COMMENTARY

Marc Weinerman & William E. Kovacic, *Larned Hand, Alcoa, and the Reluctant Application of the Sherman Act*, 79 <u>Antitrust Law Journal</u> 295 (2013)

United States v. Aluminum Co. of America (*Alcoa*) is antitrust's closest equivalent to an epic poem. . . . Judge Learned Hand's elegantly written opinion still permeates the vocabulary of antitrust law. It continues to figure prominently in debates about the ends and means of competition policy, and its symbolic significance extends beyond the specific holdings in the case. No decision teaches more about the U.S. antitrust experience.

From the Sherman Act's first decades, Alcoa elicited close antitrust scrutiny. The company achieved preeminence in aluminum production by virtue of process patents that expired in 1909. It reinforced this position by forming cartels with foreign aluminum producers and signing contracts that forbade power suppliers to sell electricity to other aluminum producers. In 1912, the Justice Department settled charges that Alcoa had engaged in illegal monopolization. Though a lesser-known aspect of the history, Alcoa remained a subject of antitrust scrutiny during the 1920s. In 1924, the Federal Trade Commission drew headlines with a report accusing the company of wrongful practices, including violations of the DOJ's consent order. That report inspired the DOJ to open a new investigation, which the Department closed in 1926. High-profile Senate hearings focused on the DOJ's inaction and addressed the FTC's stated inability to cooperate fully in the inquiry. The Commission launched its own case, but in 1930 dismissed the proceeding.

In all these events, politics intensified scrutiny of Alcoa and seemingly exacerbated its vulnerability to antitrust intervention. Alcoa's early financers were Andrew Mellon and his brother Richard. Andrew, who joined Alcoa's board in 1892, served three Republican Presidents as Treasury Secretary from 1921 to 1932. All the while, he kept substantial holdings in the firm, while Richard remained active in its affairs. As a result, Andrew drew forceful attacks, among them a 1926 broadside by former Assistant Secretary of the Navy Franklin Roosevelt. Adapting language from his cousin Theodore, FDR denounced Mellon as "the mastermind among the malefactors of great wealth." Following FDR's election as President, the government brought a high-profile tax case against Mellon. The case was litigated by future Justice Robert Jackson as general counsel of the Bureau of Internal Revenue.

Later, with Jackson heading the Antitrust Division, the DOJ brought its monopolization case against Alcoa. Following an international investigation aided by the State Department, the DOJ sued Alcoa for various violations of Sections 1 and 2 of the Sherman Act. The trial lasted more than two years, longer than any previous federal trial. The district court initially vindicated Alcoa in an opinion that Judge Francis G. Caffey read aloud from the bench, in abbreviated form, over a period of nine days; 20 nine months later, Judge Caffey issued his more extended written decision.

The entry of the United States into World War II in December 1941 caused further delays, and an extraordinary procedural complication also slowed the appeal. Primarily because of FDR's penchant for selecting Justices from the DOJ, the Supreme Court lacked a quorum to hear the matter, and Congress passed special legislation providing that a panel of the most senior judges of the court of appeals in the circuit in which the district court sat would serve as the court of last resort. Thus, the Second Circuit would decide the appeal. The panel, its composition dictated by the statutory formula, consisted of Learned Hand, his cousin Augustus Hand, and Thomas Swan. Felix Frankfurter called them the court's "unrivaled trinity"; they had served together for more than two decades. . . .

On March 12, 1945, the Second Circuit panel issued its decision. With Learned Hand . . . writing for a unanimous panel, the court found Alcoa guilty of monopolization. Remanding the case for the district court to consider relief, the court left open the possibility of structural relief even as it anticipated that unfolding events might make such a remedy unnecessary. . . .

