspiracy issue and we cannot say that he erred when he believed, or refused to believe, any part of the testimony relative to this matter."

Fanchon & Marco v. *Paramount Pictures,* 100 F. Supp. 84 (S. D. Cal., 1951), a case cited with approval by the Ninth Circuit in *Chorak* v. *RKO Radio Pictures, supra,* is in accord. The plaintiff claimed that its Baldwin Theatre in suburban Los Angeles had been refused a first run and uniformly granted a playing date twenty-one days after the Los Angeles first run by reason of a conspiracy among the defendant distributors and the associated exhibition companies. Judge Yankwich, who heard the case without a jury, found that the clearance was "warranted by special conditions which reasonable persons may take into consideration in determining their action," and that conspiracy had not been established. On the subject of uniform action Judge Yankwich observed (p. 91):

> ". . . similarity of action, at times, may be the result not of previous agreement, but of solving an identical situation in a similar manner."

To the same effect are *Westway Theatre* v. *Twentieth Century-Fox F. Corp.,* 30 F. Supp. 830, 833 (D. Md.,

1940), aff'd 113 F. 2d 932 (4th Cir., 1940); *Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 94 F. Supp. 388 (D. Md., 1950), aff'd 189 F. 2d 797 (4th Cir., 1951); *United States* v. *Borden Co.*, 111 F. Supp. 562, 579-80 (N. D. Ill., 1953).

There is no inconsistency between the foregoing authorities and those relied on by petitioner, namely, *Interstate Circuit* v. *United States*, 306 U. S. 208 (1939); *United States* v. *Masonite Corp.*, 316 U. S. 265 (1942); *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707 (1944); *American Tobacco Co.* v. *United States*, 320 U. S. 781 (1946); and *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948). These cases are not applicable here and do not stand for the following proposition which petitioner purports to deduce from them:

> " . . . evidence sufficient to establish a combination or conspiracy in violation of the Sherman Act exists when it is proved that members of an industry have participated in a particular course of conduct under circumstances which indicate that each must have known that the others would do or had done the same things, and the necessary result of their common, though separate, acts is to impose a restraint of trade of the character prohibited by the Sherman Act." (Br. 36-37)

In the *Interstate Circuit* case, the dominant exhibitor of motion picture theatres in several Texas cities, sent a letter to each of the defendant distributors proposing that they comply with certain demands as to the manner in which films should be leased in Interstate's competitive territory. These demands required the imposition of price-fixing and other restrictions on Interstate's subsequent-run competitors.

Each distributor was made aware of the fact that the same proposal was made to every other distributor, since the names and addresses of all appeared as addressees on each copy of the circular letter. Ultimately, every distributor complied with Interstate's demands.

The trial court specifically found as a fact that Interstate and the distributor defendants had conspired to impose these unlawful restrictions upon the subsequent-run exhibitors. This Court held that the finding of agreement among the distributors was supported by the evidence, but went on to say "that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy, [it being] enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it" (306 U. S. at 226-27). The Court added that it was "elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators" (306 U. S. at 227).

Since each distributor became a co-conspirator when it joined the scheme initiated by the exhibitor, it was not necessary to establish a separate agreement among the distributors themselves. In holding that the knowing adoption by each of the distributors of the existing conspiratorial plan rendered them co-conspirators, even though they did not conceive the plan or join in it simultaneously, Mr. Justice Stone enunciated a doctrine no more novel than that contained in the famous charge to the jury of Mr. Justice Coleridge in *Regina* v. *Murphy*, 8 C. & P. 297, 311 (1837):

> "It is not necessary that it should be proved that these defendants met to concoct this scheme, nor is

> it necessary that they should have originated it. If a conspiracy be already formed, and a person joins it afterwards, he is equally guilty."

There is no suggestion in *Interstate* that conscious uniformity is the equivalent of conspiracy. On the contrary, the Court's language on its face shows that concerted action is a *sine qua non* to the existence of a conspiracy. Thus it is said that where a concert of action is contemplated and invited, acceptance of the invitation by adherence to and participation in the scheme is proof of conspiracy.[1] It is clear, therefore, that what was condemned was collusive action, not similar independent action.[2]

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[1]Not only was there an express invitation to join the plan, in the form of Interstate's letter to all the distributors jointly, but the plan involved a "radical departure" from normal business practices in the industry, and its success depended on the cooperation of all the distributors. The fact that all did participate in the plan under these circumstances, coupled with the failure of the distributors to offer any reasonable explanation for the unanimity of their unusual action, and their further failure to call as witnesses those officers who had authority to act and knew whether their company had acted pursuant to an agreement, was stressed by this Court in affirming the finding of conspiracy.

None of these facts is present in the case at bar. Here there was no invitation to join in a plan; there was no change in customary business practices by the distributors, much less a radical change; there was no necessity for cooperative action among the distributors, since it did not make the slightest difference to any distributor whether any other granted petitioner a first run; a full and valid explanation was given by each distributor justifying its refusal to entertain petitioner's request; and these explanations, together with denials of conspiracy and assertions of separate and independent action, were provided by high and responsible officials having knowledge of the facts.

[2]This is confirmed by subsequent application of the *Interstate Circuit* case by this Court. *United States* v. *Masonite Corp.*, 316 U. S. 265, 275 (1942); *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 723 (1944); *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394 (1948); *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 142 (1948). In all these cases the finding of conspiracy rested upon proof of concerted action.

In *Masonite,* a series of unlawful agreements were entered into by Masonite with its competitors, taking the form of a *del credere* agency contract. Each separate agreement violated the antitrust laws since it involved illegal vertical price control by the seller. As each agreement was made, Masonite informed the other party of the existence and terms of like agreements which Masonite had previously made with its other competitors. Upon the execution of each contract, Masonite sent copies to the companies which had previously entered into similar contracts.[1] The basic plan was contrived by Masonite; others were invited to participate and gave their adherence to the scheme knowing that concerted action was contemplated and invited. As the Court pointed out:

> "The fixing of prices by one member of a group pursuant to express delegation, acquiescence, or understanding is just as illegal as the fixing of prices by direct, joint action." (316 U. S. at 276)

In *American Tobacco,* where the only question presented was whether actual exclusion is necessary to the crime of monopolization, and where it was assumed for the purpose of decision that a conspiracy had been established, the Court in considering the meaning of conspiracy, said:

> "Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the

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[1]Later on, modifications of the agreements were executed and placed in escrow pending delivery to all signatories. New agreements made in 1941 were negotiated by a committee of purchasers and were only completed after meetings at which all of the defendants attended.

conclusion that a conspiracy is established is justified." (328 U. S. at 810)[1]

In *Bausch & Lomb,* there was a specific finding of an agreement between the seller and purchaser to maintain resale prices (321 U. S. 707, 720).[2]

In a vain effort to bring itself within the ambit of *Interstate Circuit* and *Masonite,* petitioner intimates that the

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[1]The trial court in its instructions had defined conspiracy in terms of "a mutual agreement or understanding", and specifically charged that:

> "The same or similar actions by two or more persons, as the result of and pursuant to independent plans and purposes of each of them, without prior agreement, arrangement or understanding between them so to act, in and of themselves do not constitute conspiracy, even though they be substantially concurrent in time and place and tend toward the accomplishment of the same end." (R. 6350)

[2]Petitioner also makes passing reference to three non-jury cases decided by the Third Circuit, namely: *Milgram* v. *Loew's, Inc.,* 192 F. 2d 579 (3d Cir., 1951); *Ball* v. *Paramount Pictures,* 169 F. 2d 317 (3d Cir., 1948); and *William Goldman Theatres* v. *Loew's, Inc.,* 150 F. 2d 738 (3d Cir., 1945). The opinion below discusses these cases in detail, points out that each contains a factual finding of conspiracy, that not one held that evidence of conscious uniform action dispenses with the necessity of proving a conspiracy or that such evidence in and of itself establishes a conspiracy as a matter of law, and concludes that they are not inconsistent with the case at bar (201 F. 2d at 312-13). This reconciliation of these cases is especially significant because Chief Judge Parker, who joined in the opinion below, also sat and concurred with the Third Circuit in the *Goldman* case.

