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I. INTRODUCTION

Few fields of law have experienced a more dramatic pace of development in recent years than has that of the private antitrust action.[1] After several decades of relative quiescence, the action for treble damages has grown in significance as an antitrust enforcement device at a rapidly accelerating rate since World War II.[2] Especially since the advent of the multitude of Electrical Industry Antitrust Cases in 1960, such private antitrust litigation has occupied a large segment

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1. The private action for damages caused by violation of the antitrust laws is entirely statutory. Actions by injured individuals to recover treble damages originally were authorized by section 7 of the Sherman Act. Sherman Act, § 7, 26 Stat. 210 (1890). That provision was superseded by section 4 of the Clayton Act in 1914. Clayton Act, § 4, 38 Stat. 731 (1914), 15 U.S.C. §15 (1963), and for this reason it was repealed by the Act of July 7, 1955, ch. 283, §3, 69 Stat. 283. Section 4 of the Clayton Act, *supra,* provides as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

In 1955, the Clayton Act was amended to permit the Federal Government to recover damages for injuries caused to it, but without providing for a threefold recover. Clayton Act, § 4A, as added by the Act of July 7, 1955, ch. 283, §1, 69 Stat. 282, 15 U.S.C. §15a (1963).

2. See, *e.g.,* Loevinger, *Private Action — The Strongest Pillar of Antitrust,* 3 ANTITRUST BULL.. 167 (Mar. — Apr., 1958); Wham, *Antitrust Treble—Damage Suits: The Government's Chief Aid in Enforcement,* 40 A.B.A.J. 1061 (1954).

of the time and effort of many judges and of many more lawyers throughout the country. Although few have come to trial,[3] this set of cases has already produced procedural innovations[4] and preliminary rulings which will be major factors in structuring the future course of antitrust litigation. Perhaps of even greater importance, however, is the fact that the mere filing and costly preparation of more than eighteen hundred such actions has created an acute awareness among the business community and the Bar of the possibilities and the threat which the treble damage claim may represent.

A primary question raised in the ordinary private actions for damages under the antitrust laws concerns the benefit, if any, which the plaintiffs can derive from a previous prosecution of the same defendants by the Government. In enacting the Clayton Act in 1914, Congress recognized the difficult problem of proof faced by private claimants and sought to ease that burden by providing (in the clause which originally was section 5 and now is section 5(a)) that judgments entered against the defendants in Government prosecutions or injunction suits can be utilized by private parties, under certain circumstances, to prove the defendants' violation in subsequent actions for treble damages. The pertinent language of that section of the Clayton Act is as follows:

> (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply

3. At the time of the writing of this article, in March of 1965, trials have been started and concluded in the following electrical industry antitrust cases: Philadelphia Electric Co. v. Westinghouse Electric Corp., Civil No. 30015, E.D. Pa., 1964; N. W. Electric Power Cooperative v. Maloney Electric Co., Civil No. 13290-3, W.D. Mo., W. Div., 1964; City of Burlington v. Westinghouse Electric Corp., Civil No. 348-62, D. DC., 1964; San Antonio v. Westinghouse Electric Corp., Civil No. 3064, W. D. Tex., 1964. The *San Antonio* case was settled after several months of trial. The other three trials proceeded to jury verdicts. Trials in a few other cases are now in progress or are imminent. It is clear, nevertheless, that all but a small fraction of the more than 1800 cases filed against electrical equipment manufacturers have been or will be settled without trials.

4. See in general, Neal and Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration,* 50 A.B.A.J. 621 (1964).

> to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.[5]

It requires little imagination to realize that the outcome of a treble damage action easily can turn upon the extent, if any, to which the plaintiff can rely upon this provision to satisfy the burden of proof on such difficult and expensive issues as the existence of a conspiracy or of an intent to monopolize. It is equally obvious that the potential availability of section 5(a) is a powerful incentive for the bringing of such an action by any allegedly injured customer or competitor of a firm found guilty of a violation of the antitrust laws in a criminal prosecution.

The extent to which private litigants can utilize criminal judgments entered on *nolo contendere* and guilty pleas in later actions for treble damages is the subject of this article.[6] Fundamentally this involves the question of the status of guilty pleas and of *nolo contendere* pleas under section 5(a) of the Clayton Act. This subject necessarily re-

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5. Clayton Act, §5, 38 Stat. 731 (1914), as amended, ch. 283 §2, 69 Stat. 283, 15 U.S.C. §16 (a) (1955). As originally enacted in 1914, the provision was designated simply as section 5 and read as follows:

> That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further,* This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

The 1955 amendment involved no material change. It was occasioned only by a desire to insert an unrelated provision (now section 5 (b)) in the statute. The second proviso of the original section 5 was deleted by the 1955 amendment, since it had been a temporary qualification. Some other changes in wording were made at that time, but none of them are material to the problem of statutory construction discussed in this article. For purposes of convenience the original section 5 and the amended version will hereinafter be referred to a section 5(a) without further distinction.

6. Although this discussion relates specifically to the use of *criminal* pleas, it should be borne in mind that judgments entered in favor of the Government in civil injunction suits brought under section 15 of the Clayton Act, as amended, *supra,* 15 U.S.C. §25, also may be available under section 5(a), to provide prima facie evidence of the defendants' guilt.

quires a consideration of questions such as (1) the propriety of referring to the criminal proceedings in the subsequent civil complaints and (2) the admissibility and evidentiary value of such pleas, and of the judgments and indictments relating thereto, in the course of the treble damage trials.

The discussion in Part II of this article is focused upon the question of whether judgments entered upon *nolo contendere* and guilty pleas are within the scope of section 5(a) or are excluded therefrom by the proviso referring to consent judgments entered before the taking of any evidence. It traces the development of the basic case law in this area under which the courts have excluded the *nolo contendere* plea from the operation of section 5(a) for many years, but recently have held guilty pleas to be within its scope. Because of the procedural context in which this basic question ordinarily has been posed, Part II includes a consideration of how the courts have ruled upon motions to strike references to prior Government proceedings from treble damage complaints.

Part III of this article is a brief outline and evaluation of arguments which have been advanced for and against the proposition that judgments entered on criminal pleas in general, and *guilty* pleas in particular, are within the scope of section 5(a) of the Clayton Act. Those policy matters may well be re-argued in future cases, although the course of recent decisions probably has settled the law in favor of the plaintiffs with regard to guilty pleas. In any event, the underlying contentions undoubtedly will influence the manner in which the courts actually permit guilty pleas, and their related judgments and indictments, to be utilized in future civil actions.

Part IV is devoted to the evidentiary scope and effects of section 5(a) in those instances in which it is available to the plaintiff. The discussion therein is focused principally upon the few recent Electrical Industry Antitrust Cases in which the courts, for the first time, have had to deal with questions concerning the practical utility in treble damage trials of judgments entered against the defendants on guilty pleas in preceding criminal actions.

