THE YALE LAW JOURNAL

VOLUME 58

JUNE, 1949

NUMBER 7

THE TRIAL OF ECONOMIC AND TECHNOLOGICAL ISSUES OF FACT: I*

GEORGE H. DESSION†

COMPLEX economic and technological issues have come before the courts with increasing frequency in recent years, reflecting the growth of regulatory legislation and the conflicts which account therefor. Many of these issues originated before administrative agencies. Others have originated as criminal or civil proceedings in the courts. Their number is considerable. But there has been little comment on the evidential—as distinguished from the substantive—problems involved. This discussion will focus on the recurring types of economic and technological issues of fact presented in antitrust proceedings, particularly those of the industry-wide type. Many of these proof problems are of course similar to those which arise in other types of regulatory proceedings, so that conclusions here developed are not confined in application to cases under the Sherman Act.

One unique aspect of these issues is their typical vastness of scope, whether the issue be one of industry history, the purpose and effect of some continuing distributive practice, or the scale of operation necessary to draw the maximum benefit from modern technology and to contribute to the future development of that technology. The sheer volume of factual material which must usually be assembled, evaluated, and organized for presentation in court typically presents a task of staggering proportions. Considerable adaptability and inventiveness on the part of all involved in the processes of adjudication are necessary if these issues are to be explored with the informed subtlety which they deserve, rather than dealt with in broad-axe fashion.

Visual presentation devices for summarizing masses of data and rendering them intelligible are of course at a premium, and no doubt will be increasingly utilized as techniques progress. The history of a technology, for example, could probably most effectively be presented in the form of a documentary film. Specially prepared studies, statistical and otherwise, also bulk large in proof. Testimony by a variety of economic, trade and marketing experts is another common feature. Novel ques-

* The concluding portion of Professor Dession's article will appear in the next issue of the JOURNAL.

† Lines Professor of Law, Yale Law School.

tions inevitably arise with respect to the admissibility of such evidence and the possibility of relaxing certain foundation requirements normally adhered to in proceedings where proof is simpler and more manageable. Court and counsel, indeed, not infrequently find that they must proceed on relatively uncharted ground. Most of the more specific rules of evidence and procedure were, after all, developed in the context of shorter and simpler trials. For evolving practice with respect to economic proof one must therefore look to the trial courts. Discussion of these evidential issues on the appellate level is relatively meager. In lieu of operational formulations of standards of proof, the opinions usually state merely that this or that proposition was "adequately established by the evidence," or "clearly shown."

But what, for example, are the criteria for evaluating a circumstantial case of conspiracy? How far may a given type of economic expert witness go in drawing inferences with respect to the effects of various industry practices and their impact on the possibilities of competition in the industry, increased production, wider distribution, full employment, successful competition from abroad, and the American industrial potential for national defense? What sorts of information may such an expert take into account without necessity for its introduction into evidence or availability to opposing counsel for purposes of cross-examination? These are a few samples of the types of evidential issues which recurrently arise and as to which counsel must make critical pre-trial judgments—matters of no little concern considering the substantial financial investment normally required to assemble any chosen type of industry proof on issues of this nature. Beyond questions of admissibility there are some important questions as to burden of proof. Antitrust proceedings may, at the option of the government, be either criminal or civil. Should a lighter burden of proof be required where the proceeding is civil, or should this depend on the severity of the legal sanctions actually to be imposed? ¹

CONSPIRACY TO RESTRAIN TRADE AND TO MONOPOLIZE— THE NATURE OF THE ISSUES

A concentration of more than 50% of the production and sale of a manufactured commodity or technologically related group of commodi-

1. Suppose, for example, that the government seeks dissolution, divorcement or divestiture in an equitable proceeding under the Sherman Act. And *cf.* M. R. Cohen, *On Absolutisms in Legal Thought*, 84 U. OF PA. L. REV. 681, 686 (1936): "As regards substance and as regards procedure the civil and the criminal law overlap so that it is impossible to say with absolute precision where one begins and the other ends. . . . As to the difference of procedure, it is easy enough to call certain procedures criminal and others civil, but not easy to define the difference. . . . Despite all sorts of theoretical differences, such as the different degrees of evidence required, such civil actions do not in effect differ very much from prosecutions to enforce penalties for certain misdemean-

ties in the hands of a relatively small number of otherwise distinct business organizations seems increasingly typical of American industry;² and the pre-war case of Alcoa is an instance of even greater concentration in one organization. The nature of the issues to be litigated when such situations are challenged is our present concern. This portion of the discussion will be based primarily on three recent anti-trust proceedings—those against (1) the Tobacco Companies,³ (2) Alcoa,⁴ and (3) the Flat Glass group of manufacturers.⁵ The first and last groups were alleged by the government to be oligopolies. Alcoa was alleged to be a monopoly. The first was a criminal proceeding under the Sherman Act and the last two were equity proceedings. The first two were litigated through to final judgment in favor of the government. The last was partially litigated but terminated with a consent decree. The focus of this portion of the discussion on these three cases is based on the belief that the problems of trial preparation which they presented are reasonably typical of the great majority of important trade regulation cases.

Special interest attaches to the Supreme Court's opinion in the *Tobacco* case. Together with the opinion of the court of appeals in the *Alcoa* case,⁶ it sheds considerable light on the difficult problem of what constitutes monopoly under Section 2 of the Sherman Act. Read against the voluminous record, the *Tobacco* opinion is also suggestive with respect to the central problem of proof in major oligopoly cases—the criteria which will determine whether the transactions, practices, and conditions relied upon by the government suffice as circumstantial proof of conspiracy.

The sweeping repercussions of the *Tobacco* decision in this respect become apparent when one compares the government's theory of action therein with its allegations in other recent proceedings such as that against the Flat Glass companies. In both of these cases the government sought to portray as a unit separate and distinct companies alleged to have conspired together in violation of Sections 1 and 2 of the Sherman Act, to have committed restraints, and monopolized an industry. In both, the "industry" or "trade and commerce" was so

ors. . . . Nor are the fines of the criminal law necessarily more severe than the civil damages that are frankly recognized as punitive. Consider, for instance, the triple damages paid by the Danbury union hatters under the Sherman Anti-Trust Law. . . ."

2. See Levi, *The Antitrust Laws and Monopoly*, 14 U. OF CHI. L. REV. 153, 164 (1947).

3. *American Tobacco Co. v. United States*, 323 U.S. 781 (1946).

4. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

5. See amended complaint filed March 19, 1946, in *United States v. Libbey-Owens-Ford Glass Co.*, Civil No. 5239 (N.D. Ohio 1946), and consent decree dated October 30, 1948, CCH TRADE REG. REP. (9th ed.) ¶ 62,323 (1948).

6. See especially that portion of *Alcoa* expressly adopted by the Supreme Court in *American Tobacco Co. v. United States*, 323 U.S. 781, 813 (1946).

defined by the government as to include otherwise distinct lines of trade and commerce, joining defendants engaged in only one of the several lines and defendants who admittedly were not in existence or operating in the conspiracy throughout the period of its alleged duration. And, while the *Tobacco* case was a criminal proceeding and *Flat Glass* was civil, the government pleadings in both were drawn on the same basic pattern. Inevitably, it is from this pattern that the issues to be litigated arise.

The pattern consists in alleging an overall conspiracy to dominate, under which practically everything done by the defendants in the conduct of their business over a long period of time, broken down into classes of "practices", is subsumed.⁷ These classes became the "methods and means" whereby the alleged conspiracy was furthered. In both cases factors such as price leadership, selective selling, cooperative activities and the established position of the defendants figure prominently in the allegations.

The government naturally relies on acts and transactions which actually happened. The real issue is as to their ultimate characterization and effect—not as isolated acts or transactions, but in the aggregate and, of course, viewed long after the fact. The government found this pattern effective in the *Tobacco* case. The convictions were unanimously affirmed both in the court of appeals⁸ and in the Supreme Court of the United States. The Supreme Court's opinion, as we shall see, went all out in endorsing the government's theory, and in addition took occasion to endorse portions of Judge L. Hand's opinion in the *Alcoa* case which are of significance here.

This is the pattern of attack in industries comprised of a few large

7. See *United States v. General Electric Co.*, 82 F.Supp. 753, 902-3 (D.N.J. 1949), per Forman, J.:

"There was little oral testimony offered on the part of the Government to develop its case, reliance being placed upon documentary evidence or cross-examination of defense witnesses. The major portion of the documents is from the files of the defendants supplied on request of the Government and by stipulation their genuineness and authenticity were admitted. Preliminary objections were offered to their admissibility at pre-trial hearings. Certain documents were admitted into evidence subject to objections of General Electric and International General Electric as contained in their motion to strike for reasons therein specified on which decision was reserved.

