University of Miami Law Review

Volume 11
Number 3 *Miami Law Quarterly*

Article 9

5-1-1957

Constitutional Law -- Sherman Act -- Cross-Elasticity in Determining Percentage of Market Control

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Recommended Citation

Edgar Lewis, *Constitutional Law -- Sherman Act -- Cross-Elasticity in Determining Percentage of Market Control*, 11 U. Miami L. Rev. 429 (1957)
Available at: https://repository.law.miami.edu/umlr/vol11/iss3/9

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Congress derived its *power* to legislate in this manner is not clear. The Court said in the *Toth* case, "There can be no valid argument, therefore, that civilian ex-servicemen must be court-martialed or not tried at all. If that is so, it is only because Congress has not seen fit . . . [to act]."[23] This same reasoning if applicable to ex-servicemen like Toth who actually did commit crimes while under military jurisdiction, seems to be applicable also to citizens whose only connection with the armed forces is by the mere fortune of being dependents of military personnel. There is no doubt that Congress can and should establish courts with jurisdiction over the military-dependent class abroad. However, it would seem that courts-martial are not constitutionally proper for that purpose.*

HARVEY I. REISEMAN

CONSTITUTIONAL LAW—SHERMAN ACT—CROSS-ELASTICITY IN DETERMINING PERCENTAGE OF MARKET CONTROL

The Attorney-General brought anti-trust proceedings against the defendants, producers of 75% of all available cellophane sold in the United States, relying on Sec. 2 of the Sherman Act, which prohibits "Every . . . combination . . . in restraint of trade or commerce among the several states." The District Court denied the petition. *Held*, on appeal, affirmed (4-3). The Supreme Court declared that merely producing such a percentage of the market does not constitute a monopoly in restraint of trade. *United States v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377 (1956).

The issue resolved in the instant case, that control of an overwhelming amount of the market does not constitute monopolistic power, is an official pronouncement of the adoption of a new interpretation of the Sherman Act. Size of the company in comparison with the rest of the industry had been the established rule when the size carried with it a possibility of abuse of power.[1] This was the determinative test used by the courts when predatory

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only alternatives to this course of action are either to allow citizens to stand trial by foreign jurisdictions or not be tried at all. The inconsistency of this rationale is readily seen by comparison with the Court's remark in the Toth case quoted at note 23 in this text.

23. United States *ex rel.* Toth v. Quarles, 35 U.S. 11, 21 (1955).

*This note was begun in October of 1956. On November 5, 1956 the court agreed to rehear both cases noted here. Counsel were invited to discuss or reargue the practical necessities for or alternatives to court-martial jurisdiction over civilian dependents overseas, historical evidence bearing on the scope of such jurisdiction, relevance of distinctions between dependents and civilians employed by the armed forces, and relevance of distinctions between major and petty offenses. See 25 U.S.I. Week 3136 (Nov. 6, 1956) (Nos. 701, 713).

1. American Tobacco Co. v. United States, 328 U.S. 781, 796 (1946). Defendants produced 63% of all smoking tobacco, 68% of all domestic cigarettes, 44% of chewing tobacco in 1939. ". . . comparative size on this great scale inevitably increased the power of these three to dominate all phases of the industry." Standard Oil Co. v. United States, 221 U.S. 1 (1911).

practices had been evident in the past.[2] Monopolization was thus held illegal per se when the practices of a company had been designed to result in effective market control,[3] or when the size itself was an earmark of monopoly power without a specific intent to restrain trade or build monopoly.[4] Judging monopolization by its effects on the market is a softening of the test of size[5] when that effect is negligible on a nationwide market.[6] Consideration of the availability of other products has been used by the courts when the other product is in most respects similar to that charged as being in violation of the Act.[7] This criterion is regarded when the use of the product was for other purposes though virtually of the same constituency.[8] The newly-adopted approach broadens the scope of the above tests and does not require products to be of the same constituency so long as other products of the same general usage are available by examining the "relevant market" in the determination of the extent of control of the industry.[9]

In reaching a decision three possible approaches were available to the Court:[10] (1) An enterprise has monopolized if it has maintained a power to exclude others by acquiring an overwhelming share of the market. This was the test laid down by Judge L. Hand in the *Aluminum* Case.[11] (2) It is a violation of Section 2 for one having effective control of the market to use, or plan to use, any exclusionary practice, even though it is not a technical restraint of trade. Thus production of 75% of the cellophane could have been, in and of itself, the earmark of monopoly.[12] This rule disregards other factors and deals only with the size of the enterprise in issue. (3) The third approach disregards *size* as the paramount criterion and stresses *effect on*

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2. United States v. Swift & Co., 286 U.S. 106, 116 (1932). ". . . but 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."

3. United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945).

4. United States v. Griffith, 334 U.S. 100, 105, 106 (1948). United States v. United States Steel Corp., 251 U.S. 417 (1920). The doctrine of this longstanding case was overruled in United States v. Aluminum Co. 148 F.2d 416 (2d Cir. 1945).

5. See note 3 *supra*.

6. United States v. Columbia Steel Co., 334 U.S. 495 (1948). Compared on a nationwide basis, the company supplied ½ of 1% of the entire market even though it was the largest producer on the west coast and mainly served an 11 state area.

7. Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953).

8. See note 3 *supra*.

9. United States v. E. I. DuPont de Nemours & Co., 351 U.S. 377 (1956).

10. United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D.C. Mass. 1953).

11. United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945). A company monopolizes whenever it does business when it has reached such a disproportionate size in comparison with the rest of the industry.