II. STATE OF THE LAW

Although many important questions remain open, the basic issue of the status of *nolo contendere* and guilty pleas under section 5(a) of the Clayton Act is now rather well established. A judgment entered on a *nolo contendere* plea unquestionably is excluded by the proviso

from the scope of section 5(a).[7] The status of a judgment entered on a guilty plea is less certain, but the courts in the future probably will feel compelled to follow the recent decisions of the Courts of Appeals for the Fifth, Seventh and Ninth Circuits in holding that such judgments are within the scope of section 5(a).[8]

With respect to *nolo* pleas, the only significant issue now likely to be raised in the ordinary treble damage case is whether any reference to the prior Government proceedings can be included in the complaint for a collateral purpose, such as the avoidance of a statute of limitations defense. In analyzing the status of guilty pleas, however, it is necessary also to consider the common law principles concerning the effects of such pleas as admissions, and it remains pertinent to consider whether Congress intended section 5(a) to apply.

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7. City of Burbank v. General Electric Company, 329 F.2d 825, 830-35 (9th Cir. 1964); Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company, 323 F.2d 412, 414-15 (7th Cir. 1963), *cert. denied* 376 U.S. 939 (1964); Illinois v. Sperry Rand Corp., 237 F. Supp. 520, (N.D. Ill., 1965); Atlantic City Electric Company v. General Electric Company, 207 F. Supp. 620, 628-29 (S.D.N.Y. 1962); N.W. Electric Power Cooperative, Inc. v. General Electric Company, 30 F.R.D. 557 (W.D.Mo. 1961); Philadelphia v. Westinghouse Electric Corp., 308 F.2d 856 (3rd Cir. 1961); Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers, 3 F.R.D. 157, 159 (S.D.N.Y. 1942); Barnsdall Refining Corporation v. Birnamwood Oil Co., 32 F. Supp. 308, 310-12 (E.D. Wisc. 1940); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D. Minn. 1939), *aff'd on other issues*, 119 F.2d 747 (8th Cir. 1941), *Cert. denied* 314 U.S. 664 (1941). *Cf., e.g.,* Simco Sales Service of Pennsylvania, Inc. v. Air Reduction Company, Inc., 213 F. Supp. 505, 506 (E.D. Pa. 1963) (Civil consent decree struck); Ulrick v. Ethyl Gasoline Corporation, 2 F.R.D. 357 (W.D. Ky. 1942) (involving consent decree entered on stipulated facts). See also, *e.g.,* General Electric Co. v. San Antonio, 334 F.2d 480 (5th Cir. 1964) (inadmissibility of *nolo contendere* pleas not challenged on appeal); Olympic Refining Company v. Carter, 332 F.2d 260, 264-66 (9th Cir. 1964), *cert. denied* ..... U.S. ..... (1964). See discussion in Part IIA, *infra.*

8. General Electric Co. v. San Antonio, 334 F.2d 480, 486-87 (5th Cir. 1964); City of Burbank v. General Electric Co. 329 F.2d 825, 834-36 (9th Cir. 1964); Commonwealth Edison Co. v. Allis-Chalmers, 323 F.2d 412, 415-417 (7th Cir. 1963), *cert. denied* 376 U.S. 939 (1964). Other reported decisions directly so holding are Atlantic City Electric Company v. General Electric Company, 207 F. Supp. 620, 624-27 (S.D.N.Y. 1962); Sacramento Municipal Utility District v. Westinghouse Electric Corporation, 1962 CCH Trade Cases, Para. 70,552 (N.D. Calif. 1962). *Cf.* Simco Sales Service of Pennsylvania, Inc. v. Air Reduction Company, Inc., 213 F. Supp. 505, 506-08 (E.D. Pa. 1963) (Guilty plea in contempt proceeding for violation of antitrust law consent decree held admissible). See also Philadelphia v. Westinghouse Electric Corp., 1961 CCH Trade Cases, Para. 70,143 (E.D. Pa. 1961) (Defendant did not move to strike guilty pleas). *Contra* N.W. Electrical Power Cooperative, Inc. v. General Electric Company, 30 F.R.D. 557 (W.D. Mo. 1961) (References to proceedings in which defendants had entered guilty pleas struck); Note, *The Admissibility and Scope of Guilty Pleas in Antitrust Treble Damages Actions,* 71 YALE L.J. 684 (1962). See discussion in Part IIB below.

A. *Inadmissibility of Nolo Contendere Pleas*

The state of the law with regard to *nolo contendere* pleas can be summarized with confidence: Such pleas, and the criminal indictments and judgments relating to them, cannot properly provide any assistance whatever to a private claimant in attempting to establish any element of his cause of action.[9] The courts consistently have held for more than three decades that judgments entered on *nolo contendere* pleas are excluded entirely from the scope of section 5(a) because they are ". . . consent judgments . . . entered before any testimony has been taken. . .", within the meaning of the proviso to that section.

The procedural context in which the section 5(a) issue has been raised with regard to *nolo contendere* pleas, in the pertinent cases, has been a motion by the defendants to strike from the complaint various references to the prior criminal proceeding in which the *nolo* plea has been entered. Despite the liberal approach ordinarily followed by the federal courts on matters of pleading, and despite the fact that section 5(a) says nothing directly concerning this question, the courts generally have granted the defendant's motion to strike from the complaint all reference to the Government proceedings. Similarly, a *nolo contendere* plea is inadmissible under ordinary rules of evidence.[10]

The law concerning the effect of *nolo contendere* pleas was settled long before the recent Electrical Cases arose. The leading case in point is *Twin Ports Oil Co. v. Pure Oil Co.*,[11] one of the many private antitrust actions against major oil refining companies which followed in the wake of the Government's prosecutions in the so-called "Madison Oil Cases". Decided in 1942, it was the first reported decision in which the section 5(a) proviso was held to be applicable to criminal proceedings as well as to consent decrees in Government injunction suits. In a persuasive analysis, District Judge Nordbye concluded that judgments entered in Government criminal proceedings on *nolo contendere* pleas are "consent judgments" entered before the taking of testimony within the meaning of the proviso of section 5(a) of the Clayton Act.[12] Without further discussion, the court also concluded that references to such criminal proceedings were entirely inadmissible in the subsequent private action and could not be included in the plaintiff's complaint.

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9. *Supra* note 7. With regard to the possible use thereof for collateral purposes see pp. 176-177 *infra*.

10. *E.g.*, United States v. Standard Ultramarine & Color Co., 137 F. Supp. 157 at 170 (S.D.N.Y. 1955) (dictum).

11. 26 F. Supp. 366 (R. Minn. 1939), *affirmed on other issues* 119 F.2d 747 (8th Cir. 1941), *cert. denied* 314 U.S. 664 (1941).

12. *Id.* at 370-79.