Alcoa transformed the doctrine of monopolization and dramatically expanded the Sherman Act's capacity to address dominant firm conduct. In so doing, the Second Circuit emphasized the Sherman Act's purpose to preserve a more egalitarian business environment. To find that Alcoa possessed monopoly power under Section 2 of the statute, the court resolved a series of questions concerning market share. Its resolution of those questions gave Alcoa more than a 90% market share (while certain alternative approaches would have reduced that by more than half). . . .

Alcoa became a flashpoint for debate over the aims and standards of the Sherman Act. Some extolled the decision, both for its broad conception of what constitutes improper exclusion and for its solicitude for a wide range of economic and social objectives extending beyond the pursuit of efficiency. Others lambasted it as a poorly disguised effort to condemn large corporate size as an evil in itself or, slightly more charitably, attacked the opinion's sweeping definition of culpable behavior. Since the late 1970s, the power of *Alcoa* as precedent for the interpretation of Section 2 has waned as the courts of appeals and the Supreme Court have adopted increasingly permissive interpretations of Section 2 of the Sherman Act. In doing so, the modern jurisprudence has walked away from the pluralist view of goals that Alcoa embraced and has focused almost single-mindedly on the attainment of superior efficiency. . . .

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United States v. Aluminum Company of America

148 F.2d 416 (2d Cir. 1945)

LEARNED HAND, Circuit Judge.

[The government brought this action against Aluminum Company of America, alleging that the company] was monopolizing interstate and foreign commerce, particularly in the manufacture and sale of 'virgin' aluminum ingot, and [asking the court to dissolve the company. The government further alleged that Alcoa] and the defendant, Aluminum Limited, had entered into a conspiracy in restraint of such commerce. It also asked incidental relief.

The action came to trial on June 1, 1938, and proceeded without much interruption until August 14, 1940, when the case was closed after more than 40,000 pages of testimony had been taken. The judge took time to consider the evidence, and delivered an oral opinion which occupied him from September 30, to October 9, 1941. Again he took time to prepare findings of fact and conclusions of law which he filed on July 14, 1942; and he entered final judgment dismissing the complaint on July 23rd, of that year. . . .

I.

Alcoa's Monopoly of 'Virgin' Ingot

Alcoa is a corporation, organized under the laws of Pennsylvania on September 18, 1888. It has always been engaged in the production and sale of 'ingot' aluminum, and since 1895 also in the fabrication of the metal into many finished and semi-finished articles. It has proliferated into a great number of subsidiaries, created at various times between the years 1900 and 1929, as the business expanded. Aluminum is a chemical element; it is never found in a free state, being always in chemical combination with oxygen. [This chemical compound of aluminum and oxygen (AI_2O_3) is known as "alumina"]. Aluminum was isolated as a metal more than a century ago, but not until about 1886 did it become commercially practicable to eliminate the oxygen, so that it could be exploited industrially. One, Hall,* discovered a process by which this could be done in that year, and got a patent on April 2, 1889, which he assigned to 'Alcoa,' which thus secured a legal monopoly of the manufacture of the pure aluminum until on April 2, 1906, when this patent expired. [Another company held a patent in a process that permitted efficient, large-scale manufacturing of aluminum. That patent ("Bradley's patent") expired in February 1909. Thus,] although after April 2, 1906, anyone could manufacture aluminum by the Hall process, for practical purposes no one could compete with Bradley or with his licensees until February 2, 1909, when Bradley's patent also expired. On October 31, 1903, Alcoa and the assignee of the Bradley's patent entered into a contract by which Alcoa was granted an exclusive license under that patent, in exchange for Alcoa's promise to sell to the assignee a stated amount of aluminum at a discount of ten per cent below Alcoa's published list price, and always to sell at a discount of five per cent greater than that which Alcoa gave to any other jobber. Thus, until February 2, 1909, Alcoa had either,

* [Charles Martin Hall (1863-1914) was an American inventor, businessman, and chemist. He is best known for his invention in 1886 of an inexpensive method for producing aluminum, which became the first metal to attain widespread use since the prehistoric discovery of iron. Hall was one of the founders of Alcoa.].

a monopoly of the manufacture of 'virgin' aluminum ingot, or the monopoly of a process which eliminated all competition.