In summary, the most that these cases hold is that the trier of the facts *might* infer conspiracy from the evidence. They do not hold, as petitioner appears to contend, that conscious uniformity is of itself a violation of the antitrust laws. Indeed, the Third Circuit in the *Milgram* case expressly recognized that while uniformity "forms the basis of an inference of joint action, [this] does not mean . . . that in every case mere consciously parallel business practices are sufficient evidence, in themselves, from which a court may infer concerted action" (192 F. 2d at 583). Directed verdicts were not granted in these cases, and they are no authority for the proposition that a directed verdict is proper where, as here, the evidence is susceptible of conflicting inferences on the issue of conspiracy.

separate action of each distributor in denying a first run to the Crest and in granting an exclusive first run to a downtown outlet was in itself an unlawful restraint of trade. Indeed, this assumption of separate illegality is the premise on which its argument rests. The premise is erroneous. The right of each distributor, acting separately and not in concert with others, to license its films on an exclusive first run basis and to grant reasonable clearance protection to first run customers was sustained in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948). The law is settled, as we have seen, that a single trader is privileged to select his own customers. Neither the granting of an exclusive first run to a downtown outlet nor the denial of such a run to the Crest was tainted with any illegality. Admittedly, an exclusive first run with concomitant clearance necessarily involves a *pro tanto* exclusion of others. Nevertheless the exclusion is a lawful restraint so long as it is reasonable. Petitioner's premise being faulty, its conclusion is necessarily erroneous.

In view of Myerberg's concessions on the stand that he was not attacking clearance and runs as such in this case, and that a 21-day clearance was reasonable (R. 332, 840), it is quite extraordinary that an argument should be made on this appeal which implicitly challenges the legitimacy of runs and clearances as employed by any distributor acting separately.

With a like purpose of bringing itself within the ambit of *Interstate Circuit* and *Masonite*, petitioner asserts at various parts of its brief (Br. 24, 36) that respondents admitted that each knew that the common policy of all could not be maintained in the absence of common action by all of them. We have already pointed out that there was no such admission, that there was no such evidence,

and that, on the contrary, this record demonstrates that it was a matter of entire indifference to each of the distributors whether or not its competitors granted the Crest first run. Unlike *Interstate Circuit,* unanimity of action was not essential for the accomplishment of the business purpose of each distributor.

A rule making uniformity of itself unlawful would have far reaching and drastic repercussions throughout the business world. This is because uniform action is so typical of normal human and business behavior and results from individual and not joint impulses. Sometimes, for example, uniformity is the instinctive reaction of human beings to the same situation, as when in a rainstorm people use umbrellas, and as when there is a loud noise everyone looks in the direction of the sound. Sometimes it is the common sense response to the same business situation, as when all department stores with good credit departments refuse to extend credit to the same bad risk, or when all fire insurance companies refuse to sell insurance to a known fire bug. Cf. *Ruddy Brook Clothes* v. *British & Foreign Marine Ins. Co.*, 195 F. 2d 86 (7th Cir., 1952). Most frequently it is the result of competition, as when competing department stores have furniture sales or white goods sales in the same month, or sell the same merchandise at the same price.

To hold that conscious uniformity of business behavior not resulting from agreement is unlawful, irrespective of the cogency of the reasons producing it, would place businessmen in a hopeless dilemma. If several distributors had granted a first run to the Crest, would they then be guilty of a conspiracy against their former first run customers, the downtown theatres, because they consciously and uniformly rejected their requests for a first run? Were this so, distributors would be guilty of an antitrust violation

and subject to suit whether they gave first run to the Crest or to the downtown theatres. The Sherman Act plainly does not create such an intolerable situation. It does not require diversity merely for the sake of diversity, even though it be contrary to sound business judgment. Can it be said that one must operate his business uneconomically because his competitor previously adopted a sound business policy? Is there to be a race as to who acts first? And is the first actor to be condemned as a conspirator because others have responded similarly to a common stimulus?

Undoubtedly these are the reasons why up to now no court has ever said that mere conscious uniformity of action is of itself sufficient to compel a finding of conspiracy. If such conduct were conspiracy, then all sellers would act at their peril in exercising a judgment which to them is sound, the moment they know that their competitors have exercised their judgment the same way. Such clearly is not the law.

To bolster its case, petitioner urges that the events which occurred during the claimed damage period should be "measured against the background and findings in the *Paramount* case" (Br. 28). In Point II of this brief we demonstrate that the decrees in the *Paramount* litigation were erroneously admitted in evidence; that the *Paramount* case related to a state of facts existing in 1945 and prior years; that the conspiracy found in that case respecting runs and clearances was effectively enjoined from May, 1948, prior to any denial of first run pictures to petitioner; that there is no presumption that the earlier conspiracy continued up to the time plaintiff entered business; that the *Paramount* case dealt with conduct in the country as a whole and contained no finding with respect to the theatre situation in Baltimore; that runs and clearances in Baltimore

were not attacked by the Government; that there was no determination of any impropriety in the granting of first run to downtown theatres in Baltimore, or elsewhere, and no decree requiring the licensing of first run films to theatres outside the downtown areas irrespective of the merits; that five of the eight first run downtown theatres in Baltimore, accounting for 63% of first run exhibitions, are owned by independent exhibitors having no affiliation with any of the respondents; and that the decrees, if admissible at all, would at best be *prima facie* evidence of the earlier conspiracy and would not obviate the necessity of proving subsequent conspiratorial action by respondents during the claimed damage period.

The post-decree evidence consisted, as we have seen, of mere conscious uniformity and did not establish a conspiracy as a matter of law. Since the decrees themselves were at best only *prima facie* evidence of a conspiracy that existed in 1945, and since evidence which is *prima facie* means only that it is sufficient to go to the jury, it follows that even if the decrees were admissible there would be no basis for a directed verdict.

In summary, the conflict in the testimony on the issue of conspiracy, the differing inferences which the parties drew from the evidence, the questions of credibility presented by the testimony, all raised triable issues requiring submission of the case to the jury. Since conscious uniformity is not conclusive proof of conspiracy where the reasons prompting such uniformity are fully explained, as they were here, and since the *Paramount* decrees were not admissible, or if admissible were at best *prima facie* evidence only, the trial court was under a clear duty to deny petitioner's motion for a directed verdict and permit the jury to pass upon the issue of conspiracy.

POINT II

THE COURT BELOW DID NOT ERR IN UPHOLDING THE CHARGE TO THE JURY CONCERNING THE PARAMOUNT DECREES.

This case is *not* the *Paramount* case all over again.

In *United States* v. *Paramount Pictures, Inc.*,[1] it was held that respondents' conduct in the country as a whole during the year 1945 and previous years violated the antitrust laws. In the case at bar, petitioner sought to establish that respondents' conduct in the City of Baltimore during the period February, 1949 to March, 1950, also violated those laws, with resultant injury to petitioner.

At petitioner's insistence, and over respondents' objections (R. 116-17, 482-83, 1002), the *Paramount* decrees were admitted in evidence (R. 942-43) and the trial court instructed the jury as to their *prima facie* effect under section 5 of the Clayton Act (R. 1001-02, 1104-05). Petitioner contends that these instructions were inadequate.

We shall demonstrate that the *Paramount* decrees should never have been admitted in evidence in the first place and hence petitioner was not entitled to *any* assistance from them; but that even if the decrees were admissible, the trial court's instructions accorded petitioner the maximum probative advantage conferred by section 5. In neither event is petitioner in a position to complain.

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[1] 66 F. Supp. 323 (S. D. N. Y. 1946), aff'd in part and rev'd in part, 334 U. S. 131 (1948); opinion on remand 85 F. Supp. 881 (S. D. N. Y. 1949).

A. The Paramount decrees should not have been admitted in evidence.

It has consistently been respondents' position that the *Paramount* decrees should not have been admitted in evidence. The Court of Appeals was not required to pass upon their admissibility since it found no error in the trial court's charge. However, respondents' right to urge this additional ground in support of the decision below is clearly established.[1]

The decrees were offered and ultimately received as *prima facie* evidence under section 5 of the Clayton Act. That section authorizes a plaintiff in a treble damage action to use a Government decree adjudicating that a defendant has violated the antitrust laws as *prima facie* evidence against the same defendant "as to all matters respecting which said . . . decree would be an estoppel as between the parties thereto."[2] As this Court pointed out in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 568 (1951):

> "The evidentiary use which may be made under § 5 of the prior [judgment] is thus to be determined by reference to the general doctrine of estoppel."

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[1] *Walling* v. *General Industries Co.*, 330 U. S. 545, 547 (1947); *Public Service Commission of Puerto Rico* v. *Havemeyer*, 296 U. S. 506, 509 (1936); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 560 (1931); *Langnes* v. *Green*, 282 U. S. 531, 538 (1931).