Subsequent cases uniformly have followed the *Twin Ports* decision with respect to the status of *nolo contendere* pleas under section 5 (a) of the Clayton Act. Most of them also have followed the lead of Judge Nordbye in declaring that all references to such Government prosecutions are inadmissible in the treble damage actions and are subject to a motion to strike. In *Barnsdall Refining Corporation v. Birnamwood Oil Co.*,[13] for example, the court granted a motion to pleas from a counterclaim in which allegedly an injured purchaser had strike averments concerning a judgment entered on *nolo contendere* demanded treble damages. In addition to holding that the *nolo contendere* pleas and judgment were within the exclusionary proviso in section 5(a), the court concluded that they must be struck from the the pleadings and said "If the judgments referred to would not be admissible in evidence at the trial of this action, then it should not be pleaded. A motion to strike is a proper method of raising the question."[14]

It is noteworthy that the *nolo* pleas involved in the *Barnsdall* case had been entered before a second trial, after the defendants had obtained the reversal of a prior conviction based on a jury verdict. Although the court might well have concluded that the *nolo* plea had *not* been entered before the taking of any testimony, since there had been testimony in the first trial, it elected instead to take the more technical view that the granting of a new trial required the criminal proceeding to be treated as if it had never before been tried.[15]

In another relatively early case, *Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers*,[16] the District Court for the Southern District of New York granted the defendant's motion to strike all references to a prior consent decree and to a judgment of guilty entered upon a *nolo contendere* plea. The court held that such allegations were improper because they were "unnecessary" and prejudicial. District Judge Conger there stated (1) that the averments concerning the consent decree and *nolo* plea could not be justified on the ground that they provided background information, because the circumstances could be introduced in evidence without being averred in the complaint if they were relevant for such purpose, and (2) that the allegations could not be justified on the ground that

13. 32 F. Supp. 308 (E.D. Wisc. 1940).

14. *Id.* at 310.

15. *Id.* at 311.

16. 3 F.R.D. 157, 159 (S.D.N.Y. 1942).

they were needed to avoid the statute of limitations defense, because the plaintiff had no obligation to anticipate that defense.[17]

The decisions in the recent Electrical Cases have followed this consistent line of authority regarding *nolo* pleas. In every instance the courts have held that section 5(a) of the Clayton Act does not apply to judgments entered on *nolo contendere* pleas. As a general rule, the Electrical Cases also have more firmly established the corollary principles that no reference to Government proceedings in which *nolo contendere* pleas have been entered can be included in a treble damage complaint or admitted in evidence.

The earliest reported ruling in the Electrical Cases was an informal opinion in *Philadelphia v. Westinghouse Electric Corporation,*[18] in which Senior Judge Kirkpatrick granted motions of the defendants to strike all portions of the treble damage complaint referring to the *nolo contendere* pleas. In addition to saying that he felt bound to grant the motions on the authority of the *Twin Ports* case and similar decisions, he observed: 'The allegations objected to certainly can't be called impertinent or scandalous, but I think they must be called immaterial, and I can see possibilities of prejudice."[19]

A case in which various facets of the present problem were discussed in some detail was *Atlantic City Electric Company v. General Electric Company.*[20] In that case, District Judge Feinberg granted the defendants' motions to strike from the complaints all references to indictments to which all of the defendants had pleaded *nolo contendere,* and to the judgments and pleas relating thereto. In doing so, he said that the inapplicability of section 5(a) of the Clayton Act to the *nolo contendere* plea was a matter of "overwhelming authority", and he observed that the plaintiffs had not been able to cite any treble damage case in which a motion to strike references to such pleas had been denied.[21] Judge Feinberg apparently had some doubt in his own mind as to whether the inapplicability of section 5(a) to a *nolo contendere* plea should necessitate the granting of a motion to strike, but he concluded that the consistent line of precedents left no leeway

17. *Ibid.* The Court did say, however, that it would grant leave for the plaintiffs to amend that complaint to allege simply that the running of the statute of limitations had been suspended for a certain period because of the pendency of government proceedings. With regard to the question of whether a plaintiff can circumvent the rule excluding references to *nolo* pleas by allegations concerning the tolling of the statute of limitations, see the discussion at pp. 176-177 *infra.*

18. Philadelphia v. Westinghouse Electric Corporation, 1961 C.C.H. Trade Cases, Para. 7143 at p. 78,553 (transcript of oral opinion) (E.D. Pa. 1961).

19. *Id.* at p. 78,555.

20. 207 F. Supp. 620 (S.D.N.Y. 1962).

21. *Id.* at 628-29.

for any other ruling.[22] With respect to the averments concerning the content of the particular indictments to which *nolo* pleas had been entered, he granted the motions to strike on the ground that the issue thus raised was "inextricably linked" with the question raised by the motion to strike the *nolo* pleas and the judgments thereon.[23]

In all other cases in which the question has been considered, in the Electrical Industry Litigation and elsewhere, the courts have held that *nolo contendere* pleas are excluded from section 5(a) as "consent judgments" within the meaning of the proviso, that such pleas are themselves not admissible in evidence for any purpose, and that other references to the prior Government proceedings in which *nolo contendere* pleas were accepted ordinarily should be struck from the treble damage complaint and excluded from evidence because they are either evidentiary in nature or irrelevant and prejudicial.[24]

Because of the definite inapplicability of section 5 of the Clayton Act to judgments entered on *nolo contendere* pleas, the Justice Department has endeavored for several years to prevent defendants accused of so-called "hard-core" antitrust violations from avoiding the affects of section 5(a) by entering *nolo* pleas in the Government's criminal prosecutions. In some instances, including the Electrical Cases, the Justice Department has demanded that the defendants enter guilty pleas, at least to the principal indictments, as the price of avoiding criminal trials.[25] In other instances, the Government lawyers have succeeded in inserting in consent decrees language designed to prevent the defendants from contesting the basic issues of liability in subsequent actions for damages.[26]

Whether the Government can avoid the *Twin Ports* principle for the benefit of potential private plaintiffs by following such a strategy remains uncertain. In some instances, the courts have rejected the view that the Justice Department has any business attempting to assist private claimants in such a manner and have accepted the *nolo*

22. *Id.* at 628-30.

23. *Id.* at 629.

24. *Supra* note 7.

25. See transcript of argument in United States v. Westinghouse Electric Corp., Crim. No. 20235, and related cases, E.D. Pa., March 24, 1960, 1960 CCH Trade Cases, Para. 69,699. In that instance, however, Acting Assistant Attorney General Robert A. Bicks expressly denied that the purpose of the Justice Department's opposition to the entry of *nolo contendere* pleas was to assist potential plaintiffs in subsequent treble damage actions.