The extraction of aluminum from alumina requires a very large amount of electrical energy, which is ordinarily, though not always, most cheaply obtained from waterpower. Beginning at least as early as 1895, Alcoa secured such power from several companies by contracts, containing in at least three instances, covenants binding the power companies not to sell or let power to anyone else for the manufacture of aluminum. Alcoa—either itself or by a subsidiary—also entered into four successive 'cartels' with foreign manufacturers of aluminum by which, in exchange for certain limitations upon its import into foreign countries, it secured covenants from the foreign producers, either not to import into the United States at all, or to do so under restrictions, which in some cases involved the fixing of prices. These 'cartels' and restrictive covenants and certain other practices were the subject of a suit filed by the United States against Alcoa on May 16, 1912, in which a decree was entered by consent on June 7, 1912, declaring several of these covenants unlawful and enjoining their performance; and also declaring invalid other restrictive covenants obtained before 1903 relating to the sale of alumina. (Alcoa failed at this time to inform the United States of several restrictive covenants in waterpower contracts; its justification-which the judge accepted—being that they had been forgotten.) Alcoa did not begin to manufacture alumina on its own behalf until the expiration of a dominant patent in 1903. . . .

None of the foregoing facts are in dispute, and the most important question in the case is whether the monopoly in Alcoa's production of 'virgin' ingot, [which was originally secured by two patents], was unlawful under § 2 of the Sherman Act. It is undisputed that throughout this period Alcoa continued to be the single producer of 'virgin' ingot in the United States; and the plaintiff argues that this without more was enough to make it an unlawful monopoly. It also takes an alternative position: that in any event during this period Alcoa consistently pursued unlawful exclusionary practices, which made its dominant position certainly unlawful, even though it would not have been, had it been retained only by 'natural growth.' Finally, it asserts that many of these practices were of themselves unlawful, as contracts in restraint of trade under § 1 of the Sherman Act. . . .

From 1902 onward until 1928 Alcoa was making ingot in Canada through a wholly owned subsidiary. . . . In the year 1912 the sum of these two items represented nearly ninety-one per cent of the total amount of 'virgin' ingot available for sale in this country. This percentage varied year by year up to and including 1938: in 1913 it was about seventy-two per cent; in 1921 about sixty-eight per cent; in 1922 about seventy-two; with these exceptions it was always over eighty per cent of the total and for the last five years 1934-1938 inclusive it averaged over ninety per cent. [Additionally, Alcoa arguably dominated the market for] 'secondary' ingot, the name by which the industry knows ingot made from aluminum scrap.

[We assume that secondary ingot is as good as virgin ingot]. . . . Nevertheless, there is an appreciable 'sales resistance' even to this kind of scrap, and for some uses (airplanes and cables among them), fabricators absolutely insist upon 'virgin': just why is not altogether clear.

There are some seventeen companies which scavenge scrap of all sorts, clean it, remelt it, test it for its composition, make it into ingots and sell it regularly to the trade. . . . The [trial] judge found that the return of fabricated products to the market as 'secondary' varied from five to twenty-five years, depending upon the article; but he did not, and no doubt could not, find how many times the cycle could be repeated before the metal was finally used up.

[The trial judge found that Alcoa's market share from 1929 to 1938 was] only about thirty-three percent; to do so he included 'secondary,' and excluded that part of Alcoas own production which it fabricated and did not therefore sell as ingot. If, on the other hand, Alcoa's total production, fabricated and sold, be included, and balanced against the sum of imported 'virgin' and 'secondary,' its share of the market was in the neighborhood of sixty-four per cent for that period. The percentage we have already mentioned—over ninety- results only if we both include all Alcoa's production and exclude 'secondary'. That percentage is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not. Hence it is necessary to settle what he shall treat as competing in the ingot market.