[2] Were it not for the provisions of section 5, a judgment rendered in an antecedent Government proceeding would not be admissible in a later treble damage action. *Buckeye Powder Co.* v. *Du Pont Powder Co.*, 248 U. S. 55, 63 (1918); cf. *Tidewater Optical Co.* v. *Wittkamp*, 179 Va. 545, 19 S. E. 2d 897 (1942). In any event, no question as to the admissibility or effect of the *Paramount* decrees, apart from section 5, can be raised on the present record since the decrees were offered by petitioner and received by the court solely under that section.

There are two conditions which must be satisfied before the doctrine of estoppel may be invoked: (1) the matter must have been "distinctly put in issue and directly determined" in the prior suit;[1] and (2) the matter must be "determinative" of an ultimate fact in the second suit.[2]

Application of these principles to the case at bar requires, therefore, a comparison of what was determined in the *Paramount* case with what petitioner had to establish in order to recover in this case.

(1) ***The Paramount case was an adjudication of a 1945 conspiracy, whereas petitioner had to prove a conspiracy in 1949-50.***

Although the decrees that were introduced in evidence were not entered until 1948, 1949 and 1950, the violations of law to which they attest all took place in 1945 and prior years.[3] Petitioner expressly concedes that "the findings in

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[1]*Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 569 (1951). See discussion and additional authorities cited *infra*, pp. 67-68.

[2]*United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 459 (1922); *The Evergreens* v. *Nunan*, 141 F. 2d 927 (2d Cir. 1944). See discussion and additional authorities cited *infra*, pp. 68-73.

[3]The *Paramount* action was instituted on July 20, 1938, and came to trial in 1945. The decision of the District Court adjudicating that the defendants had violated the Sherman Act was handed down in June, 1946 [66 F. Supp. 323 (S. D. N. Y. 1946)]. A decree was entered the following December which enjoined the defendants, among other things, from conspiring with respect to runs and clearances [70 F. Supp. 53 (S. D. N. Y. 1946)]. This decree was stayed by order of Mr. Justice Reed in April, 1947, pending "final disposition of the cases by this Court." In May, 1948, this Court affirmed the District Court's findings and injunctive provisions relating to runs and clearances, but remanded the cause to the District Court for reconsideration of the relief to be granted [334 U. S. 131 (1948)]. Upon this affirmance, the injunction with respect to runs and clearances became effective. The order on mandate was entered on June 25, 1948.

On remand the District Court conducted further hearings, which began on November 8, 1948. On the same date it approved a consent

the *Paramount* case showed the situation generally as of 1945" (Br. 53).

The Crest Theatre did not open until February 26, 1949 (R. 167-68). Petitioner's claimed damage period is February, 1949, to March, 1950 (PX 92, R. 1150).

Petitioner could not have been damaged by a conspiracy antedating its existence. *Buckeye Powder Co.* v. *Du Pont Powder Co.*, 248 U. S. 55, 63-64 (1918). As petitioner itself recognized below, it could not rest its case on the *Paramount* conspiracy; it had to "go beyond, and show the conspiracy" in the later years (R. 930).

(2) *The Paramount decrees were not admissible to establish prima facie the ultimate fact of a 1949-50 conspiracy.*

The first condition that must be met before the doctrine of estoppel can come into play is that the question of fact sought to be established by estoppel in the second action

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decree entered against RKO, prior to the reception of any evidence on remand. During the course of such hearings, on March 3, 1949, a consent decree against Paramount was approved. On July 25, 1949 the District Court handed down its decision on remand [85 F. Supp. 881 (S. D. N. Y. 1949)]. Pursuant thereto the Court on February 8, 1950, entered findings of fact and conclusions of law as well as two decrees, one against the "major" defendants (Loew's, Warner's and Fox) and a second against the "minor" defendants (Columbia, Universal and United Artists). Appeals were taken by the majors only from the injunctive provisions concerning divorcement and divestiture, and the decree against them was affirmed in *Loew's, Inc.* v. *United States*, 339 U. S. 974 (1950). The minors acquiesced in the decree and took no appeal.

Evidence of conspiracy in the *Paramount* case was all presented prior to the conclusion of the trial in 1945. Hearings held subsequent to that date were not concerned with the presence or absence of conspiracy, but only with the nature of the relief to be afforded. Petitioner does not dispute this (Br. 32-33).

must have been "distinctly put in issue and directly determined" in the first action.[1]

It is self-evident that events occurring in 1949-50 could not possibly have been distinctly put in issue or directly determined in an action based on evidence relating to a period ending in 1945. Hence the adjudication in the *Paramount* case could not operate as an estoppel between the parties as to an alleged conspiracy occurring in the subsequent period of 1949-50.

There being no estoppel, it follows under section 5 that petitioner could not utilize the *Paramount* adjudication to establish *prima facie* a later conspiracy in 1949-50.

(3) *The Paramount decrees were not admissible to establish prima facie a 1945 conspiracy as a mediate fact from which the ultimate fact of a 1949-50 conspiracy might be inferred.*

It remains to consider whether the decrees, though not *prima facie* evidence of the 1949-50 conspiracy charged in this case, might nevertheless be admissible as *prima facie* evidence of a 1945 conspiracy, from which a 1949-50 conspiracy might be inferred.

Admissibility for this purpose is not sanctioned by section 5 because the general doctrine of estoppel does not permit a fact established in a prior litigation to be used to establish a *mediate* fact in the second litigation from which an *ultimate* fact can be deduced. It only permits a fact necessarily determined in the first action to be used to establish an identical ultimate fact in the second. The most

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[1]See *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 569 (1951); *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 38 (1950); *Commissioner* v. *Sunnen*, 333 U. S. 591, 597-98 (1948), and cases cited.

illuminating exposition of this aspect of the doctrine of estoppel is given by Judge Learned Hand in *The Evergreens* v. *Nunan,* 141 F. 2d 927, 928 (2d Cir., 1944):

> "It is of course well-settled law that a fact, once decided in an earlier suit, is conclusively established between the parties in any later suit, provided it was necessary to the result in the first suit. . . . However, a 'fact' may be of two kinds. It may be one of those facts, upon whose combined occurrence the law raises the duty, or the right, in question; or it may be a fact, from whose existence may be rationally inferred the existence of one of the facts upon whose combined occurrence the law raises the duty, or the right. The first kind of fact we shall for convenience call an 'ultimate' fact; the second, a 'mediate datum'. 'Ultimate' facts are those which the law makes the occasion for imposing its sanctions."

Evergreens involved a determination of the tax basis of certain cemetery lots, some of which were improved and others of which were unimproved. A prior adjudication had established the value of the improved lots. It was conceded that the adjudication was binding on the Commissioner in the subsequent case. The taxpayer further contended, however, that the value of the improved lots as conclusively established by the prior suit should be used to arrive at the value of the unimproved lots in the second suit by deducting from the previously adjudicated value of the improved lots the cost of the improvements. The Court of Appeals for the Second Circuit rejected that argument, stating (141 F. 2d at 930-31):

> ". . . we do not hesitate to hold that . . . no fact decided in the first [suit] . . . conclusively establishes any 'mediate datum' in the second, or anything except a fact 'ultimate' in that suit."

The *Evergreens* doctrine was followed in *Grandview Dairy* v. *Jones,* 157 F. 2d 5, 10 (2d Cir., 1946) and *United States* v. *Five Cases,* 156 F. 2d 493 (2d Cir., 1946), and its applicability to the problem at hand was recognized in *Bordonaro Bros. Theatres* v. *Paramount Pictures Inc.,* 203 F. 2d 676 (2d Cir., 1953). The latter case involved the second of two actions brought by the same plaintiff against the motion picture companies to recover treble damages under the antitrust laws. The first suit was brought in 1946 and alleged a conspiracy, with consequent injury to plaintiffs, in prior years. That case resulted in a jury verdict for plaintiff which was affirmed by the Court of Appeals. 176 F. 2d 594 (2d Cir., 1949). In 1948 plaintiff brought a second suit to recover further damages for the period between September, 1946 and March, 1948. The jury again returned a verdict for the plaintiff, but in the amount of only $7,500. Plaintiff, disappointed with the jury's verdict, appealed to the Court of Appeals and ascribed the jury's niggardliness to certain errors of law committed during the course of the trial. Judge Clark characterized and disposed of the first of those assigned errors as follows:

> ". . . The first assigned error was the refusal of binding instructions in favor of the plaintiff based on the finding of conspiracy in the previous case. But the judge properly—we might say inevitably—ruled that the plaintiff must prove that the conspiracy continued from 1946 to 1948, and so charged. *The judge actually went far in the plaintiff's favor when he told the jury that the former judgment 'is conclusive proof that there was a conspiracy between the defendants prior to September 16, 1946,' cf. The Evergreens* v. *Nunan,* 2 Cir., 141 F. 2d 927, 930, 931, 152 A. L. R. 1187, certiorari denied 323 U. S. 720, 65 S. Ct. 49, 89 L. Ed. 579; *but in any*

> *event the plaintiff cannot complain.*" 203 F. 2d at 678. [Emphasis added.]