26. See, *e.g.*, United States v. Lake Asphalt and Petroleum Co., 1960 CCH Trade Cases, Para. 69,835 (D. Mass. 1960); United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167 (S.D.N.Y. 1955); Note, 71 YALE L.J. 684 n. 5 (1962).

contendere pleas (or entered proposed consent decrees) over the Government's objections.[27] Furthermore, the court in a subsequent treble damage action might well treat such a criminal case as if it had involved a simple and unqualified consent judgment. Thus, in *Ulrich v. Ethyl Gasoline Corporation,*[28] a district court held that a consent decree which had been entered upon stipulated facts agreed upon solely for the purpose of the Government case was inadmissible in a treble damage action. A significant decision in this regard was made in January of this year in *Illinois v. Sperry Rand Corp.,*[29] where District Judge Hubert L. Will granted a motion to strike from a treble damage complaint all references to a prior criminal case in which the defendants had entered *nolo contendere* pleas coupled with express consents to the entry of guilty findings.

The principal question yet to be decided concerning the value of *nolo contendere* pleas in private antitrust actions is the extent to which references to such Government proceedings may be averred in the complaint or admitted in evidence for a *collateral* purpose, even though they are clearly inadmissible for purposes of establishing the defendants' guilt. In *Pfotzer v. Aqua Systems, Inc.,*[30] for example, Circuit Judge Learned Hand held that a plaintiff was entitled to introduce in evidence a prior criminal indictment and a plea of *nolo contendere* thereto for the purpose of impeaching the credibility of an individual defendant who had elected to testify in the subsequent civil case. A more important aspect of this question is whether the plaintiff should be permitted to make references in the complaint to the Government prosecutions for the purpose of showing that the statute of limitations had been tolled.[31] In the *Atlantic City Electric Company* case,[32] Judge Feinberg denied motions to strike from the complaint references to civil injunction suits brought by the Govern-

27. See note 56 and 57, *infra.*

28. 2 F.R.D. 357 (W.D. Ky. 1942).

29. 237 F. Supp. 520, (N.D. Ill. 1965).

30. 162 F.2d 779, 784-85 (2nd Cir. 1947). However, the plaintiff in that action had not even asserted a right to utilitze the criminal judgment as evidence of an antitrust law violation, under section 5(a) of the Clayton Act, and Judge Hand observed that the *nolo* plea clearly was inadmissible for the purpose of proving the operative facts in any other case.

31. Section 5(b) of the Clayton Act, *supra,* as added by the Act of July 7, 1955, ch. 283, §2, c. 9 Stat. 283, 15 U.S.C. §16(b) (1963), provides that the running of the four year statute of limitations therein established for treble damages acts shall be tolled during the pendency of any criminal or civil proceedings of the government against the defendant on the basis of some allegedly unlawful conduct.

32. Atlantic City Electric Company v. General Electric Company, 207 F. Supp. 620, 629 (S.D.N.Y. 1960).

ment in connection with the Electrical Industry indictments, on the ground that the avernments were material to the defendants' anticipated statute of limitations defense. In the *Alden-Rochelle, Inc.* case,[33] however, a district court rejected the plaintiffs argument that they should be permitted to allege and show that a criminal judgment had been entered against the defendants on *nolo contendere* pleas for that purported purpose, although the court did grant leave for the plaintiffs to amend their complaint to allege simply that the running of the statute of limitations had been suspended during a certain period by the pendency of a proceeding instituted by the Government. As a matter of fairness and of sound judicial policy, the courts certainly should be wary about permitting plaintiffs to refer to criminal prosecutions under the guise of such collateral purposes. If the fact that a judgment has been entered against the defendants in a Government prosecution is made known to the jury, it is bound to have a prejudicial effect far out of proportion to any proper purpose for which ostensibly they have been offered by the plaintiffs.

B. *Admissibility of Guilty Pleas*

The status of guilty pleas under section 5(a) of the Clayton Act has involved much more uncertainty and dispute than has that of *nolo contendere* pleas. Despite their many similarities, *nolo* and guilty pleas have been treated quite differently in regard to section 5(a). Whereas the courts long and consistently have held that judgments entered on *nolo contendere* pleas are beyond the scope of section 5(a), no court squarely faced that question with respect to guilty pleas until the Electrical Cases. Different rulings have been handed down by different judges in those cases, but the decisions of the Courts of Appeals for three circuits in 1963 and 1964 probably have established, beyond serious challenge, the proposition that judgments entered on *guilty* pleas do furnish a prmia facie case for plaintiffs in subsequent civil actions on certain of the issues they must establish.

Until quite recently there was good reason to expect the courts to treat guilty pleas as consent judgments under the proviso to section 5(a). The language of such early landmark decisions as the *Twin*

33. Alden-Rochelle v. American Society of Composers, Authors and Publishers, 3 F.R.D. 157, 159 (S.D.N.Y. 1942). A similar intermediate position on this question was stated as dicta by Judge Halbert in Sacramento Municipal Utility District v. Westinghouse Electric Corporation, 1962 CCH Trade Cases, Para. 70,552 at p. 77,224 (N.D. Calif. 1962), and by Senior Judge Kirkpatrick in Philadelphia v. Westinghouse Electric Corporation, 205 F. Supp. 830 (E.D. Pa. 1961).

Ports case[34] and the *Barnsdall*[35] case rather clearly indicates that those courts which excluded *nolo* pleas from the scope of section 5(a) also viewed guilty pleas as beyond the scope of that section. In one of the early rulings in the Electrical Industry Litigation, the District Court for the Western District of Missouri, without discussion, granted a motion to strike references to the criminal proceedings in which guilty pleas had been entered.[36] Even in the three cases in which the Courts of Appeals ultimately ruled to the contrary, some notable members of the judiciary issued opinions stating that section 5(a) has no proper application to judgments entered on guilty pleas.[37]

Nevertheless, three appellate court decisions have been handed down on this point in the Electrical Cases, and all three have held that guilty pleas are *not* consent judgments within the meaning of the section 5(a) proviso and, therefore, that they *do* furnish potential plaintiffs the benefit of a prima facie case under the terms of that section. The first of those precedents was a two to one decision by the Court of Appeals for the Seventh Circuit on September 12, 1963, in *Comonwealth Edison Company v. Allis-Chalmers Manufacturing Company.*[38] The second decision was handed down in the Ninth Circuit on March 20, 1964, in *City of Burbank v. General Electric Company.*[39] The most recent of the three is *General Electric Com-*

34. Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 370-76 (D. Minn. 1939), *affirmed on other issues* 119 F.2d 747 (8th Cir. 1941), *cert denied* 314 U.S. 644 (1941).