* * * *

"The documents herein presented a panorama of corporate practices in a specialized field covering a period of fifty years. A major industry has been exposed to a searching inquiry to determine whether in the light of the facts developed, practices detrimental to trade and commerce of the United States are in existence. Exaggerated and over refined niceties in the rules of evidence must give way to the broad terms of Rule 43(a), Federal Rules of Civil Procedure, if full effect to the anti-trust laws is to be given."

8. *American Tobacco Co. v. United States*, 147 F.2d 93 (6th Cir. 1944).

units. The extent to which the government may be expected to continue to rely on it was indicated by the government brief filed in the *General Electric* case⁹ in which the *Tobacco* decision was cited throughout.

In cases where it is the government's theory that an aggregate of defendants have monopolized the trade and commerce in their field, a conspiracy so to monopolize must of course be established, and the case will stand or fall on that issue. Thus one searching question for evaluation of a trial brief and general plan of offense or defense is: What factors will determine whether an inference of conspiracy may be drawn from any given transaction, agreement or cooperative arrangement between two or more of the defendants, or from a common practice (pursued by each with awareness that the others would probably do likewise)?

Proof of any conspiracy requires a showing of "intent". Under Section 2, however, intent need not be "specific". It is enough if defendants entertained a common purpose embracing the doing of acts which, in the view of the court, tend to create a monopoly. This "monopoly" which transactions and practices otherwise innocent may not lawfully tend to foster is defined by the Court only as a power to exclude existing or potential competitors from any part of interstate trade and commerce, coupled with an intent to exercise the power. But power is relative. To measure by the Court's formula an industry situation attributed to exclusionary practices, one must ask: What sorts of competitors should be able to compete and under what conditions?

In the *Tobacco* case the court was not obliged to, and did not, answer these questions. The *Alcoa* case is of course distinguishable, since it was not one of "oligopoly". The latter opinion, however, clarifies the desired "organization of industry" against which agreements and common purposes may not work without giving rise to the inference of a conspiracy in violation of Section 2 of the Sherman Act. The organization to be fostered and protected, according to Judge L. Hand, is one of "small units which can effectively compete with each other," and this state of things is desired "for its own sake," and "in spite of possible cost."¹⁰

In view of this underlying philosophy any oligopoly case presents two broad issues: (1) Is the industry as presently constituted monopolistic within the meaning of the Sherman Act? This is the "effects" part of the case, on which the defense must take the initiative and develop its own picture of the industry, or more often than not fail. An adequate showing on this issue depends on the economic proof—the industry history, technological factors, distribution problems, and problems of foreign competition. The government may not develop this phase of the case, since public policy as well as legal norms in these areas are

9. Filed Aug. 30, 1946.

10. *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945).

unintegrated and unclear.¹¹ The defense should therefore primarily be organized around an affirmative exposition of this issue. And (2), were particular acts or transactions in which defendants participated done with an actual purpose (or specific intent) to restrain or exclude competitors, or otherwise "dominate" the industry? From a defense point of view this is the negative phase of the case. The Answer will presumably deny such purpose or intent. Throughout the trial the effort will be to place every questioned act or transaction in its total context of motivation, effect, and government-approved policy as of the time; in short, to localize it.

By these standards, typical highlights of an antitrust defense include propositions such as the following: The product contributes to the economy; the history of its technology, together with the requirements of the technology, show that it cannot feasibly be manufactured and distributed by small or single-plant units; selective selling is necessary and has nothing to do with any monopolistic purpose; price leadership, generally speaking, is unavoidable as a competitive matter; the real difficulties which would confront a new competitor in the field are inherent in the advanced state of the technology, in the conditions of conducting business on a nation-wide scale, and in the nature, handling and use of the product; operation on a nation-wide basis is justified, since competition would otherwise be reduced; the size and scale of operation of actual and potential foreign competitors have a bearing on the problems of the American-owned and/or managed companies.

A. Factual Background of Conspiracy: The Tobacco Case

The legal standards thus far suggested are, for the government, the most favorable for which support can be found in the opinions in *American Tobacco Co. v. United States* or any of the related decisions. Actually, given the facts summarized and commented upon in the opinion of the Supreme Court as well as in the opinion below, there was no necessity for the Court to go so far. (The certiorari was limited to the substantive question of interpretation of Section 2 of the Act, but "All the grounds urged for review of those judgments were considered here on petitions for certiorari.")¹²

Salient differences between the *Tobacco* case and some other oligopoly cases including the *Flat Glass* case should be noted at the out-

11. Cf. *Levi*, *supra* note 2, at 183: "The Sherman Antitrust law embodies a tradition against monopolies. That tradition is confused. It is not clear whether we are against monopolies or only against their abuses. For almost all of the history of the act, it has been applied as a practical matter only against the abuses. . . . Today, however, as a result of an increased awareness of the monopoly problem, and as a result of the *Alcoa* and *American Tobacco* decisions we appear to have a new interpretation of the act, closer probably to its original intention. . . ."

12. 328 U.S. 781, 784 (1946).

set, especially since many of them lie in facts on which the Supreme Court placed considerable emphasis.

The *Tobacco* case centered around a single product—cigarettes—of relatively simple manufacture. They can, after all, be rolled by hand. The machines employed are small and relatively inexpensive units. No complex technology confronts the newcomer (many club brands, for example, are manufactured by small independents operating in lofts). No special problems are involved in handling and shipment. Demand is constant. Distributive overhead costs are at a minimum. In the hands of the retailer—of whom no special skill, service or equipment is required—the product sells itself. Consumer preference in the field—according to evidence which the court of appeals found substantial—depends largely on national advertising.

In contrast to the position of *Flat Glass* manufacturers in relation to their major customers in the automobile industry, each of the "Big Three" manufacturers of cigarettes is bigger than any of its customers or, for that matter, its suppliers of raw materials.

Another distinguishing feature of the *Tobacco* case consists in the nature of the conspiracy proof. While the mass of the government's evidence was circumstantial, there was clear and *direct* evidence of collusion between the Big Three on a variety of occasions, *with the express motive and purpose to exclude competing ten-cent brands*. There was, for example, the so-called "Denver Incident," when representatives of each of the Big Three met together to devise means of manipulating the retail differential between the standard and "ten-cent" brands to the disadvantage of the latter. Its existence was proved by a series of written reports extending over a considerable period of time made by a Reynolds field superintendent to his home office. The same express motive and purpose in connection with other practices pursued by the defendants individually was similarly proved by direct written admissions. On several occasions the defendants cut their prices and sold at a loss in order to reverse an upward trend in the sales of the ten-cent brands.¹³ Other evidence of efforts on the part of the defendants to control the resale price of the ten-cent brands, as well as their own, through a system of rewards and penalties for dealers, implemented by an efficient check-up system, was found by the court of appeals to warrant the jury in finding from the conduct of *each* of the defendants an intent to monopolize, and the practices in question were viewed as illegal in themselves quite apart from the element of combination, within the rule of *FTC v. Beech-Nut Packing Co.*¹⁴

13. *Id.* at 806.

14. 257 U.S. 441 (1921). See *American Tobacco Co. v. United States*, 147 F.2d 93, 113 (6th Cir. 1944).

B. Theory of an Overall Conspiracy

While centering as a matter of trial emphasis in the *Tobacco* case on cigarettes, the government's theory of action embraced restrictive and monopolistic practices in the purchase of leaf in the auction and hogshead markets as well as in the manufacture and distribution of cigarettes. Major leaf dealers and buyers of leaf for export were named defendants along with the cigarette manufacturers.¹⁵ Shortly before trial the defendants other than the Big Three were severed on stipulation to abide by the outcome as against the Big Three, but evidence of the leaf purchasing practices of all defendants was used at the trial. The government was therefore obliged—to meet objections of duplicity and variance—to show that the purposes and practices of defendants on the leaf markets, in manufacture and in distribution, were interdependent. That this was done in a factual way will be apparent from the evidence hereinafter discussed. In any alleged oligopoly case some comparable interdependence of purpose of the defendants' dealings in producing and distributing their own products must be shown. The government's position may be assumed to be that the several products are so interchangeable in use as to be competitive with one another, that a monopoly of the trade in any one of them would be ineffective without a monopoly of all, or that some other comparable functional relationship exists.