In *Shotkin* v. *General Electric Co.*, 171 F. 2d 236, 238 (10th Cir., 1948), a treble damage action, the court made the following pertinent observation in the course of its opinion dismissing the complaint:

> "And the complaint contained further allegations relating to a criminal prosecution against some of the defendants in the United States Court for Illinois, *but that was long prior to the time plaintiff entered business at Denver and it had no bearing whatever upon any justiciable issue appropriate for determination in this case.*" [Emphasis added.]

The Restatement of Judgments has specifically adopted the rule of the *Evergreens* case. Section 68 provides that where a question of fact essential to the judgment is actually litigated and determined, such determination is conclusive between the parties as to the ultimate facts in a subsequent action. Comment *p* of this section (1948 Supplement) reads as follows:

> "*Evidentiary facts.* The rules stated in this Section are applicable to the determination of facts in issue, i.e., those facts upon whose combined occurrence the law raises the duty or the right in question, but not to the determination of merely evidentiary or mediate facts, even though the determination of the facts in issue is dependent upon the determination of the evidentiary or mediate facts."[1]

While this Court has never had occasion explicitly to apply the *Evergreens* rule, it has often used language that

[1]See also, Note, *Developments—Res Judicata*, 65 Harv. L. Rev. 818, 843 (1952).

fully supports that rule. Thus in *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451, 459 (1922), it stated:

> ". . . to determine the effect of a former judgment pleaded as an estoppel, two questions must be answered: (1) Was the former judgment rendered on the same cause of action? (2) If not, was some matter litigated in the former suit *determinative* of the matter in controversy in the second suit." [Emphasis added.]

Similarly, in *United States* v. *Moser,* 266 U. S. 236, 241 (1924), the doctrine of estoppel by judgment was formulated in this manner:

> ". . . whether the point or question *presented for determination in the subsequent action* is the same as that litigated and determined in the original action." [Emphasis added.]

And in *New Orleans* v. *Citizen's Bank,* 167 U. S. 371, 396 (1897), estoppel was said to exist:

> ". . . when *the question upon which the recovery of the second demand depends* has under identical circumstances and conditions been previously concluded by a judgment between the parties. . . ." [Emphasis added.]

In summary, the doctrine of estoppel would not authorize use of the 1945 conspiracy found in the *Paramount* case to establish in a subsequent litigation a 1945 conspiracy as a mediate fact from which the ultimate fact of a 1949-50 conspiracy might be inferred. Since section 5 does not purport to confer any greater advantage than the general

law of estoppel,[1] it follows that petitioner had no right under that section to prove that mediate fact *prima facie* by introduction of the decrees.

There is nothing in the legislative history of section 5 to suggest that Congress intended to sanction the use of government decrees by persons who were not even in existence, much less injured, during the period covered by the Government action. The plain words of the statute, referring to the doctrine of estoppel, clearly bespeak a purpose to limit such use to those injured by the acts condemned in the government litigation.

(4) *The Paramount decrees were not admissible to establish a proclivity on the part of the respondents to violate the anti-trust laws.*

The record discloses that petitioner sought to introduce the decrees, and actually utilized them when admitted, for the purpose of showing that respondents had a "proclivity" to violate the antitrust laws. Its case was based upon the familiar "bad man" theory. As counsel for petitioner put it in summation, since the decrees show a past violation, respondents "are perfectly capable of coming in and committing conspiracy again" (R. 1085). It is readily apparent that petitioner's object in introducing the decrees was to arouse in each juror the "deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught." *1 Wigmore on Evidence*, 456 (3d ed. 1940).

When the *Paramount* case was before the Court in 1948, some of the defendants had urged that the decree of

[1] *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 568 (1951).

the District Court be construed, or if necessary, modified, in such manner as to accord them greater freedom with respect to runs and clearances. The Court refused this request on the ground that it might provide the defendants with the means of continuing the conspiracies found by the District Court, stating:

> "That is too potent a weapon to leave in the hands of those whose proclivity to unlawful conduct has been so marked." 334 U. S. at 147.

In employing that language the Court was commenting upon facts disclosed by the record before it; and its comment was directed solely at the propriety of the remedy devised by the District Court. It was not commenting upon a "proclivity" demonstrated by facts *dehors* the record. Nor was it the Court's intention to suggest that respondents' past acts should be evidence of alleged future misconduct.

In short, petitioner's use of the decrees to show an unlawful proclivity was not only "alien to our conception of fair trial,"[1] but wholly without the sanction of section 5.

(5) *Continuation of the Paramount conspiracy into petitioner's claimed damage period may not be presumed.*

Finally, petitioner attempts to span the crucial gap between 1945 and 1949 by invoking a presumption of continuance. It argues that it may rely upon the decrees "as prima facie evidence of conspiracy here" because it can be *presumed* that the 1945 conspiracy continued until it was

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[1] Judge Hastie, dissenting in *Milgram* v. *Loew's, Inc.*, 192 F. 2d 579, 595 (3d Cir., 1951): "My concern about this kind of proof is very great. . . . To imply new wrongdoing from past wrongdoing is in itself alien to our conception of fair trial."

enjoined by the entry of the decrees of November 8, 1948, March 3, 1949, and January 8, 1950 (Br. 53-55). This argument is untenable both as a matter of fact and as a matter of law.

In the first place, petitioner is in error in assuming that the *Paramount* conspiracy was not enjoined as to all respondents until 1950. Actually, it was enjoined no later than May, 1948, when this Court handed down its decision in the *Paramount* case affirming the injunctive provisions relating to runs and clearances.[1] For at this point Mr. Justice Reed's stay of the 1946 decree expired by its own terms.

Among the decretal provisions approved and rendered effective by the Court's decision were paragraphs II 2, II 3, and II 4 of the 1946 decree.[2] Those provisions were identical with the corresponding paragraphs of the decrees introduced below.[3] While it is true that this Court also directed modification of the 1946 decree with respect to competitive bidding, such modification in no way affected the injunctive

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[1]In any event, the injunction became effective not later than June 25, 1948 when the order on mandate was entered in the District Court. On remand, Judge Hand observed that this Court had affirmed the District Court's findings with respect to runs and clearances (see 334 U. S. at 144-48) and expressly stated that "our disposition of clearances was in no way altered by the Supreme Court." 85 F. Supp. 881, 885, 897. Accordingly, the injunctive provisions of the 1946 decree concerning runs and clearances were left intact.

[2]This is apparent from the following passage of this Court's opinion paraphrasing these injunctive provisions: "The District Court enjoined defendants and their affiliates from agreeing with each other or with any exhibitors or distributors to maintain a system of clearances, or from granting any clearance between theatres not in substantial competition, or from granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. In view of the findings this relief was plainly warranted." *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 147 (1948).

[3]Compare 70 F. Supp. 53, 73 with R. 1003.

provisions respecting runs and clearances which took effect immediately upon their affirmance. *People ex rel. Platt* v. *Rice,* 144 N. Y. 249, 262, 39 N. E. 88 (1894); *Hathorn* v. *Natural Carbonic Gas Company,* 137 App. Div. 557, 121 N. Y. Supp. 683 (3rd Dep't, 1910); *Securities and Exchange Commission* v. *Okin,* 137 F. 2d 862 (2d Cir., 1943).

Clearly, there is no rule of law that would permit continuation of the *Paramount* conspiracy to be presumed after the injunction became effective in 1948. On the contrary, the high degree of obedience that is given antitrust decrees was pointed out by Mr. Justice Reed in *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593, 601, 604 (1951):

> "An injunction was entered by the District Court to prohibit the continuation of the objectionable contracts. Violation of that injunction would threaten the appellant and its officers with civil and criminal contempt. . . . The paucity of cases dealing with contempt of Sherman Act injunctions is, I think, an indication of how carefully the decrees are obeyed."