35. Barnsdall Refining Corporation v. Birnamwood Oil Co., 32 F. Supp. 308, 311-12 (E.D. Wisc. 1940).

36. N. W. Electric Power Cooperative, Inc. v. General Electric Company, 30 F.R.D. 557 (W.D. Mo. 1961).

37 A particularly persuasive, though ultimately rejected, analysis of the issue was set forth in Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company, 211 F. Supp. 712 (N.D. Ill. 1962), *reversed* 323 F.2d 412 (7th Cir. 1963), *cert. denied* 376 U.S. 939 (1964) by District Judge Edwin A. Robson, one of the most active of the judicial leaders in the development of the electrical industry litigation. A similar discussion is contained in the opinion of District Judge Byrne in Department of Water and Power of the City of Los Angeles v. Allis-Chalmers Manufacturing Company, 32 F.R.D. 204 (S.D. Calif. 1963), *reversed sub nom* City of Burbank v. General Electric Company, 329 F.2d 825 (9th Cir. 1964). See also the opinion of District Judge Connally, concurring specially in General Electric Company v. City of San Antonio, 334 F.2d 480, 487-88 (5th Cir. 1964); and the opinion of Circuit Judge Knoch dissenting in the *Commonwealth Edison* case, 323 F.2d 412, 417 (7th Cir. 1963). See also Note, *The Admissibility and Scope of Guilty Pleas in Antitrust Treble Damage Actions,* 71 YALE L. J. 684, 686 (1962).

38. 323 F.2d 412 (7th Cir. 1963), *cert denied* 376 U.S. 939 (1964).

39. 329 F.2d 825 (9th Cir. 1964).

pany v. San Antonio, in which the Court of Appeals for the Fifth Circuit concluded as follows:

> We agree with the conclusions reached by the 7th and 9th Circuits. The exclusionary proviso of Section 5(a) does not apply to judgments entered on pleas of guilty by defendants in criminal anti-trust actions, and judgments entered on such pleas constitute prima facie evidence of the violation of the anti-trust laws.[40]

It is interesting to note that all three of these appellate decisions reversed district court rulings which had granted motions by the defendants to strike from the complaints the plaintiffs' references to the prior criminal proceedings.[41] There have been other district court decisions in the Electrical Cases, however, which are consistent with the law as now established by the 5th, 7th and 9th Circuit Courts of Appeals.[42]

Despite the facts that the Supreme Court never has ruled on the question and that some highly respected judges have reached contrary conclusion, it seems likely now that the admissibility of judgments based on guilty pleas under section 5(a) of the Clayton Act is an established principle of law. Even those judges who might otherwise have reached a contrary conclusion probably will feel compelled now to follow the lead of the three Courts of Appeals which squarely have decided that guilty pleas are within the scope of section 5(a) of the Clayton Act.[43]

Even without the aid of section 5(a), guilty pleas entered in the Government antitrust prosecution probably would be *admissible* under ordinary rules of evidence in any later action against the same defendants. Whereas a *nolo contendere* plea by its very nature is limited in effect to the specific proceeding in which it is entered, a

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40. 334 F.2d 480, 487 (5th Cir. 1964).

41. See note 37, *supra.* The lower court ruling involved in the City of San Antonio decision in the Fifth Circuit was unreported.

42. Atlantic City Electric Company v. General Electric Company, 207 F. Supp. 620, 624-28, 630 (S.D.N.Y. 1962) (Note, however, that Judge Feinberg at p. 627 actually reserved final decision on the status of guilty pleas to the trial judge); Sacramento Public Utility District v. Westinghouse Electric Corporation, 1962 CCH Trade Cases, Para. 70,552 (N.D. Calif. 1962). See also City of Philadelphia v. Westinghouse Electric Corp., 1961 CCH Trade Cases, Para. 70,143 (E.D. Pa. 1961) (in which the defendants had moved to strike *nolo* pleas but not guilty pleas).

43. This was the reason for which District Judge Conally concurred in the result, rather than dissenting, in General Electric Company v. City of San Antonio, 334 F.2d 480, 487 (5th Cir. 1964).

guilty plea traditionally has constituted an admission against interest which could be used against the defendant in other actions.[44] Consequently, the practical significance of the applicability of section 5(a) in cases involving guilty pleas necessarily will depend upon the extent, if any, to which section 5(a) may be held to confer upon the plaintiffs evidentiary benefits not available under ordinary rules of evidence.

One final issue concerning the status of guilty pleas must be considered: Even assuming that guilty pleas and related documents are deemed to be admissible in evidence and to be entitled to prima facie effect, should they nevertheless be struck from treble damage complaints. Although the cases previously cited in this section involved the *denial* of motions to strike, there is some authority on which defendants will be able to rely in contending that at least *some* of those references should be struck. In *Federal Shoe, Inc. v. United Shoe Machinery Corporation,* for example, the District Court for the District of Massachusetts granted motions to strike from a treble damage complaint certain detailed allegations concerning a previous Government injunction suit in which the defendant had been found guilty of antitrust law violations. The holding of that case was stated as follows:

> Under § 5 of the Clayton Act, 15 USCA § 16, some or all of this material may be admissible at trial as prima facie evidence of violation of the antitrust laws by the defendant. *Its inclusion in the complaint is, however, improper as a detailed pleading of evidentiary matter.* Most of the cases dealing with this problem have, however, allowed plaintiffs to include in the complaint a simple allegation of the entry of the decree and plaintiffs' intention to rely on it.[45] (Emphasis added)

So long as the plaintiff's complaint alleges the necessary elements of a cause of action for treble damages, there is certainly no need for it to allege the existence of the previous conviction or any other

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44. See discussion of this point in Part IV, *infra,* and cases cited in note 98, *infra.*

45. 19 F.R.D. 209, 210 (D. Mass. 1956). See also Department of Water and Power of the City of Los Angeles v. Allis-Chalmers Manufacturing Company, 32 F.R.D. 204, 208 (S.D. Calif. 1963), *reversed sub nom* City of Burbank v. General Electric Company, 329 F.2d 825 (9th Cir. 1964) where the argument was stated by the district court in Allis-Chalmers in the following language at p. 208 (which was not considered by the Court of Appeals which reversed the granting of a motion to strike):

> Section 5(a) states a rule of evidence. . . and only ultimate facts should be pleaded.

evidence which the plaintiff intends ultimately to introduce to establish those elements. Despite the liberality of pleading rules in the federal courts, at least some courts might well be persuaded in future cases that references in the complaint to criminal prosecutions in which guilty pleas have been entered are evidentiary in character and should not be permitted, especially in view of their potentially prejudicial effect. Whether this issue has any practical significance in any treble damage case, of course, will depend upon the use to which the complaint is put in the trial, and particularly upon whether it is made available to the jury.[46]

III. POLICIES AND ARGUMENTS

Because the status of *nolo contendere* and of guilty pleas under section 5(a) of the Clayton Act is rather well settled by existing decisions, a detailed discussion of the arguments for and against the applicability of that section would have little value at this time. Nevertheless, an abbreviated summary and evaluation of the contentions might be worthwhile, for the reasons (1) that they are intrinsically interesting, (2) that defendants no doubt will continue to raise the issue with respect to guilty pleas in actions for treble damages in those circuits in which decisions have not yet been rendered, and (3) that the evaluation of such considerations by the courts surely will influence the practical application of section 5(a) in those future trials in which it is held to be available.