That part of its production which Alcoa itself fabricates, does not of course ever reach the market as ingot. . . . However, even though we were to assume that a monopoly is unlawful under § 2 only in case it controls prices, the ingot fabricated by 'Alcoa,' necessarily had a direct effect upon the ingot market. All ingot—with trifling exceptions—is used to fabricate intermediate or end, products; and therefore all intermediate, or end, products which Alcoa fabricates and sell, pro tanto reduce the demand for ingot itself. . . . We cannot therefore agree that the computation of the percentage of Alcoa's control over the ingot market should not include the whole of its ingot production.

[The difference in the price of virgin and secondary ingot] is ordinarily not very great; . . . between one and two cents a pound, hardly enough margin on which to base a monopoly. Indeed, there are times when all differential disappears, and 'secondary' will actually sell at a higher price. . . . Taking the industry as a whole, . . . although 'secondary' does not compete at all in some uses, (whether because of 'sales resistance' only, or because of actual metalurgical inferiority), for most purposes it competes upon a substantial equality with 'virgin.'

On these facts the judge found that 'every pound of secondary or scrap aluminum which is sold in commerce displaces a pound of virgin aluminum which otherwise would, or might have been, sold.' We agree. . . . At any given moment . . . 'secondary' competes with 'virgin' in the ingot market; . . . , it can, and probably does, set a limit or 'ceiling' beyond which the price of 'virgin' cannot go, for the cost of its production will in the end depend only upon the expense of scavenging and reconditioning. It might seem for this reason that in estimating Alcoa's control over the ingot market, we ought to include the supply of 'secondary,' as the judge did. Indeed, it may be thought a paradox to say that anyone has the monopoly of a market in which at all times he must meet a competition that limits his price. We shall show that it is not.

In the case of a monopoly of any commodity which does not disappear in use and which can be salvaged, the supply seeking sale at any moment will be made up of two components: (1) the part which the putative monopolist can immediately produce and sell; and (2) the part which has been, or can be, reclaimed out of what he has produced and sold in the past.

By hypothesis [the monopolist] presently controls the first of these components; the second he has controlled in the past, although he no longer does. During the period when he did control the second, if he was aware of his interest, he was guided, not alone by its effect at that time upon the market, but by his knowledge that some part of it was likely to be reclaimed and seek the future market. That consideration will to some extent always affect his production until he decides to abandon the business, or for some other reason ceases to be concerned with the future market.

Thus, . . . Alcoa always knew that the future supply of ingot would be made up in part of what it produced at the time, and, if it was as far-sighted as it proclaims itself, that consideration must have had its share in determining how much to produce. How accurately it could forecast the effect of present production upon the future market is another matter. Experience, no doubt, would help; but it makes no difference that it had to guess; it is enough that it had an inducement to make the best guess it could, and that it would regulate that part of the future supply, so far as it should turn out to have guessed right. The competition of 'secondary' must therefore be disregarded, as soon as we consider the position of Alcoa over a period of years; it was as much within Alcoa's control as was the production of the 'virgin' from which it had been derived. This can be well illustrated by the case of a lawful monopoly: *e.g.* a patent or a copyright. The monopolist cannot prevent those to whom he sells from reselling at whatever prices they please. *United States v. General Electric Co.*, 272 U.S. 476 (1926). . . . At any moment his control over the market will therefore be limited by that part of what he has formerly sold, which the price he now charges may bring upon the market, as second hand or reclaimed articles. Yet no one would think of saying that for this reason the patent or the copyright did not confer a monopoly.

Again, consider the situation of the owner of the only supply of some raw material like iron ore. Scrap iron is a constant factor in the iron market; it is scavenged, remelted into pig, and sold in competition with newly smelted pig; an owner of the sole supply of ore must always face that competition and it will serve to put a 'ceiling' upon his price, so far as there is enough of it. Nevertheless, no one would say that, even during the period while the pig which he has sold in the past can so return to the market, he does not have a natural monopoly. . . . It can make no difference whether the original buyer reclaims, or a professional scavenger. Yet Alcoa itself does not assert that such 'process scrap' competes. . . .