See also *United States* v. *Bausch & Lomb Optical Co.,* 321 U. S. 707, 729 (1944).[1]

Far from presuming continuance of a conspiracy in the wake of its prohibition, the law presumes compliance with its mandates. *American Ry. Exp. Co.* v. *Lindenburg,* 260 U. S. 584, 589 (1923); *Missouri Pac. R. R.* v. *Prude,* 265

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[1]If the conspiracy found in the *Paramount* case had in fact continued after the decree, respondents would be in violation of the injunction and guilty of contempt. No claim has been made by the Government of any such violation. Under the decree the District Court expressly reserved jurisdiction for such further orders as might be necessary or appropriate for the enforcement of compliance therewith and the punishment of violations thereof. That jurisdiction has never been invoked.

U. S. 99, 101 (1924); *Athens Roller Mills* v. *Com'r of Internal Revenue*, 136 F. 2d 125, 128 (6th Cir. 1943).[1]

Even if no injunction had been entered in the *Paramount* case until 1950, the decrees would still be inadmissible under the *Evergreens* doctrine. A decree has two functions: looking backward, it determines what has been done; looking forward, it prohibits the performance of certain acts in the future. It is only in its backward-looking aspect that the decree is of significance under section 5.[2] The sole

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[1] *Local 167* v. *U. S.*, 291 U. S. 293, 297-98 (1934), and *U. S.* v. *Oregon State Medical Society*, 343 U. S. 326, 333 (1952), cited at page 55 of petitioner's brief, are not to the contrary.

In *Local 167* the defendants had previously been found guilty in a criminal proceeding of violating the antitrust laws. Thereafter, the Government brought an equity suit to restrain the violation, adduced evidence to show continuation of the conspiracy subsequent to the prosecution, and secured an injunction. This Court affirmed, rejecting defendants' contention that the proof showed that they had abandoned the conspiracy.

In *Oregon State Medical Society* the evidence disclosed illegal practices eight years before the trial, but did not convince the trier of the facts that there had been any subsequent illegality. This Court approved the denial of an injunction, stating that "conduct discontinued in 1941 does not warrant the issuance of an injunction in 1949" (343 U. S. at 334).

In neither case had continuation of the prior illegal conduct been enjoined, as it was here. In each case the Court's statement that abandonment of a conspiracy will not be presumed in the absence of proof was made in determining whether the possibility of *future* transgressions was such that in order to forestall them injunctive relief was necessary. The Court at no point intimated that *actual* wrongdoing might be established by a presumption of continuance. This distinction was recently made clear in *U. S.* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953), where the Court said: ". . . power to grant injunctive relief survives discontinuance of the illegal conduct. [Citing cases.] The purpose of an injunction is to prevent future violations [citing cases], and, of course, it can be utilized even without a showing of past wrongs."

[2] In the case of a criminal judgment, which is also admissible under section 5, the judgment necessarily performs only the backward-looking function. Obviously, there is no justification either in the words or purpose of section 5 to give any broader effect to a decree in equity.

reason for admitting the decree in a later treble damage action is to show, not what the defendant was restrained from doing, but what he did to give occasion for an injunction, and the only significance that may be ascribed to the injunctive provisions themselves is the extent to which they illuminate the determination of what has been done in the past. That fact is quite apparent from the express terms of section 5, which sanctions introduction of "a final judgment or decree . . . to the effect that a defendant *has violated* [the antitrust] laws . . ." (Emphasis added). And there is no presumption of continuance of a violation adjudicated in a Government suit which would obviate the need to prove by independent evidence a conspiracy which injured the plaintiff during the damage period. Such evidence could not be supplied by the decrees, which are not proof of their own violation.

B. The charge gave petitioner the maximum probative advantage conferred by Section 5.

We have demonstrated that the *Paramount* decrees were inadmissible. But even if the decrees were admissible, the trial court's instructions gave petitioner the maximum probative advantage conferred by section 5.

The passages of the trial court's charge relating to the *Paramount* case are as follows:

> "The law further provides, I instruct you, that if any of the acts prohibited by the Anti-Trust laws which are alleged to have damaged the plaintiff have previously been established against these same defendants by a decree obtained by the United States Government, in either a criminal or a civil, that is, an equity proceeding, under these Anti-Trust laws, then the plaintiff may, in aid of its present case, rely

upon such judgment or decree previously obtained by the Government, in proving the existence of the prohibited acts to the extent that the law provides that such previously obtained judgment or decree is prima facie evidence against the defendants in a suit of the present nature brought by the plaintiff against them—that is prima facie evidence, not conclusive evidence, as to all matters involved in the present case that were decided by the previous decree.

"I instruct you that in the previous equity suits between the Government and these same defendants, which have been referred to as the Paramount case,—you will recall I allowed the decree in that Paramount case to be introduced in evidence by the plaintiff,—I instruct you that in that case, which was a suit between the Government and the same defendants, which was decided and covered by the decrees in that case, these same defendants had, at a time previous to the opening of the Crest Theatre, conspired together in restraint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run and in establishing certain clearances in numerous places throughout the United States. Thus, these proven facts, I instruct you, become prima facie evidence in the present case, which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only prima facie evidence. There was not before the Court in the prior case the present factual situation which is before you now with respect to Baltimore theatres. Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence, that these defendants, or some of them, have conspired in an unreasonable manner, to keep first run exhibitions from the plaintiff, or have

conspired to restrict plaintiff to clearances which are unreasonable." (R. 1104-05).

(1) *The instruction that the Paramount case did not present the same factual situation as the case at bar.*

Petitioner's sole objection in the trial court to the foregoing instructions was:

> " . . . with regard to your statement to the Jury, concerning the fact that the factual situation in Baltimore was not raised in the Paramount case, that the Jury be advised that there was no necessity on the part of the Government to prove the factual details with regard to that situation but that, on the contrary, the Government need not do that, and the Jury might still conclude that the evidence in the Paramount case is to be prima facie evidence." (R. 1113)

It now renews that objection, alleging that the challenged instruction "required petitioner to retry the issue of conspiracy previously resolved against respondents", whereas "[t]o establish a prima facie case under the ruling in the *Emich* case it was only necessary for petitioner to introduce the judgments in the prior Government case and such additional evidence as would show the impact of the conspiracy on petitioner" (Br. 52-53).

Such an argument rests on the assumption that the conspiracy which petitioner had to prove in this case was the identical conspiracy adjudicated in *Paramount*. That assumption, which permeates petitioner's entire brief, is clearly wrong.

Actually, the conspiracy charged by petitioner here was strikingly different from that found in the *Paramount* case. There were at least three significant differences:

(*a*) *The time difference.*

Paramount adjudicated a 1945 conspiracy, while it was incumbent upon petitioner to show a 1949-50 conspiracy. Even if the time difference did not render the decrees wholly inadmissible, at the very least it made them inadequate to establish the later conspiracy charged by petitioner. See *Bordonaro Bros. Theatres* v. *Paramount Pictures,* 203 F. 2d 676, 677 (2d Cir. 1953). Petitioner's counsel conceded as much in the course of argument in the trial court (R. 930).

(*b*) *The place difference.*

Paramount was an adjudication of illegal conduct in the country as a whole.[1] With the exception of a limited number of references to New York City,[2] the District Court did not make, and specifically disclaimed making, any findings as to the conduct of the defendants in any particular city.[3]

An adjudication of antitrust violations over such a broad area cannot serve, without more, to establish a cause of action in favor of a particular plaintiff in a particular city. Manifestly, whatever conspiracy was found to exist in *Paramount* had to be related spatially as well as temporally

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[1] *United States* v. *Paramount,* 85 F. Supp. 881 (S. D. N. Y., 1949).

[2] See 1950 Findings of Fact 154(d) and 154(f) and 1950 Conclusion of Law 16.