A. *Arguments Advanced*

The basic problem has been that section 5(a) of the Clayton Act embodies two essentially contradictory policy objectives. The primary purpose of the operative portion of that section is to encourage the filing of treble damage complaints by helping allegedly injured parties to carry their burden of proof. On the other hand, the aim of the proviso is to avoid the cost and expense of unnecessary criminal trials by giving antitrust law defendants an incentive to capitulate. Thus, as the Court of Appeals for the Ninth Circuit observed in the opinion in *City of Burbank v. General Electric Company*: "The real nub of the controversy is to be found in the delicate task of balancing the policy involved in antitrust enforcement."[47]

Courts which have been inclined to apply section 5 to judgments entered on criminal pleas generally have emphasized the policy of

46. See discussion of this point (and of the related issue of what may be in evidence where section 5(a) is applicable) in Part IV, *infra*.

47. 329 F.2d 825, 834-35 (9th Cir. 1964).

encouraging private enforcement of the antitrust laws. In *Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.*, it was stated as follows:

> There is the congressional purpose in enacting §5(a). . . . The objective was to provide more effective enforcement of the antitrust laws. . . . By giving those litigants the prima facie benefit of judgments obtained by the Government, Congress intended to save those private litigants great time and expense. And there is evidence that the section has had the effect of encouraging private treble damages actions.[48]

Similarly, in the *City of Burbank* decision, it was said:

> Thus, undoubtedly one purpose underlying the amendment adopted by Congress was to make it easier for private antitrust plaintiffs to recover from defendants already sued and found guilty by the government of antitrust violations.[49]

As the above-quoted language implies, a desire to see alleged victims of such violations recover recompense and the desire to add to the punishment of the defendants have been influential factors in the thinking of these courts.[50]

Other authorities have emphasized the objective of encouraging capitulation as embodied in the proviso. In the *Twin Ports* case the court held that the term "consent judgment" in the proviso referred to criminal judgments as well as to civil consent decrees, saying:

> Reason and common sense suggest that, if Congress intended to avoid long civil proceedings by encouraging consent decrees, the same consideration would apply to criminal proceedings. Congress was not obliged to make the way easier for private litigants. The prima facie feature of judgments and decrees entered in proceedings instituted by the Government was an innovation of the Clayton Act, and in considering the past experience with reference to the advantage of consent decrees and pleas of guilty, it was apparently assumed that the provisos would redound to the public good.[51]

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48. 323 F.2d 412, 415 (7th Cir. 1963).

49. *Supra* note 47 at 831.

50. See also, *e.g.*, Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 567-68 (1951) (dictum); Olympic Refining Company v. Carter, 332 F.2d 260, 264 (9th Cir. 1964), *cert. denied* ..... U.S. ..... (1964) (referring to this objective of section 5(a) as a reason for holding that the plaintiff is entitled access to documents furnished by the defendant to the Government in the prior criminal proceeding even though a *nolo* plea had been entered).

51. Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 372 (D. Minn. 1939).

Later in that opinion the court stated its conclusion and resolved the conflict of policies in the following words:

> In effect, Congress said to the law violator, 'It is to your advantage to capitulate to our demands before any testimony is taken in any equity or criminal proceedings. If you fail, and a decree or judgment is entered against you, such decree or judgment will constitute prima facie proof to any or all private litigants who may have been injured by your unfair practices.' That the expediency of the plan appealed to Congress, and that it intended by the provisos to encourage consent judgments in criminal cases, as well as in equity proceedings, can scarcely be gainsaid in view of the congressional record.[52]

In his dissenting opinion in *Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company,* Circuit Judge Knock emphasized this aspect of the dual purposes of the section:

> My study of it [the legislative history] leads me to the conclusion that a primary Congressional purpose was to induce capitulation of defendants to avoid protracted litigation and to impose additional burdens by way of simplifying individual civil suits only against those who exposed the government to extended and expensive unnecessary trials.[53]

Although District Judge Connally felt compelled by the authority of the Seventh and Ninth Circuit decisions on the point to concur in the result in *General Electric Company v. San Antonio,* he indicated that he would have voted otherwise if he had been faced with the issue as a matter of first impression, and he warned that the course of the law concerning guilty pleas might well undermine the purpose of the proviso:

> A defendant, his *nolo* plea denied, will, I suggest, be inclined to take his chances with the jury and try for an acquittal, a not infrequent result, irrespective of the guilt or innocence of the defendant. The purpose of the statute was to encourage a defendant who in fact was guilty to capitulate to the Government, and thus to avoid the delay and expense of the protracted proceeding.[54]

Similarly, Judge Robson concluded in the *Commonwealth Edison* case at the district court level:

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52. *Id.* at 376.

53 323 F.2d 412, 417 (7th Cir. 1963), *cert. denied* 376 U.S. 939 (1964).

54. 334 F.2d 480, 488 (5th Cir. 1964).

> The prime purpose of the statute was, as indicated, to induce capitulation of defendants to government civil and criminal charges. . . , and that purpose is served equally by pleas of guilty and pleas of *nolo contendere*.[55]

Thus, the judicial viewpoint manifested in these opinions, in essence, is that the policy of promoting capitulation is paramount to that of assisting private litigants. Other courts have expressed similar sentiments in rejecting objections of the Justice Department to the entry of *nolo contendere* pleas[56] and consent decrees.[57]

Closely related to the fundamental policy arguments have been the opposing contentions based upon the legislative history of the Clayton Act. In this respect the courts favoring the application of section 5 to judgments entered on guilty pleas ordinarily have argued that the legislative history is "inconclusive", rather than that it provides affirmative support for that position.[58] Those taking the contrary view, however, have emphasized the language of congressional debates.

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55. Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company, 211 F. Supp. 712, 728 (N.D. Ill. 1962).

56. United States v. Safeway Stores, Incorporated, 20 F.R.D. 451, 456 (N.D. Tex. 1957), where the court said:

> It is fundamental that the primary responsibility of the Government in a criminal case involves the consideration of public interests, not private interests.

See also: United States v. Rubber Manufacturers Association, Inc., 1959 CCH Trade Cases, Para. 69,435 (S.D.N.Y. 1959); United States v. B. F. Goodrich Co., 1957 CCH Trade Cases, Para. 68,173 (D.D.C. 1957); United States v. Cigarette Merchandisers Association, Inc., 136 F. Supp. 212 (S.D.N.Y. 1955); United States v. Jones, 119 F. Supp. 288 (S.D. Calif. 1954).