C. Circumstantial Proof of Conspiracy in the Tobacco Case

In the *Tobacco* case the allegations of conspiracy were predicated in part on circumstances and practices falling into the following general categories: established position of defendants in the industry; price leadership; selective selling; and cooperative activities through trade associations and otherwise in the past. A review of the *Tobacco* evidence under each of these heads, and of the judicial comment thereon, may be of assistance in evaluating the findings in that case in relation to the evidence in other cases.

Established position in the industry: As of 1939 the Big Three cigarette manufacturers in the aggregate were producing about 68% of all American-made small cigarettes, and about 80% of the fifteen-cent or standard brands. Their shares in this business were roughly equal, and the three had enjoyed their predominant position in the industry for over a generation.

The district court charged that jury that:

"It is in no respect a violation of the law that a number of individuals or corporations, each acting for himself or itself, may own

15. Criminal No. 6670 (E.D.Ky.), filed July 24, 1940 and conformed to Court's order of Oct. 30, 1940.

or control a large part, or even all of a particular commodity, or all the business of a particular commodity.”¹⁶

On the underlying assumption that a conspiracy in violation of Section 2 had been proved, however, the Supreme Court commented that:

“Without adverse criticism of it, comparative size of this great scale inevitably increased the power of these three to dominate all phases of their industry. ‘Size carries with it an opportunity for abuse that is not to be ignored *when the opportunity is proved to have been utilized in the past.*’ *United States v. Swift & Co.*, 286 U. S. 106, 116. An intent to use this power to maintain a monopoly was found by the jury in these cases.” (Emphasis supplied)¹⁷

“The fact . . . that the purchases of leaf tobacco and the sales of so many products of the tobacco industry have remained largely within the same general group of business organizations for over a generation, inevitably has contributed to the ease with which control over competition within the industry and the mobilization of power to resist new competition can be exercised.”¹⁸

As of 1939, their combined assets exceeded \$551,000,000, and their combined net income exceeded \$75,000,000. It was also shown that in each of the years 1937, 1938 and 1939, the Big Three expended a total of over \$40,000,000 a year for advertising. The Supreme Court commented on this advertising as follows:

“Such advertising is not here criticized as a business expense. Such advertising may benefit indirectly the entire industry, including the competitors of the advertisers. Such tremendous advertising, however, is also a widely published warning that these companies possess and know how to use a powerful offensive and defensive weapon against new competition. New competition dare not enter such a field, unless it be well supported by comparable national advertising.”¹⁹

As presented to the jury, however, this advertising had a significance beyond the size or power of the defendants. It appeared as an integral part of the mechanism whereby jobbers and retailers were compelled by the defendants to carry cigarettes at small profit or even a loss, given the consumer demand and defendants’ manipulation of jobbers’ and retailers’ resale prices.

With regard to defendants’ industry position generally, the Court stated:

“Large inventories of leaf tobacco, and large sums required for pay-

16. 328 U.S. 781, 785 (1946).

17. *Id.* at 796.

18. *Id.* at 793.

19. *Id.* at 797.

ment of federal taxes in advance of actual sales, further emphasize the effectiveness of a well financed monopoly in this field against potential competitors *if there merely exists an intent to exclude such competitors*. Prevention of all potential competition is the natural program for maintaining a monopoly here, rather than any program of actual exclusion. 'Prevention' is cheaper and more effective than any amount of 'cure.' " (Emphasis supplied) ²⁰

The large stocks of leaf tobacco kept on hand at all times by the defendants figured prominently in the case. These normally exceed \$100,000,000 in value for each company, and were said by the defendants to be necessary to insure proper aging of the tobacco, but conflicting evidence was presented tending to show that they were much larger than necessary for this purpose. Their significance is enhanced by the fact that tobacco in the hands of the farmer is perishable and must be sold more or less immediately, whereas the Court found that these stocks "assured [defendants'] independence of the market in any one year." ²¹

Price Leadership: The pattern in pricing followed by the defendants was as described in the following statement by the Court:

"The list prices charged and the discounts allowed by petitioners have been practically identical since 1923 and absolutely identical since 1928. Since the latter date, only seven changes have been made by the three companies and those have been identical in amount. The increases were first announced by Reynolds. American and Liggett thereupon increased their price lists in identical amounts." ²²

The defendants gave the usual explanation as to why they felt obliged to meet the prices of their competitors. Three aspects of the evidence, however, led the Supreme Court to characterize the pricing policies of the defendants as follows:

"The following record of price changes is circumstantial evidence of the existence of a conspiracy and of a power and intent to exclude competition coming from cheaper grade cigarettes." ²³

First, the defendants gave conflicting explanations as to why a competitor's price had to be followed *up* (when one's costs did not require it) as well as down. The accumulation of explanations was as summarized in the following statement by the Supreme Court:

"During the two years preceding June, 1931, the petitioners produced 90% of the total cigarette production in the United States.

20. *Ibid.*

21. *Id.* at 799.

22. *Id.* at 804.

23. *Ibid.*

In that month tobacco farmers were receiving the lowest prices for their crops since 1905. The costs to the petitioners for tobacco leaf, therefore, were lower than usual during the past 25 years, and their manufacturing costs had been declining. It was one of the worst years of financial and economic depression in the country. On June 23, 1931, Reynolds, without previous notification or warning to the trade or public, raised the list price of Camel cigarettes, constituting its leading cigarette brand, from \$6.40 to \$6.85 a thousand. . . . *No economic justification for the raise was demonstrated.* The president of Reynolds stated that it was 'to express our own courage for the future and our own confidence in our industry.' The president of American gave as his reason for the increase, 'the opportunity of making some money.' . . . He further claimed that because Reynolds had raised its list price, Reynolds would therefore have additional funds for advertising and American had raised its price in order to have a similar amount for advertising. The officials of Liggett claimed that they thought the increase was a mistake as there did not seem to be any reason for making a price advance but they contended that unless they also raised their list price for Chesterfields, the other companies would have greater resources to spend in advertising and thus would put Chesterfield cigarettes at a competitive disadvantage. *This general price increase soon resulted in higher retail prices and in a loss in volume of sales.* Yet in 1932, in the midst of the national depression with the sales of the petitioners' cigarettes falling off greatly in number, the petitioners still were making tremendous profits as a result of the price increase. Their net profits in that year amounted to more than \$100,000,000. This was one of the biggest years in their history." (Emphasis supplied) ²⁴

Second, there was strong circumstantial evidence of collusion between the defendants with reference to their price changes, quite apart from the identity of their prices. For one thing, the changes were almost simultaneous. As the Supreme Court described it:

" . . . [W]hen dealers received an announcement of the price increase from one of the petitioners and attempted to purchase some of the leading brands of cigarettes from the other petitioners at their unchanged prices before announcement of a similar change, the latter refused to fill such orders until their prices were also raised, thus bringing about the same result as if the changes had been precisely simultaneous." ²⁵

There was also evidence that the A&P—utilized by all three petitioners as a large-scale price cutter to force down retail prices, and compensated therefor with favorable discounts and large cash advertising

24. *Id.* at 805.

25. *Id.* at 808.

allowances—on at least one occasion received advance notice of manufacturers' price changes.²⁶

Third, the price changes appeared to the Court to be without "economic justification." The vulnerability of the 1931 increase has already been indicated. Speaking of the 1933 price cuts, the Court said:

" . . . [T]he petitioners, in January, 1933, cut the list price of their three leading brands from \$6.85 to \$6. a thousand. In February, they cut again to \$5.50 a thousand. The evidence tends to show that this cut was directed at the competition of the 10 cent cigarettes. . . . When the sale of the 10 cent brands had dropped from 22.78% of the total cigarette sales in November, 1932, to 6.43% in May, 1933, the petitioners, in January, 1934, raised the list price of their leading brands from \$5.50 back up to \$6.10 a thousand. During the period that the list price of \$5.50 a thousand was in effect, Camels and Lucky Strikes were being sold at a loss by Reynolds and American. Liggett at the same time was forced to curtail all of its normal business activities and cut its advertising to the bone in order to sell at this price." ²⁷

Selective Selling: Each of the petitioners sold its products to jobbers and selected dealers at list prices, less discounts. A great advantage naturally accrued to any dealer buying at the discounted or wholesale price list.

The *Tobacco* case involved no criticism of selective selling as such. The petitioners could hardly be expected to sell direct to all of the million or more dealers who handle cigarettes at retail throughout the country. In selecting jobbers they are presumably entitled to take into account the number of jobbers already servicing the area, the credit standing of the applicant, and his facilities for handling the product. In admitting dealers to the direct list they are presumably entitled to consider the volume of the dealer's business and the impact of granting his application on the business of other local jobbers. The government's case involved no attack on any of this.