[3] 66 F. Supp. 323, 342 (S. D. N. Y., 1946). There are references in the findings of fact to first run competition obtaining in ten named cities (Boston, Chicago, Los Angeles, Philadelphia, St. Paul, Washington, Nashville, Louisville, Indianapolis and St. Louis); but those references were included for the sole purpose of illustrating the extent of affiliation of first run theatres with the distributor defendants. See 1950 Findings of Fact 148. The 1946 Findings are reported in 70 F. Supp. 53 (S. D., N. Y. 1946). The 1950 Findings are unreported, but can be found in the record in *United States* v. *Loew's et al.,* October Term, 1949, No. 847.

to the alleged damage suffered by petitioner. This is demonstrated by *Dipson Theatres, Inc.* v. *Buffalo Theatres, Inc.*, 190 F. 2d 951, 958 (2d Cir., 1951), where Judge Augustus Hand, speaking for a unanimous court, said:

> ". . . There is also no showing that evidence of the Buffalo situation was introduced or relied upon by the government in proving the conspiracy in the Paramount case. Therefore we must look to the record in this case to see if Dipson has shown that the general conspiracy found to exist in the Paramount case, or some other conspiracy, had as one of its objects or effects the monopolization of the first and second run exhibition of pictures in the Buffalo area and that he suffered injury as a result."

(c) *The subject matter difference.*

The *Paramount* case dealt with a number of trade practices in the movie industry. But petitioner does not, and cannot, show a single instance in which either the District Court or this Court in the *Paramount* case condemned, or even considered, the propriety of licensing first run pictures to downtown theatres, rather than neighborhood houses.

In view of these three significant differences between what was adjudicated in *Paramount* and what petitioner had to prove here, it was clearly incumbent upon the court to explain to the jury that "the present factual situation which is before you now with respect to Baltimore . . . was not before the Court in the prior case." This is the incontrovertible truth, and failure to have so informed the jury would have been grossly misleading.

The court, therefore, told the jury in substance that the *Paramount* case was an action in equity brought by the Government against respondents under the antitrust laws

at a time prior to the opening of the Crest Theatre; that respondents were found to have conspired in restraint of trade to restrict first run product to themselves, and to establish clearances, in numerous places throughout the United States; that these proven facts were *prima facie* evidence in the present action of that conspiracy; and that the jury was entitled to consider those facts in determining whether respondents, in denying the Crest a first run in Baltimore subsequent to the *Paramount* case, acted in concert.

If the decrees were admissible at all, this was the most that petitioner was entitled to by way of instructions under section 5. The instructions by no means eliminated the decrees from the case, as petitioner contends. What they did was to limit the decrees to their maximum permissible significance: *prima facie* proof of a 1945 conspiracy, which then became a fact in the case like any other fact, to be considered with all the evidence in determining whether a later conspiracy had been proved in Baltimore.

Petitioner's contention that these instructions were too restrictive, because the jury should have been told that the decrees were *prima facie* evidence of the identical conspiracy charged in the complaint, is untenable.

The *Emich* case, which is a classic example of the proper application of section 5, does not help petitioner, for there the plaintiffs had been in business during the existence of the very conspiracy covered by the Government action and had been victims of that conspiracy. Indeed, one of plaintiffs' officers had testified in the Government action as to the acts performed by the defendants which injured plaintiffs' business. For that reason, this Court held that the decrees were sufficient to establish a *prima facie* case of conspiracy, which plaintiffs had to supplement only by inde-

pendent proof of impact and damage. Obviously, nothing decided in *Emich* holds that a plaintiff in a treble damage action, who was not in business during the period covered by the prior Government suit, and who therefore must prove a subsequent conspiracy, may discharge its burden by the mere introduction of a decree attesting to an earlier conspiracy.[1]

In summary, the contested charge clearly did not require petitioner to retry the *conspiracy found in the Paramount case.* It did require petitioner to prove the *later conspiracy in Baltimore* on which it sought to recover. As such, the instruction was clearly proper.

(2) *The alleged brevity of the charge.*

Petitioner further assails the charge as too "superficial and limited". Since it made no such objection below, the question is not properly before the Court.[2] In addition, there is no substance to the contention.

Counsel for petitioner referred to the *Paramount* litigation in his opening statement (R. 108, 109), and offered the decrees in evidence at the beginning of his case (R. 116-17). A lengthy hearing was then held outside the presence of the jury (R. 175-222), at the conclusion of which the trial court ruled against admissibility, but invited petitioner to renew its proffer at a later stage of the trial (R. 218-22).

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[1] *Twentieth Century-Fox Film Corp.* v. *Brookside Th. Corp.*, 194 F. 2d 846 (8th Cir., 1952), cited by petitioner (Br. 53, fn. 94), is distinguishable on the same ground, since the plaintiff had been in business in 1937. Nevertheless, it is interesting to note that the trial court instructed the jury as follows: "In admitting these findings in evidence for your consideration, you are charged that they of themselves do not establish any fact as to the activities of these defendants in Kansas City, Missouri. They cover a nationwide situation of which the Government complained." These instructions were approved by the Court of Appeals (194 F. 2d at 853).

[2] *Tyrrell* v. *District of Columbia*, 243 U. S. 1 (1917); Rule 51, Fed. Rules Civ. Proc.

Petitioner again offered the *Paramount* decrees at the end of its case. The trial court adhered to its ruling against admissibility, but without prejudice to petitioner's right to offer the decrees at the close of all the evidence (R. 482-3). Nothwithstanding that ruling, the court permitted counsel for petitioner to propound questions on cross-examination of various witnesses for respondents, so phrased that their obvious purpose, and necessary effect, was to apprise the jury of the previous government litigation (e.g., R. 559, 574, 619, 671-2, 762, 830).

At the close of all the evidence further argument was held as to the admissibility of the decrees (R. 914-46). Prior to this argument, petitioner's counsel had submitted typewritten portions of the decrees setting forth only four injunctive provisions (R. 914). During the argument the following colloquy occurred between the trial court and counsel for petitioner:

> "MR. ROME: . . . Those are the four things which we claim fit the present case directly within the issues that were raised and found in the Paramount case as to which these defendants have been enjoined. . . .
>
> "THE COURT: As I understand it, leaving out the exact words of the decree, you want to be able to argue to the jury as to putting in these decrees, that these parties were enjoined from doing the four things which you gave me on this special memorandum brief?
>
> "MR. ROME: That is correct, sir, as a result of there having been a finding they were violative of the Anti-trust laws, in the Paramount case they were enjoined from doing those things, and we would ask leave to say that to the jury.
>
> "THE COURT: . . . What you want to do, I suppose, is to have them in the record so you can summarize.

> "MR. ROME: Exactly, sir. That is exactly the point. . . . Your Honor has caught my point exactly of what I have asked leave to do, and what I think we are permitted to do within Section 5 of the Clayton Act, sir, is *to make a summary reference to the Paramount case* and point out what we consider to be its impact upon the present situation." (R. 915-16). (Emphasis added.)

After hearing these arguments the court stated that the admissibility of the decrees presented a "twilight zone" case (R. 943), and, resolving its doubts in favor of petitioner, changed its ruling and held that those excerpts from the decrees selected by petitioner would be received in evidence (R. 942-43; PX 97, R. 1157-61).

Petitioner never furnished the court with the record in the *Paramount* case, nor requested that it be read by the court.[1]

After ruling that the decrees were admissible, the court recalled the jury and delivered preliminary instructions as to the background of the decrees and their nature as *prima facie* evidence (R. 1001-02). Specifically, the jury was told that respondents had been enjoined from conspiring

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[1]Petitioner now complains of the court's failure to examine the *Paramount* record as allegedly required by *Emich* (Br. 48).

Emich was a criminal case. Examination of the record was necessary in order intelligently to determine what had been decided. However, there was no necessity to go through the thousands of pages in the *Paramount* case in view of the detailed findings of facts and conclusions of law that were made by the District Court and the comprehensive opinions in the case.

Petitioner quotes the judge as saying: "Well, I am not disposed to examine the record anymore than I have done from the papers that have been given me and the copies of the decree". But petitioner neglects to quote the very next sentence: "If I did, we would have to adjourn this case until the Fall term" (R. 917).

Petitioner's failure to provide the court with the *Paramount* record attests to its own belief that examination of the record was not necessary.

to maintain a system of clearances, from granting clearances between theatres not in substantial competition, and from licensing pictures on any run in any manner other than on a theatre-by-theatre basis "solely upon the merits;" and that the decrees were to be taken as *prima facie* evidence of conspiracy. Counsel for petitioner did not object to these ininstructions but remained silent, thereby indicating his approval. It was respondents who objected (R. 1002). Thereupon petitioner's counsel read his selection of excerpts from the decrees to the jury (R. 1002-05).[1]

Before delivering its charge to the jury, the trial court read to counsel its proposed instructions relating to the *Paramount* decrees (R. 1040-41). These instructions were in all material respects identical to those ultimately given to the jury. After reading its proposed charge, the court asked, "Do counsel want to say anything?" Again counsel for petitioner had no objection or suggestion, as indicated by his silence. And again respondents objected (R. 1041-2).