57. United States v. Brunswick-Balke-Collender Company, 203 F. Supp. 657 (E.D. Wisc. 1962). The Supreme Court has held that the courts should not enter consent decrees over Government objections as to the substantive terms of relief in United States v. Ward Baking Company, 376 U.S. 327 (1964), but its opinion in that case furnishes no support for an argument that the Justice Department should be permitted to insist upon the entry of guilty pleas or express admission of liability to potential plaintiffs as a condition to the avoidance of a Government trial.

58. Atlantic City Electric Company v. General Electric Company, 207 F. Supp. 620, 625 (S.D.N.Y. 1962). (Only one actual reference to the debates was as cited by Judge Feinberg). See also City of Burbank v. General Electric Company, 329 F.2d 825, 834 (9th Cir. 1964); Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company, 323 F.2d 412, 415 (7th Cir. 1963), *cert. denied* 376 U.S. 939 (1964).

One of the most thorough discussions of the legislative history is contained in the *Twin Ports* opinion.[59] As District Judge Nordbye explained in that case, the original version of the bill as introduced in and adopted by the House contained a provision making Government *civil* decrees *conclusive* evidence in subsequent treble damage actions, and the Senate amended it by committee action and on the floor to make both *civil and criminal* judgments admissible as *prima facie* evidence.[60] The proviso making sections 5(a) applicable to consent judgments thereafter was added in Conference for the purpose of encouraging capitulation.[61] This sequence of events itself indicates that the proviso was intended to cover criminal pleas as well as civil consent decrees. Moreover, the language of the floor debates provides evidence of specific understanding that it would apply to guilty pleas as well as to *nolo contendere* pleas. One of several such statements is the following explicit statement by Senator Reed, a member of the Conference Committee which inserted the proviso:

> It is my opinion, from that language, that the deduction must be drawn that the exception applies to criminal as well as civil consents. The only way you can consent in a criminal case is by an absolute plea of guilty or the plea of nolo contendere.[62]

Similarly, the courts have fashioned arguments for and against the application of section 5(a) to *nolo* and guilty pleas from the language of the statute. As Judge Feinberg observed in the *Atlantic City* case, the language of section 5(a) permits the making of diametrically opposed contentions.[63] The argument in favor of the application of the section to criminal pleas was that the term "consent judgment" implied a reference to "consent decrees" as entered in civil injunction suits. The above-cited legislative history persuasively answered that contention in the view of the District Court for the District of Minnesota in the *Twin Ports* case.[64] Moreover, as origi-

59. Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 373-75 (D. Minn. 1939). Another extensive discussion of the legislative history is found in Judge Robson's opinion in the *Commonwealth Edison* case, Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company, 211 F. Supp. 712, 728 (N.D. Ill. 1962).

60. See Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 374 (D. Minn. 1939).

61. See also U.S. 63rd Cong., 2d Sess., Senate Doc. No. 585, 4.

62. 51 Cong. Rec. 15823 (1914). This statement and other pertinent excerpts from the debate are quoted in the *Twin Ports* opinion.

63. Atlantic City Electric Company v. General Electric Company, 207 F. Supp. 620, 624-25 (S.D.N.Y. 1962).

64. *Supra* note 60 at 373-75.

nally enacted, section 5(a) contained a second proviso, which expressly employed the term "consent judgments" in referring to the results of certain criminal actions pending before the courts on the effective date of the Clayton Act.[65]

Under another frequently found type of argument, some courts have endeavored to determine whether the *nolo contendere* or guilty pleas involve elements of "consent". The opinions of courts favoring the application of section 5(a) to guilty pleas have purported to distinguish between the two pleas by asserting that the *nolo contendere* plea requires the consent of the Justice Department or the consent of the court under Rule 11 of the Federal Rules of Criminal Procedures, whereas a defendant is entitled to plead guilty as of right.[66] Such an attitude was stated tersely and unpersuasively in *Sacramento Municipal Utility District v. Westinghouse Electric Corporation* where the court said, ". . . a plea of guilty cannot be construed as being a consent decree, any more than a crime can be consented to."[67] Even the court which decided the *Twin Ports* case —and which clearly was of the opinion that *both* of these criminal pleas should be excluded by the proviso — distinguished between *nolo* and guilty pleas in this regard.[68] Other courts have found no real difficulty in construing the words "consent judgment" as sufficiently broad to cover judgments entered on guilty pleas however. In *Department of Water and Power of the City of Los Angeles v. Allis-Chalmers Manufacturing Company,* for example, Judge Byrne interpreted this term by referring to the balance of the proviso:

> The reasons for regarding judgments rendered on pleas of nolo contendere in criminal proceedings as within the proviso are that such judgments are entered before testimony in a trial on the merits is taken, signify capitulation, and *there-*

65. See City of Burbank v. General Electric Company, 329 F.2d 825, 831 (9th Cir. 1964); Barnsdall Refining Corporation v. Birnamwood Oil Co., 32 F. Supp. 308, 312 (E.D. Wisc. 1940). See also opinion of Judge Robson in Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company, 211 F. Supp. 712, 728 (N.D. Ill. 1962).

66. See, *e.g.,* Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company, 323 F.2d 412, 415-16 (7th Cir. 1963), *cert. denied* 376 U.S. 939 (1964); City of Burbank v. General Electric Company, 329 F.2d 825, 835 (9th Cir. 1964); Atlantic City Electric Company v. General Electric Company, 207 F. Supp. 620, 626 (S.D.N.Y. 1962). It should be noted, of course, that the cases cited in note 56, *supra,* indicate that Justice Department consent is *not* a prerequisite to the acceptance by the court of a *nolo contendere* plea.

67. 1962 CCH Trade Cases, Para. 70,552 at p. 77,225 (N.D. Calif. 1962).

68. Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 372-73 (D. Minn. 1939), *affirmed on other issues* 119 F.2d 747 (8th Cir. 1941), *cert. denied* 314 U.S. 644 (1941).

> *fore constitute 'consent judgments'. . . .These characteristics are also typical of guilty pleas* in antitrust cases, and consequently it seems that Congress intended both types of pleas to be included within the proviso of Section 5(a).[69] (Emphasis added)

The argument was answered in a different way by Judge Robson in *Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company*: "While it is unusual to call a guilty plea a 'consent' to a judgment, viewed in context, it can not be said to be inappropriate."[70]

The traditional distinction between *nolo contendere* and guilty pleas at common law has furnished the basis of another line of argument. The essence of that distinction is that the effect of a *nolo* plea always has been limited to the particular prosecution in which it is entered, whereas a guilty plea generally has been admissible in other actions, at common law, as an admission against interest.[71] Some courts have regarded such distinctions as a persuasive reason for holding guilty pleas within the scope of section 5(a) of the Clayton Act, while excluding *nolo contendere* pleas therefrom.[72] Moreover, the common law principles under which *nolo* pleas provide no collateral estoppel or admissible evidence in later cases have been cited by others as reasons for construing section 5(a) as inapplicable to them.[73] Contrary arguments on this point would be that the common law distinction has no logically necessary relationship to this special statutory provision and that the very fact that guilty pleas ordinarily are admissible in evidence at common law substantially diminishes the policy appeal of a determination that section 5(a) applies.