The government's case was, however, predicated in part on alleged abuses of the power involved in defendants' ability to grant or withhold the privilege of direct purchasing, with concomitant privileges such as "free goods," "drop shipments," extra credit allowances and advertising allowances. The court of appeals characterized defendants' practices in this regard as illegal in themselves, quite apart from any element of combination. The Supreme Court vigorously condemned these predatory practices.²⁸

Cooperative Activities: The government's case was in no way pred-

26. See 147 F.2d 93, 106 (6th Cir. 1944).

27. 328 U.S. 781, 806 (1946).

28. *Id.* at 808.

icated on joint activities under NRA or in connection with meetings held in the course of administration of AAA. These chapters in the history of the industry did not figure in the case.

Other cooperative activities did. The district court admitted considerable evidence concerning the Tobacco Merchants Association—chiefly supported by the defendants, and engaged primarily in maintaining a register of trademarks and copyrights, and in opposing unfavorable state sales taxes. Most of the activity of the Association, while apparently innocent, was considered relevant to show prior association and opportunity. The government made a point of the fact that the Association, while purporting to represent all tobacco merchants, was in fact operated as the agency of the major manufacturers. The government also contended that a telegram jointly authorized by the defendants to a legislative agent stating that all three would refuse to absorb a proposed sales tax amounted to a collusive attempt at pricing-fixing.

There was also evidence concerning the Tobacco Association of the United States. As the Court described it:

“The dates for opening the markets in the flue-cured belts are set by the Tobacco Association of the United States of which buyers, including petitioners, warehousemen and others connected with the industry, but not including farmers, are members.”²⁹

This evidence was treated as relevant to show prior association and opportunity, and as one more item in the accumulation of circumstances showing the dominant position in general enjoyed by the defendants.

Local Tobacco Boards of Trade in the several market towns figured quite prominently in the case. Voting control in these Boards was typically held by representatives of the defendants, and the record showed that normally they would vote as a unit. These Boards set the opening dates and closing dates for the local auction markets, and promulgated rules governing the conduct of the auctions—including the permissible speed of sale. The government contended that these Boards constituted a part of the mechanism whereby the defendants dominated the market, and that the rules and regulations promulgated were contrived to facilitate the collusive fixing of leaf tobacco prices, and the avoidance of competition for leaf among the defendants themselves.

Speaking of the prior association of the defendants generally and of its bearing on the case, the Court said:

“A friendly relationship within such a long established industry is, in itself, not only natural but commendable and beneficial, as

29. *Id.* at 800.

long as it does not breed illegal activities. Such a community of interest in any industry, however, provides a natural foundation for working policies and understandings favorable to the insiders and unfavorable to outsiders. *The verdicts indicate that practices of an informal and flexible nature were adopted* and that the results were so uniformly beneficial to the petitioners in protecting their common interests as against those of competitors that, entirely from circumstantial evidence, the jury found that a combination or conspiracy existed . . . with power and intent to exclude competitors . . ." (Emphasis supplied) ³⁰

D. "Monopoly" and "Conspiracy to Monopolize"

The certiorari in the *Tobacco* case was limited to the question—"not . . . previously decided by this Court"—whether "actual exclusion of competitors is necessary to the crime of monopolization under § 2 of the Sherman Act." ³¹ The district court's instruction had not called for proof of actual exclusion, the relevant portion being as follows:

"Now, the term '*monopolize*' . . . means the joint acquisition or maintenance by the members of a conspiracy formed for that purpose, of the *power to control and dominate interstate trade and commerce in a commodity to such an extent that they are able, as a group, to exclude actual or potential competitors from the field, accompanied with the intention and purpose to exercise such power.*" (Emphasis in original) ³²

This instruction was approved, and the convictions for monopolization were affirmed. The opinion assumes that the facts called for by the instruction, including the existence of the conspiracy to monopolize, were sufficiently established, the court of appeals having so held. It also assumes "that an actual exclusion of competitors by the petitioners was not claimed or established by the prosecution." ³³ In the course of the opinion the holding is restated even more strongly, as follows:

"Neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization under the Sherman Act." ³⁴

The rationale of this holding appears to be that the Act strikes at the menace as well as at its fulfillment. ³⁵

30. *Id.* at 793.

31. *Id.* at 784.

32. *Ibid.*

33. *Id.* at 787.

34. *Id.* at 810.

35. *Ibid.*

Intent to Monopolize: Both the district court's instruction and the Supreme Court's opinion stress intent to exclude competitors (or to fix prices) as an element of the offense. There was, however, little occasion to define this intent in the *Tobacco* case, since the evidence so clearly established the specific motive of the defendants to exclude manufacturers of competing ten-cent brands, and to fix prices as well. In other cases the precise requisites of the intent might or might not be more sharply in issue.

Read as a whole, the *Tobacco* opinion suggests that a general, rather than a specific intent will suffice. The following statements by Judge Hand in the *Alcoa* case, quoted with approval by the Supreme Court, are the most pointed:

"In order to fall within § 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing."³³

They were prefaced by quoting Judge Hand's discussion of the meaning of the Act:

"Starting, however, with the authoritative premise that all contracts fixing prices are unconditionally prohibited, the only possible difference between them and a monopoly is that while a monopoly necessarily involves an equal, or even greater, power to fix prices, its mere existence might be thought not to constitute an exercise of that power. That distinction is nevertheless purely formal; it would be valid only so long as the monopoly remained wholly inert; it would disappear as soon as the monopoly began to operate; for, when it did—that is, as soon as it began to sell at all—it must sell at some price and the only price at which it could sell is a price which it itself fixed. Thereafter the power and its exercise must needs coalesce. . . .

"It does not follow because 'Alcoa' had such a monopoly, that it 'monopolized' the ingot market: it may not have achieved monopoly; monopoly may have been thrust upon it. . . . [S]o far as concerns the public interest, it can make no difference whether an existing competition is put an end to, or whether prospective competition is prevented. . . .

" . . . [W]e can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. *Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pur-*

36. *Id.* at 814.

sued, be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act. . . ." (Emphasis supplied)³⁷

Judge Hand was, of course, speaking with reference to Alcoa—a single enterprise controlling approximately 90% of the virgin aluminum ingot market. But in the *Tobacco* opinion the Court found the above statements "especially appropriate here."³⁸ It seems clear that, given a conspiracy to monopolize, the aggregate power of the conspiring industry group will be viewed in much the same light as if it were the power of a single and distinct enterprise, and this despite the fact that the co-conspirators may seek to eliminate only certain forms of competition among themselves, while continuing actively to compete on other levels. In the *Tobacco* case, for example, it was never suggested that the defendants did not compete in their advertising. Government counsel conceded in summation to the jury that they did.

The net result of the foregoing discussion is that all transactions and courses of dealing which involve any privity or reflect any community of interest between two or more of the defendants—for it is from such evidence that the government seeks to establish conspiracy—must be evaluated not alone in terms of the actual purpose or motivation of the parties at the time, but also in terms of the demonstrable economic result. Evaluation by the court is made long after the fact. If that evaluation indicates, as the Court put it in the *Tobacco* case, that ". . . the results were . . . uniformly beneficial to the petitioners in protecting their common interests as against those of competitors . . .," a conspiracy may be circumstantially inferred. The parties will be held to have intended the natural and probable consequences of their acts.

This brings us to the criteria to be applied. Broadly speaking, the issue of conspiracy in each instance will turn on whether a transaction, agreement, cooperative arrangement or common practice (pursued by each with awareness that the others will probably do likewise) appears to the Court to have had a substantial tendency to promote a monopolistic organization of the industry—or, failing that, to have been done with a purpose to exclude actual or potential competitors.

Acts which may constitute circumstantial evidence of a common purpose to monopolize may then be classified as follows: (a) *Acts regarded as inherently tending toward monopoly, and so unconditionally condemned.* It is clear that agreements fixing prices fall into this category.³⁹ Other examples are discussed by Judge L. Hand in his *Alcoa* opinion, including contracts dividing a territory among producers.⁴⁰

37. *Id.* at 813-4.

38. *Ibid.*

39. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

40. *See* 148 F.2d 416, 427-8 (2d Cir. 1945).