We conclude therefore that Alcoa's control over the ingot market must be reckoned at over ninety per cent; that being the proportion which its production bears to imported 'virgin' ingot. . . . The producer of so large a proportion of the supply has complete control within certain limits. It is true that, if by raising the price he reduces the amount which can be marketed . . . he may invite the expansion of the small producers who will try to fill the place left open; nevertheless, not only is there an inevitable lag in this, but the large producer is in a strong position to check such competition; and, indeed, if he has retained his old plant and personnel, he can inevitably do so. There are indeed limits to his power; substitutes are available for almost all commodities, and to raise the price enough is to evoke them. . . . Moreover, it is difficult and expensive to keep idle any part of a plant or of personnel; and any drastic contraction of the market will offer increasing temptation to the small producers to expand. But these limitations also exist when a single producer occupies the whole market: even then, his hold will depend upon his moderation in exerting his immediate power.

The case at bar is . . . different, because [there could have been] practically unlimited supply of imports as the price of ingot rose. Assuming that there was no agreement between Alcoa and foreign producers not to import, they sold what could bear the handicap of the tariff and the cost of transportation. For the period of eighteen years—1920-1937—they sold at times a little above Alcoa's prices, at times a little under; but there was substantially no gross difference between what they received and what they would have received, had they sold uniformly at Alcoa's prices. While the record is silent, we may therefore assume . . . that, had Alcoa raised its prices, more ingot would have been imported. . . . It is entirely consistent with the evidence that it was the threat of greater foreign imports which kept Alcoa's prices where they were, and prevented it from exploiting its advantage as sole domestic producer; indeed, it is hard to resist the conclusion that potential imports did put a 'ceiling' upon those prices. Nevertheless, within the limits afforded by the tariff and the cost of transportation, Alcoa was free to raise its prices as it chose, since it was free from domestic competition. . . .

Was this a monopoly within the meaning of § 2? The judge found that, over the whole half century of its existence, Alcoa's profits upon capital invested, after payment of income taxes, had been only about ten per cent. . . . [I]t would be hard to say that Alcoa had made exorbitant profits on ingot. . . A profit of ten per cent in such an industry . . . could hardly be considered extortionate.

. . . It may be retorted that it was for the plaintiff to prove what was the profit upon ingot in accordance with the general burden of proof. We think not. Having proved that Alcoa had a monopoly of the domestic ingot market, the plaintiff had gone far enough. [Alcoa has the burden of proving that it had not abused its power]. But the whole issue is irrelevant anyway, for it is no excuse for 'monopolizing' a market that the monopoly has not been used to extract from the consumer more than a 'fair' profit. . . . Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. Such people believe that competitors, versed in the craft as no consumer can be, will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them. In any event the mere fact that a producer, having command of the domestic market, has not been able to make more than a 'fair' profit, is no evidence that a 'fair' profit could not have been made at lower prices. . . . [Congress] did not condone 'good trusts' and condemn 'bad' ones; it forbad all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes.

. . . [T]here are some contracts restricting competition which are unlawful, no matter how beneficent they may be; no industrial exigency will justify them; they are absolutely forbidden. Chief Justice Taft said as much of contracts dividing a territory among producers. . . . *United States v. Addystone Pipe & Steel Co.*, 85 F. 271, 291 (6th Cir. 1898). The Supreme Court unconditionally condemned all contracts fixing prices in *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397, 398 (1927). . . . United States v. Socony-Vacuum Co., 310 U.S. 150, 220-224 (1940), [stated again that price-fixing agreements are unlawful per se]. . . . Starting . . . 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. . . . Indeed it would be absurd to condemn [price-fixing] contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers: they are really partial monopolies.