Petitioner, having been accorded precisely the opportunity it sought—to argue to the jury concerning the in-

[1]Petitioner's contention that it was prejudiced by the court's delay in admitting the *Paramount* decrees is devoid of any merit. No exception on this ground was taken below; the point is not within the scope of the questions presented in the petition for certiorari, and indeed was not even mentioned in the petition and supporting brief. Moreover, petitioner acquiesced in the delayed admission of the decrees. The record shows that after the court explained to counsel why it was deferring a final ruling on admissibility until the end of the case, and pointed out that it could not see how such a deferred ruling could be prejudicial to petitioner, petitioner's trial counsel stated: "I will be happy to be governed by Your Honor's wishes" (R. 495). It was clearly within the discretion of the trial court under the *Emich* case to control the order of proof in this respect. If anything, delaying the reception of the decrees until the conclusion of the entire case, and then instructing the jury as to their *prima facie* effect shortly before the charge, and amplifying those instructions in the charge itself, gave added prominence to this evidence, to petitioner's advantage and respondents' disadvantage.

junctive provisions of the decrees—delivered an argument in summation based upon those provisions and their effect as *prima facie* evidence (R. 1025-26, 1077, 1082-83, 1084, 1085-86, 1090-91.[1]

The court thereupon instructed the jury in its charge a second time with respect to the *Paramount* decrees (R. 1104-05), as quoted at pages 78-80 *supra*.

From the foregoing it is apparent that petitioner did not seek any precise and detailed analysis of the *Paramount* decision and its effect upon the case at bar. Indeed, petitioner would have shunned such an analysis since it would have demonstrated the highly tenuous nature of its reliance on the *Paramount* adjudication. All that petitioner sought was to have the record afford a basis for it to urge that the jury punish respondents for their past violation. That purpose was accomplished when the decrees were admitted and was facilitated by the general nature of the court's instructions.

(3) *The charge on burden of proving reasonableness of clearances.*

Petitioner in its brief complains in passing of that part of the trial court's instructions which related to the burden of proving the reasonableness of clearances (Br. 56). Here

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[1]Petitioner's argument in summation is epitomized by the following passage: "Perfectly true, it was not in a criminal case, it was in an equity case, but they have committed conspiracy in order to exclude independents from having access to the first-run field, and I feel confident His Honor will so explain that to you when he comes to discuss the effect and impact of the Paramount case. So, if they committed conspiracy before, they are perfectly capable of coming in and committing conspiracy again, because the Courts have recognized there was a strong temptation on the part of people who for a period of 20 years continued a uniform conduct and uniform course of action, to continue with that course, and it came out here before from other counsel." (R. 1085).

again no objection was taken by petitioner at the trial. The record shows that it was respondents who objected and not petitioner (R. 1119). Hence the propriety of these instructions is not reviewable.

In any event, the charge was much more beneficial to petitioner than it had any right to expect. The charge was based on the following portion of the *Paramount* decrees: "Whenever any clearance provision is attacked as not legal *under the provisions of this decree,* the burden shall be upon the distributor to sustain the legality thereof" (R. 1003) (emphasis added).

It is well settled that the entry of a decree confers no rights upon strangers to it. See *United States* v. *Paramount,* 75 F. Supp. 1002 (S. D. N. Y., 1948). It is patent that the only way in which the legality of a clearance could be attacked under the terms of the decree would be in a contempt proceeding brought by the Government, and that the District Court in including such a provision in its decree had no intention of formulating a novel, substantive rule of law that would have universal application akin to a statute in every treble damage action which might thereafter be brought against the defendants.

Furthermore, petitioner's interpretation of the word "clearance" in the decree is far too sweeping. The accepted meaning of that term, as we have pointed out, is the period of time elapsing between successive runs. It is in this sense that the decree refers to clearance when it provides for shifting the burden of proof. The reasonableness of the 21-day clearance having been conceded by Myerberg, clearance was not an issue in the case. The sole issue was whether there had been a conspiracy to deny petitioner a first run. There was accordingly no necessity for any

charge whatsoever relating to the burden of proof as to the reasonableness of clearance. To the extent that the trial court did place such a burden on respondents, it is clear that petitioner was benefited rather than harmed.

(4) *The charge as to the right of Warner and Loew's to place their pictures in their own theatres.*

The trial court instructed the jury that Warner and Loew's each had a right, as a distributor, to prefer its own theatres, and that such preference was not, *in and of itself,* proof of conspiracy on their part (R. 1103). Petitioner objected to these instructions below, and reiterates its objection now (Br. 56-57), on the ground that the trial court should have pointed out to the jury that "even though these distributors might have some right to put their own pictures into their own theatres, there would be the element of day and date and the prohibition in the *Paramount* decree, on the part of these distributors in granting clearances to theatres not in substantial competition" (R. 1113). The trial court, however, had previously adequately charged the jury in regard to petitioner's claim for a day and date first run with the downtown theatres (R. 1095-96, 1102), and as to the significance of substantial competition in determining the legitimacy of that claim (R. 1001, 1102). Since its earlier instructions were clearly sufficient, there was no necessity for repetition of those instructions in dealing with Loew's and Warner.

Contrary to petitioner's assertion (Br. 57), the trial court at no time told the jury that Warner and Loew's "had the absolute legal right to place their own pictures in their own theatres, on any terms they saw fit", and no such objection was made on this ground below.

Petitioner now advances a further objection to this phase of the charge which was not interposed below (Br. 58). It argues that since the final decrees against Loew's and Warner were not entered until February, 1950, the proviso in the decrees permitting those companies to license their pictures in their own theatres "in such manner, and upon such terms, subject to such conditions as may be satisfactory to it," for a period of three years, merely gave them immunity from contempt action by the Government for the period allowed for theatre divestiture, but did not confer retroactive validity to the prior licensing of their theatres. There is no merit to this contention. The instruction does not depend on the decrees alone for its validity. For such an instruction merely explains, as this Court held in the *Paramount* case, and in *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (1948), that vertical integration is not illegal *per se*.[1] The present contention in essence is that the licensing by a distributor of its own pictures in its own theatres is a *per se* violation of law unless protected by judicial decree.

Moreover, the issue here was conspiracy. As Judge Augustus N. Hand said in the *Dipson* case, 190 F. 2d at 960, the action of the distributors in favoring their own theatres "was to be expected, and the fact that they did so is no evidence that they conspired to do so jointly rather than doing so individually".

(5) *Refusal to grant petitioner's requests to charge.*

Petitioner's objection to the failure of the court to charge as to the *Paramount* decrees pursuant to its requests is both unavailable and unavailing.

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[1]Petitioner expressly recognized this basic legal principle in the trial court (R. 213).

(a) *Petitioner did not properly except below.*

The only objection which petitioner noted after the trial court had failed to charge as requested consisted of a general exception to its failure to charge pursuant to "our requests submitted to you, which we believed should be given to the jury with respect to specific aspects of the *Paramount* case" (R. 1113-14), followed by a numerical enumeration of some 58 requests, including 16[1] relating to the *Paramount* case (R. 1116-17). Petitioner made no effort to demonstrate to the court in what respects, if any, its charge concerning the *Paramount* decrees was inadequate, or wherein petitioner's proposed instructions were preferable.

It was just such an omnibus objection as this that Rule 51 of the Federal Rules of Civil Procedure was designed to prevent. That rule explicitly provides that "No party may assign as error . . . the failure to give an instruction unless he objects thereto . . . stating distinctly the matter to which he objects and the grounds of his objection." This is but a restatement of what has always been the law in the federal courts. For it is a settled rule of appellate review that a catch-all exception such as petitioner employed below, which merely objects to the denial of a series of requests without apprising the trial court of the respects in which refusal of any of the requests is claimed to be error, does not preserve for review the propriety of rejecting any individual requests.[2]

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[1]Nos. 12, 31, 61, 70-80, 83 and 93 (R. 38, 43-44, 51, 53-55, 56, 57).