The course of decision over recent years suggests that this category is an expanding one. (b) *Acts which, however lawful in themselves, can be shown to have been done with a specific intent to exclude competitors to a substantial extent.* In discussing *Fashion Originators' Guild v. FTC*,⁴¹ which dealt with a combination of dressmakers who set up a boycott against retailers dealing in "pirated" designs, Judge Hand said: "Although in many settings it may be proper to weigh the extent and effect of restrictions in a contract against its industrial or commercial advantages, this is never to be done when the contract is made with intent to set up a monopoly."⁴² (c) *Other acts which, by eliminating some competition between existing units in an industry, or involving co-operation between them, tend to preclude reasonably small existing or potential competitors from competing effectively.* This is the least clear category. As Judge Hand has pointed out, "not all contracts which in fact put an end to existing competition are unlawful."⁴³ Many of the transactions and practices of which the government complained in the *Flat Glass* case—plant acquisitions, cross-licenses, foreign license restrictions, use of a joint selling agency, and the like—constitute evidence of conspiracy only if they can be brought within this category.

The issue seems to turn on whether such transactions and practices in the context of the particular industry appear to work substantially against a "competitive" organization of the industry and in favor of a monopoly. But these are relative terms, to be read in the light of current interpretations of the policy of the Sherman Act.

Policy of the Sherman Act: In the *Alcoa* opinion Judge Hand described the organization of industry sought to be fostered by the Act as one of "small units which can effectively compete with each other." As he put it:

"We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. . . . That Congress is still of the same mind appears in the Surplus Property Act of 1944, . . . and the Small Business Mobilization Act. . . . Not only does § 2(d) of the first declare it to be one aim of that statute to 'preserve the competitive position of small business concerns,' but § 18 is given over to directions designed to 'preserve and strengthen' their position. . . . Throughout the history of these statutes [the antitrust laws] it has been constantly assumed that one of their purposes was to *perpetuate and preserve, for its own sake and in spite of possible cost, an organization*

41. 312 U.S. 457 (1941).

42. *United States v. Aluminum Co. of America*, 148 F.2d 416, 428 (2d Cir. 1945).

43. *Id.* at 427.

of industry in small units which can effectively compete with each other." (Emphasis supplied) ⁴⁴

And, amplifying the proposition that this state of things is desired "for its own sake," and "in spite of possible cost," he said:

"In the debates in Congress Senator Sherman himself in the passage quoted in the margin showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them." ⁴⁵

The fact remains, however, that neither the *Alcoa* and *Tobacco* decisions nor the Sherman Act itself furnish any quantitative measure of ceiling size for production units in any other industry. Nor do they tell us how effectively new units should be able to compete. Presumably the units must be able to make and distribute a product of sufficient quality and variety to meet contemporary requirements.

Beyond this, the criteria may be expected to vary from industry to industry in terms of a great many factors such as: technological requirements bearing on minimum effective size, capitalization, number of plants, etc.; public interest in the development and maintenance of strong domestic productive capacity and technological efficiency; need for the product, and public interest in assured uninterrupted production; conditions requisite to meeting foreign competition; public interest in lowered costs; and unlawful practices in restraint of competition by existing units in the past.

If the Sherman Act or decisions of the Court had established a *quantitative* measure of appropriate size for competing units in a given industry, it might be argued that such considerations of foreign and domestic policy were irrelevant and outside the scope of an antitrust case. National policy and "reasonableness" would, for better or worse, be expressed in the Act and the decisions construing it. But such is obviously not the case. Congress and the Court have expressed only general qualitative considerations so far, leaving their application—and the resolution of conflicts in what has been expressed—to judicial process in the particular case.

In the Prayer for Relief in an equity case, the Antitrust Division necessarily presents its conception of an organization of the given industry which would comport with the policy objectives of the Act.⁴⁶ If this conception appears valid, inferences of conspiracy are likely to

44. *Id.* at 428-9.

45. *Id.* at 428.

46. Cf. Levi, *supra* note 2, at 182-3: "But if the Sherman Act is to be made effective in monopolization cases, something must be done about the relief secured from the courts. . . . There is no merit in the ceremony of finding a violation unless something like adequate relief is to be granted. . . . It is silly to speak of atomization in the face of the units that have been preserved, as for example in the *Tobacco* or in the *American Can*

be drawn from transactions and practices which appear to have worked against it, irrespective of the actual motivation of the parties at the time. But if it can be shown that in terms of the foregoing criteria, the government's proposed reorganization of the industry is absurd and presently competing members of the industry are no larger or more powerful than they need be, then the inferences of conspiracy fall.

E. Conclusions

The materiality of considerations of national policy in these cases seems apparent from the nature of the issues posed in the government's pattern of attack.

The current state and change in the technology of manufacture are relevant to evaluate the scale of existing plants and capacity, the disappearance of obsolete enterprises, the impracticability of small or single-plant operation, the need for licensing and cross-licensing, and to show the existence of competition between component parts of the industry in improving methods of manufacture.

The economics of distribution in the industry are relevant to evaluate the structure and practices adopted by the various companies, the success or failure of particular distributors, the selection of factory buyers, the geographical distribution of plants, the multiple operation of plants under single management, pricing practices, and freight absorption practices.

Price behavior comparisons with other industries are relevant to evaluate unfavorable inferences drawn by the government, and to judge whether price has been determined by economic conditions and competitive factors rather than by a monopolistic power to fix prices or through collusion.

The chief pre-trial question is as to the overall strategy of offense and defense. Detailed preparation of witnesses, the integration of

cases. [An entirely different approach to the problem of relief is reflected in Mr. Justice Douglas' opinion in *United States v. Crescent Amusement Co.*, 323 U.S. 173, 186 (1944): 'The pattern of past conduct is not easily forsaken. Where the proclivity for unlawful conduct has been as manifest as here, the decree should operate as an effective deterrent to a repetition of the unlawful conduct and yet not stand as a barrier to healthy growth on a competitive basis.'] In this respect the courts have performed their function with a weariness suggesting that they believe it would be more appropriate for a commission to do the job. [Cf. Mr. Justice Roberts in *Associated Press v. United States*, 326 U.S. 1, 47 (1945).] There is merit in not having a commission charged with what would look like the duty of supervising industry. Conceivably, however, a commission might be charged with the duty of making recommendations to a court as to the appropriate form of relief after violation has been found. The courts have not made use of the Federal Trade Commission for this purpose and there probably is some merit in creating an office separate from any agency having regulatory functions for this purpose. [Compare the functions of the Surplus Property Board in *United States v. Aluminum Co. of America*, 148 F.2d 416, 446 (2d Cir. 1945).]"

documents with testimony, and the integration of economic and technological expert testimony with other proof in the case, depend on the strategy adopted. Two broad alternatives suggest themselves: (1) to focus on an affirmative showing that as presently organized the industry is or is not monopolistic within the meaning of the Sherman Act—the “effects” aspect of the case; or (2) to take a narrower focus on “violation” as distinguished from appropriate “relief”, which is likely to result in a matching up of allegations in the Complaint with admissions, denials and denials of knowledge in the Answer. For defendants the latter approach presents certain disadvantages: (a) Rarely will there be many specific transactions alleged in an Indictment, Information or Complaint that are open to the defense that they never occurred. (b) In almost all instances, the characterization of the transactions embodied in the Complaint will be denied and disputed at all stages of the trial. (c) The overall conspiratorial character of the transactions alleged is of course always denied and at issue. (d) It is highly doubtful whether much probative force attaches to specific testimony by witnesses who participated in the transactions to the effect that they did not do so pursuant to the overall conspiracy alleged. And (e) probably the most important contention as to these specific transactions which the defense must be prepared to meet is that in the aggregate they resulted in an industry situation in which new enterprises could not effectively compete. The government is not obliged to prove that any or all of these transactions were done with any improper intent or purpose (in the usual sense of specific criminal intent) at the time. Of course the government could prevail by so proving. But a conspiracy can equally well be established—and this is the more common hazard in antitrust cases—by a showing that the net result of past transactions is in fact a monopolistic one. The showing usually consists in a cumulation of restrictive acts, transactions and circumstances. It is difficult to combat the cumulative effect successfully by a line of defense which consists principally in seeking to justify particular acts and transactions.⁴⁷

A second issue in order of importance is whether the government will succeed in proving a specific intent to monopolize, to restrain or to drive out competitors, similar to that proved in the *Hartford-Empire* case.⁴⁸ Success for the government on that score establishes a substantive violation, and some relief is indicated—the extent of relief

47. See, e.g., *United States v. General Electric Co.*, 82 F.Supp. 753, 903-4 (D.N.J. 1949) per Forman, J.: “General Electric sought to separate the documents to which it objected into isolated parts and apply the principles of evidence it advanced. . . . However, as the Court commented in *United States v. Patten*, 226 U.S. 525, at page 544, . . . : ‘[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.’”