But we are not left to deductive reasoning. 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. . . . [T]here can be no doubt that the vice of restrictive contracts and of monopoly is really one, it is the denial to commerce of the supposed protection of competition. . . .

We have been speaking only of the economic reasons which forbid monopoly; but . . . there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. In the debates in Congress Senator Sherman himself . . . [expressed] a desire to put an end to great aggregations of capital because of the helplessness of the individual before them. . . . Throughout the history of [the federal antitrust] statutes constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other. We hold that Alcoa's monopoly of ingot was of the kind covered by § 2.

[Alcoa's monopoly power does not mean that the company] 'monopolized' the ingot market. . . . In several decisions the Supreme Court has decreed the dissolution of combinations [that created monopolies], although they had engaged in no unlawful trade practices. . . . [Courts have not excluded the] the possibility that the origin of a monopoly may be critical in determining its legality. . . . This notion has usually been expressed by saying that size does not determine guilt; that there must be some 'exclusion' of competitors; that the growth must be something else than 'natural' or 'normal'; that there must be a 'wrongful intent,' or some other specific intent; or that some 'unduly' coercive means must be used. . . . What engendered these compunctions is reasonably plain; persons may unwittingly find themselves in possession of a monopoly, automatically so to say: that is, without having intended either to put an end to existing competition, or to prevent competition from arising when none had existed; they may become monopolists by force of accident. Since the Act makes 'monopolizing' a crime, as well as a civil wrong, it would be not only unfair, but presumably contrary to the intent of Congress, to include such instances. A market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand. Or there may be changes in taste or in cost which drive out all but one purveyor. A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus coronat*. The successful competitor, having been urged to compete, must not be turned upon when he wins. The most extreme expression of this view is in United States v. United States Steel Corporation, 251 U.S. 417 (1920).[2] . . . Alcoa's size was 'magnified' to make it a 'monopoly'; indeed, it has never been anything else; and its size, not only offered it an 'opportunity for abuse,' but it 'utilized' its size for 'abuse,' as can easily be shown.

It would completely misconstrue Alcoa's position in 1940 to hold that it was the passive beneficiary of a monopoly, following upon an involuntary elimination of competitors by automatically operative economic forces. Already in 1909, when its last lawful monopoly ended, it sought to strengthen its position by unlawful practices, and these concededly continued until 1912. [In 1934, Alcoa increased its production capacity by] almost eight-fold. Meanwhile not a pound of ingot had been produced by anyone else in the United States. This increase and this continued and undisturbed control did not fall undesigned into Alcoa's lap. . . . [It resulted] from a persistent determination to maintain the control,

[2] Justice McKenna for the majority said, "The corporation is undoubtedly of impressive size, and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the law, and the law does not make mere size an offense, or the existence of unexerted power an offense. . . . [The Sherman Act] does not compel competition, nor require all that is possible." *Id.* at 451. . . .

with which it found itself vested in 1912. There were at least one or two abortive attempts to enter the industry, but Alcoa effectively anticipated and forestalled all competition, and succeeded in holding the field alone. True, it stimulated demand and opened new uses for the metal, but not without making sure that it could supply what it had evoked. There is no dispute as to this; Alcoa avows it as evidence of the skill, energy and initiative with which it has always conducted its business; as a reason why, having won its way by fair means, it should be commended, and not dismembered. . . . Nothing compelled [Alcoa] to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we 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. [To hold that such maneuvers are not exclusionary, would] emasculate the [Sherman] Act; would permit just such consolidations as it was designed to prevent.

Alcoa answers that it positively assisted competitors, instead of discouraging them. That may be true as to fabricators of ingot; but what of that? They were its market for ingot, and it is charged only with a monopoly of ingot. We can find no instance of its helping prospective ingot manufacturers. [The government presented evidence showing that Alcoa acquired plants to keep them out of the market. The company also participated in an international cartel intending to protect its domestic interests.]. . . .