12. United States v. Griffith, 334 U.S. 100, 105, 106 (1948). "It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements . . . to require a greater showing would cripple the Act. . . ."

the market and the *use* to which the commodity will be put.[13] The majority distinguished the first two tests and applied the third rule on a much broadened basis.[14] The "relevant market" concept has been used in this decision to include within its framework products which are not of the same constituency, price, or use in packaging,[15] but have all been compared with cellophane to determine the percentage of the market controlled.[16] The decision states that since other products are available in the "relevant market", *i.e.*, the entire packaging industry, production of 75% of all available cellophane is not a monopoly in restraint of trade. Similar reasoning was rejected by Judge L. Hand when he refused a comparison of secondary and virgin aluminum, since the two products had some different usages even though their constituencies were the same.[17] The concurring opinion by Justice Frankfurter supports the conclusion that cellophane is part of a "relevant market" for flexible packaging materials. The majority takes cognizance of new economic theories[18] when they speak of determining "cross-elasticity" in the availability of other products in the market.[19] "The availability of other products must be considered without confining industrial activities to trim categories."[20]

The products to which cellophane is compared vary to such an extent in their make-up and use that no workable boundaries are established as regards the market to be examined. Based on this reasoning, future defendants in anti-trust prosecutions will be able to show that even though they possess overwhelming percentage control in one specific industry, com-

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13. United States v. Columbia Steel Co., 334 U.S. 495 (1948). *Accord*, United States v. Paramount Pictures 334 U.S. 131 (1945). This case stresses the importance of characterizing the nature of the market to be served and the leverage on the market of the particular business in issue.

14. United States v. E. I. DuPont de Nemours & Co., 351 U.S. 377, 386 (1956). Difficulties of interpretation have arisen in the application of the Sherman Act in view of the technical changes in production of commodities and the new distribution practices. They have called forth reappraisal of the effect of the Act by business and government.
United States v. Columbia Steel Co. 334 U.S. 495 (1948).

15. *Id.* United States v. E. I. DuPont de Nemours & Co., *supra* note 14 at 405.

16. See note 13 *supra* at page 527, 528. The Court said:
In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. *The relative effect of percentage command of a market varies with the setting in which that factor is placed.* (Emphasis supplied)

17. United States v. Aluminum Co., 148 F.2d 416, 424 (2d Cir. 1945).
Taking the industry as a whole, we can say nothing more definite than that, although secondary does not compete at all in some uses, (whether because of "sales resistance" only, or because of actual metallurgical inferiority) for most purposes it competes upon a substantial equality with virgin.

18. LILIENTHAL, BIG BUSINESS: A NEW ERA, c.5. (1953).

19. United States v. E. I. DuPont de Nemours & Co., 351 U.S. 377, 393 (1956).

20. *Id.* at 395.

parison on any broad general market will relieve them of any liability under the Act. The dissenting opinion appears more logical in applying reasoning which excludes a comparison of cellophane with the whole flexible packaging market.[21] A manufacturer who utilizes cellophane for his product uses it because of the particular qualities which it, and no other material, possesses. The adoption of this expanded rule amounts to a judicial nullification of the Sherman Act in this type of proceeding. The Sherman Act was originally adopted to prevent anyone from using his size to unfair advantage, and this decision does not seem consistent with that spirit.

EDGAR LEWIS

FEDERAL COURTS—JURISDICTION—STATE REVENUE ACTS

Petitioner, a labor organizer, instituted an action in a federal district court to enjoin the enforcement of a municipal ordinance imposing an alleged exorbitant tax[1] on petitioner's activities. *Held*, the federal prohibition against interference with the tax-collecting procedure of a state[2] is removed when it is shown that there is no speedy and efficient remedy in the courts of that state, and there exists a threat of genuine and irretrievable loss. *Denton* v. *City of Carrollton*, 234 F.2d 581 (5th Cir. 1956).

The federal courts' recognition of the sovereign status of the several states has at all times been the motivation behind their reluctancy to interfere with the fiscal procedures of a state.[3]

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21. *Id.* at 423.
The majority opinion purports to reject the theory of "interindustry competition." Brick, steel, wood, cement and stone, it says, are "too different" to be placed in the same market. But cellophane, glassine, wax papers, sulphite papers, greaseproof and vegetable parchment papers, aluminum foil, cellulose acetate, pliofilm and other films are not "too different", the opinion concludes. The majority approach would apparently enable a monopolist of motion picture exhibition to avoid Sherman Act consequences by showing that motion pictures compete in substantial measure with legitimate theater, television, radio, sporting events and other forms of entertainment. Here, too, "shifts of business" undoubtedly accompany fluctuations in price and "there are market alternatives that buyers may readily use for their purposes.

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1. Municipal Ordinance, City of Carrollton, Georgia:
An ordinance providing for a business license tax and per diem license for any person conducting the business or occupation of labor union, union agent or labor union promoter or labor union organizer. . . .
. . . [T]he applicant shall pay a license tax in the amount of $1,000.00 and shall thereafter deposit at the beginning of each twenty four hour period of each day for each person engaged in any said activity the sum of $100.00 with the City Clerk for the continuance of said license during said twenty four hour period. There will be no proration of the initial license of $1,000.00.

2. 28 U.S.C. § 1341 (1952). "The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such State."

3. Matthews v. Rogers, 284 U.S. 521 (1932).