48. See *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945).

depending upon the kind of showing the government may make in its case as to effects. It is assumed, for purposes of this discussion, that no transactions demonstrably illegal *per se* will be proved. If any develop, they will fall into this general category.

Proof of specific intent in an antitrust suit cuts but one way—disaster to the defendants. Since the alternative basis of monopolistic effect is available to the government, however, proof of lack of intent does not in itself insure success to defendants. Good or bad faith in respect of particular transactions otherwise lawful is rarely the principal issue, although there are usually instances of bad faith being charged. Many cases do, however, raise questions as to the documented specific purpose of particular transactions. To take an illustration from the *Hartford-Empire* case: There were letters and memoranda which spoke of acquiring patents for the purpose of eliminating a competitor, for the purpose of monopolizing the art, and for the purpose of suppressing troublesome competition. Any documentation of this kind in reference to a transaction must be isolated for extremely careful analysis and study of surrounding documents, circumstances, personalities, etc.

A common variety of specific intent language is found in the letters of sales managers to salesmen during periods of extreme depression such as prevailed in the early 1930's where low-quality marginal production created distress (in the sense of the *Appalachian Coals* case),⁴⁹ suggesting counter measures against destructive competition. Broadly speaking, such expressions need to be evaluated in terms of the views which were prevailing during the formulation and existence of NIRA and the recognition at that time of the propriety of counter measures of various kinds, coupled with the discontinuance of all this after the change in the Government's policy in 1936 and 1937.

Another kind of specific intent which may be urged is a necessary inference from restrictive clauses in agreements. Against these, one broad line of defense, which used to be sanctioned by the courts but as to which considerable doubt has been raised by recent decisions, was that a restraint ancillary to otherwise lawful purposes was not antagonistic to the antitrust laws. In terms of proof, this means that the principal purpose of the contract must be shown to be other than the restraint, and that the restraint must be shown to be reasonably ancillary to the principal purpose of the contract. This will apply to all manner of license agreements, sales agreements, purchase of property agreements, and other instruments in which these ancillary restraints may appear. It may be important in this connection to brief the law as of the time when these restrictive covenants were entered into, rather than as they exist today. It is also important, by way of dis-

49. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

tinguishing the *Associated Press* case,⁵⁰ to show that a defendant entering into such a restrictive covenant was not "dominant" at the time.

BURDEN OF PROOF AND STANDARDS FOR EVALUATING CIRCUMSTANTIAL EVIDENCE OF CONSPIRACY

Two broad questions which have rarely been explicitly explored in judicial opinions or legal literature specifically concerned with the Sherman Act are: (1) What is the government's burden of proof in a civil proceeding wherein relief of a relatively comprehensive and drastic variety is sought? (2) Where an overall conspiracy through time is sought to be demonstrated in either a criminal or a civil proceeding by a manifold of acts and practices over a long period, what are the appropriate standards for evaluating such circumstantial proof? The questions are in a technical sense distinct; but since the violations alleged by the government as a basis for the decree sought are predicated on an overall theory of continuing conspiracy between all of the defendants, and since the government proposes to prove the conspiracy circumstantially, the first question may, as we shall see, for practical purposes be reduced to the second.⁵¹

A. The Government's Burden of Proof

Little if any affirmative indication that a "mere preponderance" or "fair preponderance" of evidence should suffice to support findings in favor of the government and substantial equitable relief can be found in the opinions of the courts in Sherman Act proceedings.⁵² Typically, burden of proof is not mentioned in terms other than that a finding was "established by the evidence," or that a violation was "proved". In *International Salt Co. v. United States*, for example, a discussion of the basis for equitable relief in the particular case is prefaced merely by these words: "When the purpose to restrain trade appears from a clear violation of law" ⁵³

This avoidance of a rigid formula is in accord with the general equity

50. *Associated Press v. United States*, 326 U.S. 1 (1945).

51. See, for example, Judge Forman's discussion in *United States v. General Electric Co.*, 82 F. Supp. 753, 903 (D.N.J. 1949), of the "broad discretion" and "great latitude" permitted in the reception of evidence in antitrust conspiracy cases, citing both criminal and civil proceedings.

52. *But cf.* *United States v. General Electric Co.*, 82 F.Supp. 753, 904-5 (D.N.J. 1949) per Forman, J.: "Although the Government failed to support certain allegations of the complaint, the preponderance of evidence produced in this case fully supports its main contentions that General Electric conspired to, and did restrain trade and competition in and unlawfully monopolized the incandescent electric lamp industry in the United States."

"All of the defendants moved at the end of the Government's case to dismiss the action and renewed these motions at the end of the presentation of their defenses. In view of the findings and conclusions hereinbefore discussed, the motions are denied."

53. 332 U.S. 392, 400 (1947).

tradition of flexibility, and suggests that the strength of proof required may well vary in terms of the seeming dictates of fairness in the particular case. Factors making for requirement of a burden of proof in major antitrust proceedings higher than that customary in ordinary private civil suits include the mixed character of the proceeding, the elusive nature of so far-flung a conspiracy issue, the peculiar hazards of error inherent in the necessity for its determination largely on the basis of circumstantial evidence, and the severe character of the equitable relief often sought by the government. The bearing of each of these will be discussed in turn.

Mixed Character of the Proceeding: It is often said that the Sherman Act does not authorize mere punishment under the guise of equitable relief. But it does differ in important aspects from an equity proceeding between private parties. As Justice Rutledge pointed out in his partially dissenting opinion in *Hartford-Empire Co. v. United States*:

"The so-called equitable character of the proceeding does not nullify this inherent limitation upon appellate judicial action. Nor does it justify an attitude which would circumscribe the suit or the relief with the limitations courts of equity traditionally have put around their action in private litigation. The anti-trust injunction suit is in form 'a proceeding in equity'. In substance, it is a public prosecution, with civil rather than criminal sanctions, for vindication of public right and for redress and prevention of public injury. To regard the fashioning of appropriate relief in such a suit as identical with the same function in private litigation is to disregard at once the former's statutory origin, its public character, and the public interest it protects. The equitable garb of the proceeding therefore does not determine or conceal its true character. Nor does it limit the required relief merely to what will prevent repetition of the illegal conduct by which the combination has been formed, its property acquired, and its dominating position secured."⁵⁴

The relevance of such considerations, and of the actual severity of a sanction or remedy irrespective of its technical classification as civil or criminal, with particular reference to procedural and evidential requirements of a fair trial, have been stressed by Morris R. Cohen.⁵⁵ Similar considerations have likewise led the courts to impose a higher than ordinary burden of proof for a wide variety of issues in civil proceedings at law and in equity. These will be reviewed below.

Aspects of the Conspiracy Theory Which Require that it be Established by Clear, Satisfactory and Convincing Proof: The elusive quality of the distinction between action in concert and similar practices independently pursued is familiar. In the former case we may have conspiracy;

54. 323 U.S. 386, 441-2 (1945).

55. Cohen, *supra* note 1.

in the latter case presumably we have not, even though the result of the action has been to restrain trade or promote monopoly—unless, of course, each of the actors acted *with knowledge that the others would so act and was aware or should have been aware, at the time of acting*, that the result would be to restrain trade or promote monopoly.⁵⁶ In either way, according to decisions to date, the government may establish a privity as between the parties sufficient to warrant treating them *collectively* as co-conspirators and, when they have sufficiently succeeded in what they sought to do, as a monopoly.

Given an issue so defined, the distinction on which it turns involves the imputation of subjective as well as objective attributes to such acts of the defendants as the government may prove or upon which it may rely. The subjective consists in the categories of knowledge and purpose which are imputed to an acting defendant; and the objective in the external effects in respect of restraint of trade or promotion of monopoly which are imputed to his acts.