Although the primary evil [that motivated the enactment of the Sherman Act] was monopoly, the Act also covered preliminary steps, which, if continued, would lead to it. These may do no harm of themselves; but, if they are initial moves in a plan or scheme which, carried out, will result in monopoly, they are dangerous and the law will nip them in the bud. For this reason conduct falling short of monopoly, is not illegal unless it is part of a plan to monopolize, or to gain such other control of a market as is equally forbidden. To make it so, the plaintiff must prove what in the criminal law is known as a 'specific intent'; an intent which goes beyond the mere intent to do the act. . . . 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. So here, Alcoa meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it started. That was to 'monopolize' that market, however innocently it otherwise proceeded. So far as the judgment held that it was not within § 2, it must be reversed.

II.

Alcoa's Unlawful Practices

[The government] sought to convict Alcoa of practices in which it engaged, not because they were necessary to the development of its business, but only in order to suppress competitors. Since we are holding that Alcoa 'monopolized' the ingot market in 1940, regardless of such practices, these issues might be moot, if it inevitably followed from our holding that Alcoa must be dissolved. . . . Possibly that would be true, except that conditions have so changed since the case was closed. . . . Alcoa had a monopoly in 1940, [but it is far from clear] that it will have one when final judgment is entered after the war. . . . For this reason . . . the issues are not altogether moot. . . . [T]he challenged practices can be divided into three classes: (a) the 'preemption' of bauxite deposits and waterpower;* (b) the suppression of several efforts by competitors to invade either the ingot market, or some of the markets for fabricated goods; (c) the domination of the markets for such goods . . .

(a) 'Pre-emption' of Bauxite and Water-Power.

The [government argues] that Alcoa bought up bauxite deposits, both in Arkansas—the chief source of the mineral in the United States—and in [other countries] in excess of its needs, . . . not for the purpose of securing an adequate future supply, but only in order to seize upon any available supply and so assure its monopoly.

[To prove this claim, the government must show intent to exclude competition that is inconsistent with the intent to meet the future needs of the business. The trial judge ruled that the government failed to show such intent. The government failed to show that his findings were 'clearly erroneous.'].

(b) Suppression of Competitors Seeking to Invade the Ingot Market.

[Alcoa acquired interests in two Norwegian aluminum companies and interests in a Canadian waterpower facility. In 1921, the Ford Motor Company wished to secure an independent source of aluminum by acquiring interests in Norwegian aluminum companies. After learning about Ford's plans, Alcoa barred Ford by investing in the companies. The government could not produce evidence showing conclusively whether Alcoa was aware of Ford's plans. In accordance with the requirements of the 1912 consent decree, Alcoa secured from the U.S. Attorney General permission to buy interests in the Norwegian companies. In the letter to the U.S. Attorney General, Alcoa President stated that he wished to have the property in order to compete with German producers abroad]. . . . It is impossible to say a priori what motive actuated [Alcoa President]. Alcoa's good faith must certainly be accepted. . . .

(c) Alcoa's Domination of the Fabricating Fields.

. . . The plaintiff describes as the 'Price Squeeze' a practice by which, it says, Alcoa intended to put out of business the manufacturers of aluminum 'sheet' who were its competitors; for Alcoa was itself a large—in fact much the largest—maker of that product. . . .

Between the years 1925 and 1937 inclusive Alcoa's books show the price of all these kinds of 'sheet' . . ., together with the cost of making it from ingot. They also show the price of

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* [Bauxite is a sedimentary rock with a relatively high aluminum content. It is the main source of aluminum].

ingot. . . . The plaintiff's theory is that Alcoa consistently sold ingot at so high a price that the 'sheet rollers,' who were forced to buy from it, could not pay the expenses of 'rolling' the 'sheet' and make a living profit out of the price at which Alcoa itself sold 'sheet.' . . .

[W]e think that the plaintiff made out a prima facie case that Alcoa had been holding ingot at a price higher than a 'fair price,' and had reduced the price only because of pressure [caused by government investigations]. . . . [Despite the evidence, the trial judge found that Alcoa's price squeeze did not violate the antitrust laws].