[2]*Beaver* v. *Taylor*, 93 U. S. 46 (1876); *Jones* v. *East Tennessee, V. & G. R. Co.*, 157 U. S. 682 (1895); *Hansen* v. *St. Joseph Fuel Oil & Manufacturing Co.*, 181 F. 2d 880, 886 (8th Cir., 1950); *United States* v. *Daily*, 139 F. 2d 7, 9 (7th Cir., 1943); *Baker* v. *United States*, 21 F. 2d 903, 906-907 (4th Cir., 1927); *Buckeye Powder Co.* v. *E. I. Du Pont de Nemours P. Co.*, 223 Fed. 881,

The reason for the rule is that fairness to the trial court and to the parties requires that "objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error." *Palmer* v. *Hoffman*, 318 U. S. 109, 119 (1943).

Petitioner's failure to comply with this rule is inexcusable because it had more than the usual opportunity and notice to do so—the court having read its proposed charge concerning the *Paramount* case to counsel before actually delivering it to the jury (R. 1040-41), and having notified petitioner that objections should be made to the charge if it was considered inadequate (R. 1000).

Accordingly, whether the trial court should have granted any of petitioner's requests for instruction may not properly be considered here.

886-87 (3rd Cir. 1915), aff'd 248 U. S. 55 (1918); *cf. Palmer* v. *Hoffman*, 318 U. S. 109, 119-20 (1943).

As stated in *Buckeye Powder Co.* v. *E. I. Du Pont de Nemours P. Co., supra*: "Some of the assignments are not the subject of a proper exception. At the close of the evidence the plaintiff submitted a series of 27 requests for instruction, and the trial judge did not answer them specifically, believing that he had substantially answered them in his general instructions, as of course he had a right to do. This is evident from what he said at the end of the charge:

> "'As to the plaintiff's requests, as I recall it, I have touched upon every one of these requests, and I therefore will not charge them in the language requested, but counsel may take an exception, of course, to the fact that I do not specifically charge in the precise language requested.'

"This, of course, invited counsel to point out which instructions, if any, they did not regard as sufficiently answered in the general charge. Many decisions declare that fairness to the court requires this to be done; but the plaintiff's counsel, instead of specifying errors or omissions or insufficient answers, asked for an exception in the most general language possible: 'We also except to that portion of your honor's charge which refuses to give our instructions, except as charged.' The Supreme Court has several times decided that such an exception does not call the court's attention properly to what is objected to, and is therefore insufficient. [Citing cases]."

(b) *Refusal of petitioner's requests was not error.*

Apart from the fact that it is not open to petitioner to challenge the action of the trial court in refusing its requests to charge, such action was in each case a proper exercise of the court's discretion.

In the *Emich* case this Court refused to lay down any "mechanical rule . . . to control the trial judge" in explaining to the jury the effect of a prior Government decree admitted pursuant to Section 5, observing that the judge

> "must take into account the circumstances of each case. He must be free to exercise a 'well-established range of judicial discretion.' " 340 U. S. at 571.

Each of the sixteen requested instructions falls into one or more of the following categories:

(i) Requests which were superfluous or adequately covered in the court's instructions.

Most of the requests were cumulative and repetitious, and the trial court's refusal to grant them may be justified on that ground alone. *Good Holding Co.* v. *Boswell,* 173 F. 2d 395, 401 (5th Cir., 1949). Although there were some differences in phraseology between the court's charge and petitioner's requested instructions, it can hardly be said that the court's decision to use its own language rather than that suggested by petitioner was error.

Thus petitioner in effect requested the court to instruct the jury in six different ways that the *Paramount* decrees adjudicated that respondents had caused the exclusion of independents from the first run field by fixing runs and clearances (Nos. 70, 71, 76, 77, 78, 79; R. 53-55). The language actually employed by the court was that it was

found in *Paramount* that respondents had "conspired together in restraint of trade . . . in restricting to *themselves* first run and in establishing certain clearances in numerous places throughout the United States" (R. 1105) (emphasis added).

In view of this specific instruction as to the nature of the conspiracy adjudicated in *Paramount,* Request No. 74, that "the best customers of each of the big five defendants were ordinarily one or more of the other defendants" (R. 54), was clearly superfluous. Moreover, this instruction was plainly inapplicable to the theatre situation in Baltimore.

Requests Nos. 75 and 76, which are couched in terms of the defendants having been "convicted" of conspiracy to fix runs and clearances in the *Paramount* case (R. 54), were definitely improper because they erroneously implied that *Paramount* was a criminal prosecution in which the defendants were found guilty beyond a reasonable doubt. Furthermore, their content was adequately covered in that portion of the court's charge which described the conspiracy found in the *Paramount* case.

Similarly, Request No. 80, that the court instruct the jury that the decrees in the *Paramount* case were *prima facie* evidence of the wrongful conspiracies and conduct found in that case (R. 55), was fully—indeed, more elaborately—covered in the court's charge (R. 1104-05).

Request No. 83—that the distributors were under a duty to license their films theatre by theatre without discrimination in favor of affiliates—was specifically covered in the trial court's instructions to the jury at the time the decrees were received in evidence (R. 1001).

Needless to say, the failure of the court to adopt and give repeated effect to petitioner's flamboyant language in

many of these requests was by no means a breach of the "well-established range of judicial discretion" entrusted to it under the *Emich* case.[1]

(ii) Requests relating to respondents' "proclivity" to unlawful conduct.

Four of the proposed instructions (Nos. 12, 61, 72, 73) were nothing more than varied ways of apprising the jury that since respondents had been found to have violated the Sherman Act in the past, it could be assumed that they were violating that statute during the period covered by the complaint (R. 38, 51, 54). The impropriety of any such charge has already been demonstrated, *supra* pp. 73 to 74. Moreover, petitioner's counsel argued "proclivity" to the jury at length both in his opening and summation. (See, *e.g.*, R. 107-09, 1025-26, 1085, 1090-91.) Hence petitioner's complaint really is that the court breached its discretion in failing to repeat under its aegis and blessing the prejudicial and erroneous arguments which petitioner had already made to the jury.

(iii) Requests which were misleading because of their failure to limit the temporal coverage of the Paramount findings.

It is hornbook law that unless a request for instructions is entirely correct, has no tendency to be misunderstood, and may properly be given without qualification, there is no error in refusing to grant it.[2] Each of petitioner's requests

[1]The trial court characterized petitioner's 97 requests to charge as "pretty much in the nature of a brief for the plaintiff" (R. 956).

[2]*Palmer* v. *Hoffman*, 318 U. S. 109, 120 (1943); *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 393 (1924); *Catts* v. *Phalen*, 2 How. 376 (1844); *Coney Island Co.* v. *Dennan*, 149 Fed. 687, 692 (6th Cir., 1907).

which relates to the findings in the *Paramount* case suffers from the same basic infirmity of failing to specify the time as of which the conduct described in the finding took place.[1] Thus, to have granted these requests in the form proposed would have been grossly misleading, since the jury might well have supposed that the conduct occurred during the period of petitioner's business existence instead of several years earlier. Obviously this would have been highly prejudicial to respondents since the existence of a post-1945 conspiracy was the very point in controversy.[2]

If petitioner was entitled to any advantage at all under section 5 (and we submit that it was entitled to none), the trial court accorded it as large a benefit as could conceivably be derived from that section. In no event, therefore, is petitioner in a position to complain of the court's charge with respect to the *Paramount* decrees.

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[1]Requests Nos. 70, 71, 72, 74, 75, 76, 77, 78, 90 and 80.

[2]The only other requests refused by the trial court that had any conceivable bearing on the *Paramount* case were Nos. 31 and 93. The former, referring to this Court's condemnation of "any system of clearances which has acquired a fixed and uniform character," was properly refused because it states an abstract proposition of law, without relating it to the particular facts of this case. Moreover, the trial court adequately described in its instructions to the jury what was adjudicated in the *Paramount* case with respect to runs and clearances (R. 1001, 1105). As for request No. 93, relating to the burden of proof with respect to the reasonableness of clearance, it was clearly improper for the reasons discussed *supra*, pp. 88-90.

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

BRUCE BROMLEY,
Counsel for Respondents Paramount Film Distributing Corp., Loew's Incorporated, RKO Radio Pictures, Inc., Twentieth-Century Fox Film Corporation, Universal Film Exchanges, Inc., United Artists Corporation.

FERDINAND PECORA,
Counsel for Respondents Warner Bros. Pictures Distributing Corp., Warner Bros. Circuit Management Corp., Columbia Pictures Corporation.

Of Counsel:

MILTON HANDLER
R. DORSEY WATKINS
J. COOKMAN BOYD, JR.
E. COMPTON TIMBERLAKE
STANLEY D. ROBINSON