Elusive as the distinction may be, however, a firm insistence that the minimum measure of privity between the defendants must be proved by clear and convincing evidence is the sole protection of defendants against a finding of *guilt by unproved association*. That such a finding is no imaginary hazard is revealed by the view taken by some commentators on the Supreme Court's opinion in the last *American Tobacco* case. Consider, for example, Eugene V. Rostow's interpretation in his recent book, *A National Policy for the Oil Industry*:

"When three companies produce so large a percentage of market supply, that fact alone is almost sufficient evidence that the statute is violated. Ruthless and predatory behavior need not be shown. The actual elimination of small competitors is unnecessary. . . . Parallel action, price leadership, a reliance on advertising rather than price competition as a means of inducing changes in each seller's share of the market, and above all, size—the market position of a small number of large sellers or buyers—these are now key points to be proved in a case of monopoly, or of combination in restraint of trade. From such evidence inferences of combination will be drawn, if cautious pleaders rely on Section 1 as well as on Section 2. But the content of an antitrust case has been enormously limited and simplified, under Section 1 as well as Section 2. Pains-taking search for scraps of evidence with a conspiratorial atmosphere are no longer necessary. There need be no parade of small business men as witnesses, to testify that they have been driven from the trade, and their lives ruined, by the ruthless squeeze of monopolistic pressure. Under the *Tobacco* case, the economic fact of monopoly is very close to being the legal proof of monopoly. The decisive elements are the power to assert a degree of control over

56. *Interstate Circuit v. United States*, 306 U.S. 208 (1939).

price and output in the market as a whole; and the power to deter or discourage potential competition—even, as Judge Hand said, by embracing ‘each new opportunity as it opened,’ and facing ‘every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.’

“ . . . Such powers inhere in the few large sellers who between them produce the dominant fraction of supply. They are the inevitable economic consequences of size, within the structural framework of a market which attaches particular strategic importance to certain elements of control, and sets limits upon the extent to which prices can safely be raised.”⁵⁷

This statement seems to recognize that some element in addition to size and power and similar conduct of business may be necessary to transform the showing into a case sufficient to move a court to find violation. That such recognition may be illusory, however, is suggested by another statement by the same author elsewhere:

“But the precise issue decided by the *Tobacco* case was that a small group of sellers dominant in a market could be treated collectively as a monopoly, in Judge Hand’s phrase; and both the *Tobacco* and the *Aluminum* cases are totally at variance with the notion of subjective intent which appears in Judge Hand’s opinion and in the *Pullman* case.”⁵⁸

To be sure, there is no express warrant in the Sherman Act or any of the decisions which interpret it for assuming, merely because several companies in an industry may be of sufficient size and power collectively to enjoy a monopoly *if* they act in concert, that in fact they can or will act in concert; or for assuming that such an industry situation came about through action in concert. These are still propositions which must somehow be proved. Of significance are the observations of Edward H. Levi in his article on *The Antitrust Laws and Monopoly*:

“The Supreme Court was careful to point out in the tobacco case that it did not have before it the problem of the *Alcoa* case in that a combination and conspiracy had been charged. But in its determination that no actual exclusion need be shown and its emphasis on the power of the combination, the *Tobacco* case, like the *Alcoa* case moves away from the abuse theory to the size or power theory. The barrier placed against newcomers because of the advertising expenditures of the defendants is specifically mentioned, not as an abuse but as an illustration of the power of the combination. It is

57. ROSTOW, A NATIONAL POLICY FOR THE OIL INDUSTRY 136-7 (1948).

58. Rostow, *The New Sherman Act: A Positive Instrument Of Progress*, 14 U. OF CHI. L. REV. 567, 597 (1947).

true, of course, that the jury found a combination and conspiracy." ⁵⁹

And again:

"It must be admitted further that the interpretations of the *Alcoa* and *Tobacco* cases are problematical." ⁶⁰

But what is this quality of concert (or privity) of action, without which parallel lines of similar activity may be regarded as lawful independent courses of action but given which they are assimilated into the conception of unlawful combination or conspiracy? The referents of this key term obviously require clarification. Courts speak and juries are instructed in terms of the subjective referents—"knowledge" of the activities of other defendants, "purpose", and even "intent". These, however, can only be imputed. The question is under what conditions they will be. Courts also speak and juries are instructed in terms of objective referents—"Monopolistic in tendency or effect," "restrictive of the trade of others," "calculated to deter others from entering the field," etc. But these also can only be imputed; and, again, the question is under what conditions they will be.

Determination of the conditions under which these various imputations will be made must depend on the values and viewpoint of those who participate in the decision. Here we encounter the first major source of uncertainty as to the issue of "action in concert." For while those who must decide are charged with the interpretation and administration of a law in a manner consistent with its expressed objectives, it is only one in the total context of laws affecting the conduct of industry. The national interests on which it is focussed are only a few in the totality of our national interests. Inevitably, there is a certain confusion and lack of integration of objectives. In the economic field, indeed, the government often appears to speak with many voices. As a former First Assistant and Chief of the Consent Decree Section of the Antitrust Division has expressed it:

"The existence of a strong anti-monopoly tradition and of great economic concentration represents a confusion in the anti-monopoly tradition itself. We are not sure whether we are against monopoly or the abuses of monopoly. We do not know whether we want regulated competition or regulated monopoly. We do not know whether we are opposed to size or merely to unreasonably high prices. The confusion is deep and is a part of the tradition." ⁶¹

This current confusion, unavoidable though it may be, creates a real hazard that a defendant's conduct and position in an industry may be

59. Levi, *supra* note 2, at 178.

60. *Id.* at 181.

61. *Id.* at 153.

judged in terms of values which are not only unfair to him but unrepresentative of national policy in a more comprehensive sense.

If the ranked order and total pattern of the values to be served were less confused, the conditions under which subjective guilt and objective social harm would be imputed on the basis of observable behavior and material conditions could be more intelligibly formulated. Workable standards for judgment and guides to compliance could reduce both unevenness of administration and the probability of policy error. As matters now stand, however, sheer uncertainty as to the meaning and policy of the law in its application to a concrete industry situation would seem to entitle a defendant to more protection than would be afforded by the lowest civil burden of proof.

Given issues of considerably less difficulty, particularly in a proceeding of an equitable nature, it has often been customary to impose a higher burden of proof than that otherwise prevailing in civil actions. As Wigmore puts it: "[A] stricter standard, in some such phrase as 'clear and convincing proof,' is commonly applied to measure the necessary persuasion" to prove such issues as fraud, undue influence, an oral contract as a basis for specific performance, and prior anticipatory use of an invention.⁶²

Severe Character of the Sanctions Sought to be Invoked: Relative severity of the sanction or remedy which may be imposed has often been considered a sufficient reason to require a higher degree of probability in proof than would otherwise be required in a civil action. Were this not the case, the procedural guarantees with respect to burden of proof intended for persons accused of "crime" could often be circumvented in substance by resort to "civil" proceedings affording equally if not more severe remedies.

It was once thought both in England and the United States, indeed, that wherever facts constituting crime were alleged in any type of civil action, whether as part of the cause of action or as matter in defense, such allegations should be proved beyond a reasonable doubt.⁶³ This was put on various grounds: (1) that a person against whom crime was thus proved in a civil action could be prosecuted therefor at one stage of common law without further formal accusation or indictment; (2) that this higher burden of proof was necessary to overcome the

62. 9 WIGMORE, EVIDENCE 329-34 (3d ed. 1940). See also *Speas v. Merchants' Bank and Trust Co. of Winston-Salem*, 188 N.C. 524, 528, 125 S.E. 393, 401 (1924) (indicating that proof of issues of the sort listed above must be "clear, strong and convincing"); *Frenzer v. Frenzer*, 2 F.2d 218 (8th Cir. 1924), *cert. denied*, 269 U.S. 574 (1924) ("Clear, satisfactory, and convincing evidence is indispensable to sustain an oral agreement of a deceased person to convey, charge, or change his title or interest in real estate"); *Holt v. Brown & Co.*, 63 Iowa 319, 325 (1884) (discussing the "clear and convincing proof" rule prevailing in equity); and cases collected in 32 C.J.S., *Evidence* § 1023.

63. See 9 WIGMORE, EVIDENCE §§ 2497-8; Groom, *Proof of Crime in a Civil Proceeding*, 13 MINN. L. REV. 556 (1929).

presumption of innocence; and (3) that the injury to reputation involved in proof of crime even in a civil action made the higher burden of proof proper. This position has now been generally abandoned, though there is still some tendency to require a burden of proof higher than a "mere preponderance" in such cases even though the action is merely one for damages.⁶⁴

A recent and clear-cut example of adjustment of the burden of proof to the actual severity of the sanction or remedy invoked, irrespective of the technically "civil" character of the proceeding, is afforded by *Knauer v. United States*, a proceeding to cancel a certificate of naturalization obtained by fraudulent oath and statements of allegiance. The Court prescribed "clear, unequivocal, and convincing" evidence which does not "leave the issue in doubt" as the appropriate burden of proof, on the ground that "denaturalization, like deportation may result in the loss 'of all that makes life worth living.' " ⁶⁵ To be sure, no anti-trust Prayer for Relief has as yet requested that offending management officials be denaturalized and deported. Prayers do, however, ask for dissolution, divestiture and divorcement; and these are severe sanctions—affecting the careers and fortunes of management individuals as well as of the corporate organizations. Certainly they involve prospectively operating decrees of perpetual exclusion and permanent proscription from opportunity, factors which have been considered significant reasons for the highest procedural safeguards in other contexts.⁶⁶

B. Standards for Evaluating Circumstantial Evidence of Conspiracy

Apart from the overall burden of proof in a case, many courts have attempted to define generally the minimum strength of persuasion which circumstantial evidence must possess to support a verdict or finding in an ordinary civil proceeding. Presumably these latter standards rise with the overall burden of proof, particularly where a case is based primarily on circumstantial evidence.