[We hold that], when Alcoa came to know the effect of the 'squeeze' [on rivals], the 'squeeze' became unlawful. . . .

III.

Aluminum Limited

[Aluminum Limited was one of the corporate defendants, as well as its directors and officers]. Limited was incorporated in Canada on May 31, 1928, to take over [most Alcoa's] properties . . . outside the United States. . . . In exchange for all the properties conveyed, Limited issued all its common shares to 'Alcoa's' common shareholders in the proportion of one for every three; and it thus resulted that the beneficial ownership remained what it had been, except for the interest of Alcoa's preferred shareholders, who were apparently considered amply protected by the properties in the United States. At first there remained some officers common to both companies; but by the middle of 1931, this had ceased, and, formally at any rate, the separation between the two companies was complete. At the conclusion of the transfers a majority, though only a bare majority, of the common shares of Alcoa was in the hands of three persons: Andrew W. Mellon, Richard B. Mellon, his brother, and Arthur V. Davis. Richard Mellon died in 1933, and Andrew in 1937, and their shares passed to their families; but in January, 1939, the Davises, the officers and directors of Alcoa and the Mellon families—eleven individuals in all—collectively still held 48.9% of Alcoa's shares, and 48.5% of Limited's and Arthur V. Davis was then the largest shareholder in both companies.

The companies had a number of transactions with each other, upon which the plaintiff relies to prove that they did not deal at arms length, but that Limited was organized only as a creature of Alcoa. As one instance, Limited apparently would have been able at times to sell aluminum in the United States at a profit but did not do so, because—the plaintiff argues—they had agreed not to compete. The inference is not strong: to break into a new market protected by a tariff subject to change, particularly a market for long in the possession of a single powerful producer, is a step which an outsider might well hesitate to take. . . .

There was also some evidence that Alcoa took part in the formation of the Alliance, a foreign cartel. . . . This consists very largely of declarations of Arthur V. Davis . . . and of the improbability that the Alliance should have been set up without the active cooperation of Arthur V. Davis, especially as he was concededly in Europe and in communication with some foreign producers at about the time that the Alliance was first bruited. . . . [T]he plaintiff also introduced evidence to show that before 1928 Alcoa had already had an understanding with foreigners as to prices. . . .

Upon the whole evidence the [trial] judge found that by 1935 Limited had become altogether free from any connection with Alcoa, and that Alcoa had had no part in forming the Alliance, or in any effort at any time to limit imports, to fix their price, or to intervene in price fixing 'cartels' in Europe—except the early ones. . . . [His findings are not unreasonable].

Even so, the question remains whether Alcoa should be charged with the Alliance because a majority of its shareholders were also a majority of Limited's shareholders. . . . [Limited could not act on behalf of Alcoa without legal authority, especially because the Alliance was an illegal arrangement. In such circumstances, an authority ought convincingly to appear]. It does not appear at all. . . . For these reasons we conclude that Alcoa was not a party to the Alliance, and did not join in any violation of Sec. 1 of the Act, so far as concerned foreign commerce.

IV.

The Remedies.

Nearly five years have passed since the evidence was closed; during that time the aluminum industry, like most other industries, has been revolutionized by the nation's efforts in a great crisis. That alone would make it impossible to dispose of the action upon the basis of the record as we have it; and so both sides agree. . . .

It is impossible to say what will be Alcoa's position in the industry after the war. The plaintiff has leased to it all its new plants and the leases do not expire until 1947 and 1948, though they may be surrendered earlier. No one can now forecast in the remotest way what will be the form of the industry after the plaintiff has disposed of these plants, upon their surrender. . . . [The district court shall address the remedies. Limited, however, must be enjoined from entering into any cartel, like the Alliance].

Judgment reversed, and cause remanded for further proceedings not inconsistent with the foregoing.