Reasonable Certainty Rule: One common formulation in the federal courts as to the requisite strength of persuasion of circumstantial evidence in civil cases generally is that it must establish the truth of

64. See Note, 124 A.L.R. 1378 (1940). Cases cited in this collection for the position that a mere preponderance of evidence will suffice to establish allegations of crime in a civil action are almost exclusively actions at law rather than in equity or of an otherwise special character.

65. 328 U.S. 654, 659 (1946).

66. Cf. the Supreme Court's reaction to a "legislative decree of perpetual exclusion" and "permanent proscription from any opportunity" to engage in a chosen vocation in *United States v. Lovett*, 328 U.S. 303 (1946), wherein a provision in an appropriation bill that no part thereof or of any future appropriations should be used to pay salaries to certain named federal employees was held so penal in character as to be void as a bill of attainder.

the fact or theory advanced "with reasonable certainty."⁶⁷ In such cases it is also said that the party need not present evidence to dispel all contradictory inferences. Failure so to do would of course affect the weight of the evidence if not its bare sufficiency; and in any event, on all of the circumstances adduced, it would be necessary that the inference contended for appear more probable than any alternative explanation which might be suggested.

Reasonable Certainty and Exclusion of Other Explanations: Another line of cases, however, requires not only that the circumstances point to the existence of the fact to be established with reasonable certainty, but that they also be inconsistent with "any other rational theory" or "fairly and reasonably exclude any other explanation of the facts."⁶⁸

C. Conclusions

In reviewing findings of fact and decree provisions in civil proceedings brought by the government for enforcement of the Sherman Act, courts have conspicuously avoided rigid formulae such as "preponderance of the evidence" or "proof beyond a reasonable doubt." Reasons for this are readily apparent. The proceedings are of a mixed character, being equitable in form but authorized and designed solely to undo the consequences and prevent the recurrence of violations of a criminal statute. The factual situations for inquiry range from readily ascertainable single concrete transactions to complex industrial relationships of an allegedly conspiratorial character which can at best be only circumstantially inferred. The array of remedies available in such proceedings is equally diversified, ranging from relatively mild and non-punitive injunctions against future repetition of particular unlawful practices to highly depriving decrees of dissolution, divestiture and divorcement. Then, too, there are no juries requiring guidance as to the burden of proof.

Pretty clearly, the "mere preponderance" rule applied in ordinary private civil actions at law involving neither the infliction of relatively severe legal sanctions nor the determination of inherently difficult and elusive issues of fact, would be inappropriate in proceedings for the enforcement of the Sherman Act. In other types of civil actions involving unusually delicate issues of fact, the award of relatively drastic equitable relief, or the infliction of other types of legal sanctions which

67. *E.g.*, *Adair v. Reorganization Inv. Co.*, 125 F.2d 901, 905 (8th Cir. 1942); *Cudahy Packing Co. v. National Labor Relations Board*, 116 F.2d 367, 371 (8th Cir. 1940).

68. *Rider v. Griffith*, 154 F.2d 193, 197 (Ct. Cus. & Pat. App. 1946); *Mutual Life Insurance Co. of New York v. Zimmerman*, 75 F.2d 758, 762 (5th Cir. 1935); and *United States v. Pullman Co.*, 50 F. Supp. 123, 127 (E.D.Pa.1943), *aff'd*, 330 U.S. 806 (1947), *reh'g denied*, 331 U.S. 865 (1947), wherein the government argued that the practices of the defendants up to the time of suit were "such that only an organization with complete monopolization of the market which it serves could follow them."

though technically classified as civil are recognized as extremely depriving, a higher burden of proof is generally required. Presumably, in Sherman Act proceedings, this higher burden of proof must be conceived as flexible, rising in proportion with the hazard of mistake implicit in the nature of a given issue and with the drastic nature of the sanctions invoked by the government.

The higher overall burden of proof applicable here would, by analogy to other civil proceedings most comparable in kind, probably have been characterized as "clear, satisfactory and convincing proof" or in words of similar effect, had the courts had occasion to articulate more precisely the standard actually applied.

Since the "action in concert" pursuant to a common plan on which the government predicates its case must be proved by circumstantial evidence of repeated acts or continuing practices through time, certain recognized standards for the evaluation of circumstantial evidence in relation to such a probandum (*i.e.*, the subjective conspiratorial purpose and pattern imputed to the defendants in the government's Complaint) are applicable. These are: (a) all of the facts established—the data adduced, after it has been checked for value judgments, accuracy, etc.—must be consistent with the government's hypothesis of conspiracy as defined; (b) all other reasonable hypotheses or explanations which are also consistent with the facts established must be eliminated by satisfactory proof; and (c) the hypothesis must in addition be tested for its truth through time (*i.e.*, its validity as a basis for prediction). This latter corresponds to the experimental stage in a scientific inquiry.

To state the foregoing criteria is to suggest that the government's hypothesis of conspiracy, given the nature of the available data and the familiar problems of inquiry into things social, is not susceptible of proof on any level of probability high enough to be deemed conclusive for purposes of social science and technology. Verification through experiment is out of the question; and there are too many uncontrollable variables. But it is understood, for these reasons, that inquiry and determination in the judicial process must usually rest on lower degrees of probability than could be accepted in the sciences. The question is: How much lower?

In speaking generally of circumstantial proof in ordinary civil cases, the federal courts have more often than not said that the circumstances as a whole must point to the existence of the fact to be established "with reasonable certainty"; and, what is perhaps more important, they have recognized that such evidence must in some satisfactory degree meet *more than one* of the three generally accepted tests for circumstantial (or empirical-inductive) proof outlined above. Considering that in the light of the ordinary canons of reasoning an hypothesis might quite conceivably survive the first two types of test and yet, on subjection to the third, prove altogether false as of any given point in

time, this degree of caution in drawing inferences from a mass of circumstantial evidence even in the ordinary civil action is hardly surprising. *A fortiori*, considering the elusive and factually complex character of an antitrust conspiracy issue, the gravity of the legal sanctions invoked, and the large public interest in correct determination of questions which so directly involve the whole balance of the national economy, special caution would appear in order in a case of this kind.

But if this higher degree of caution in drawing inferences is to mean more than a verbal gesture ("violation being clearly proved," "the findings being amply supported by the evidence," etc.), it must be translated into criteria of less subjective and ambiguous reference. The following suggest themselves as workable yardsticks.

One measureable dimension of the government's proof will be its success or failure to meet with some plausibility all three of the general requirements for circumstantial proof of an hypothesis as outlined above. The first—which consists in showing consistency of the facts adduced with the government's theory of conspiracy—is the easiest. The second—which consists in showing inconsistency of the facts adduced with all other possible theories or explanations—is more difficult. The third—which consists in showing that all of the consequences and behavior on defendants' part which might reasonably have been predicted or anticipated, assuming the existence of conspiratorial purpose at a given time, did in fact occur—is of course the most difficult. But, passing the question of the minimum degree of persuasion which may be deemed significant as to any one of these three aspects of the proof, the government's case may be rated in terms of its serious engagement on all three, only two, or only one of these fronts.

Another measurable dimension of the government's proof will consist in the frequency of recurrence of acts relied upon as a series to show a continuity and consistency of purpose. The validity one may assign to inference of this order is of course dependent on a previous decision as to the minimum rate of frequency which may be deemed significant.

A third measurable dimension of the government's proof is suggested by the circumstance that it consists in a manifold of events. Ideally, demonstration of the conspiracy hypothesis in any one of the three ways outlined above would have to account for all of the known facts. An initial question with respect to any inference which may be advanced, therefore, is whether it rests on the whole manifold or only a part, and in the latter event on what part. This degree of inclusiveness of the base is another way of rating the plausibility of proof in support of an inference.