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69. 32 F.R.D. 204, 207 (S.D. Calif. 1963), *reversed sub nom* City of Burbank v. General Electric Company, 329 F.2d 825 (9th Cir. 1964).

70. 211 F. Supp. 712, 728 (N.D. Ill. 1962).

71. See, *e.g.*, Hudson v. United States, 272 U.S. 451, 455 (1926) (dictum); Simco Sales Service of Pennsylvania, Inc. v. Air Reduction Company, Inc., 213 F. Supp. 505, 507-08 (E.D. Pa. 1963); United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167, 170 (S.D.N.Y. 1955); United States v. Jones, 119 F. Supp. 288, 290-91 (S.D. Calif. 1954). See also the discussion in Part IV, *infra*.

72. *E.g.*, Atlantic City Electric Company v. General Electric Company, 207 F. Supp. 620, 626-27 (S.D.N.Y. 1962).

73. Barnsdall Refining Corporation v. Birnamwood Oil Co., 32 F. Supp. 308, 312 (E.D. Wisc. 1940); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 378 (D. Minn. 1939), *affirmed on other issues* 119 F.2d 747 (8th Cir. 1941), *cert. denied* 314 U.S. 644 (1941). *Cf.*, Simco Service of Pennsylvania, Inc. v. Air Reduction Company, Inc., 213 F. Supp. 505 (E.D. Pa. 1963) (references to consent decree struck); Ulrich v. Ethyl Gasoline Corporation, 2 F.R.D. 357 (W.D. Ky. 1942) (references to consent decree and stipulation of facts held inadmissible).

In the *Burbank* opinion,[74] the Ninth Circuit Court of Appeals included a rather unusual line of argument to the effect (1) that some defendants plead guilty because they know they are guilty, and others plead guilty because they believe the Government can prove the allegations of the indictments, and (2) that neither group should be treated better than defendants which honestly believe they are innocent but are found guilty in a trial of their causes. Another circumstance which apparently has influenced some of the courts to the disadvantage of defendants on this point is the fact that criminal defendants have argued so energetically in the criminal proceedings for the acceptance of *nolo contendere* rather than of guilty pleas. For example, the following observation was made in the *City of Burbank* case:

> . . . we think it curious that antitrust lawyers who will and have spent hours in urging district court judges that their clients should be permitted to plead *nolo contendere* rather than guilty to antitrust government charges, because of the differing effect of the two pleas, should now urge there really is not and should not be any different consequences. . . .[75]

Whatever may be the merit of the ultimate conclusion reached as to the status of guilty pleas under section 5(a), this last group of contentions certainly must be viewed as unrealistic and unfair. Many factors in addition to the prospects of conviction or acquittal are considered by defendants in deciding whether to fight or to capitulate when indicted for a violation of the antitrust law.[76] Moreover, the insistence of defendants upon pleading *nolo contendere* rather than guilty reflects no more than the customary caution and a recognition that the status of *nolo* pleas has been more firmly established under the authorities than has that of guilty pleas.[77]

B. *Evaluation*:

The recent line of decisions in the Electrical Cases, to the effect that judgments entered on guilty pleas are within the scope of section 5 (a), provides a graphic illustration of the principle that bad facts make bad law. The conclusion is inescapable that the rulings of the

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74. City of Burbank v. General Electric Company, 329 F.2d 825, 835 (9th Cir. 1964).

75. *Ibid.*

76. For illustrations, see the reasons cited by counsel for the electrical equipment manufacturers at the time of the entry of pleas in response to the Philadelphia indictments, note 115 *infra*.

77. See United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167, 169 (S.D.N.Y. 1955).

courts on this point have been influenced materially by the same feelings of moral indignation against the defendants as previously had been manifested by the Justice Department.[78] These decisions have rested, in reality, upon the view that the objective of assisting allegedly injured purchasers of electrical equipment is paramount to that of encouraging capitulation.[79] Such other reasons as have been cited have been essentially unpersuasive or irrelevant.

If it were possible to consider the matter as a question of first impression, the stronger arguments clearly would favor the position that guilty pleas, as well as *nolo contendere* pleas, are beyond the scope of section 5(a). In particular, the legislative history, far from being inconclusive, shows with unusual clarity a specific congressional intent that the proviso should cover *all* criminal pleas entered without the necessity of a trial.[80] As a matter of logic, of proper statutory construction, and of fairly balancing the conflicting interests involved, therefore, the courts should adopt the view that judgments entered on guilty pleas *are* "consent judgments" excluded by the proviso of section 5(a) of the Clayton Act.[81] Guilty pleas should not be accorded *prima facie* significance in subsequent private actions, even though they might be admissible therein under ordinary rules of evidence.

IV. EVIDENTIARY EFFECT OF GUILTY PLEAS

Assuming that a judgment entered on a guilty plea in a criminal antitrust action is within the scope of section 5(a) of the Clayton Act and is not excluded by the proviso of that section, it is necessary to determine what evidentiary effect such a judgment should have in a subsequent treble damage action. On this point, section 5(a) states that the "final judgment" in the prior criminal proceeding "shall be prima facie evidence against such defendant . . . as to all matters respecting

78. See, *e.g.*, the concurring opinion of Judge Connally in General Electric Company v. City of San Antonio, 334 F.2d 480, 487 (5th Cir. 1964).

79. In the light of the legislative history of the provision, the attitude manifested by the courts in these cases is subject to the same criticism which Chief Judge Tehan made of the Justice Department's policy of refusing to agree to a consent decree in United States v. Brunswick-Balke-Collender Company, 203 F. Supp. 657, 661 (E.D. Wisc. 1962):

> In our opinion, this policy is an unauthorized attempt on the part of an administrative agency to avoid congressional intent as clearly set forth in the proviso in §5 of the Clayton Act.

80. See, *e.g.*, the opinion of Circuit Judge Knoch, dissenting in Commonwealth Edison Company v. Allis-Chalmers Manufacturing, 323 F.2d 412, 417 (7th Cir. 1963).

81. *Supra* note 78.

which said judgment . . . would be an estoppel as between" the Government and the defendant. Thus, this portion of section 5(a) has three elements to it: (1) the *final judgment* from the criminal proceeding is the evidence which may be used against the defendant, and (2) it constitutes *prima facie evidence* (3) *as to all matters for which it would be an estoppel as between the Government and the defendant.*

A. *General Principles*

There should be no dispute regarding the weight to be given to evidence introduced under section 5(a). This section very clearly states that it is prima facie evidence, and the meaning of this is clear in the law. It is evidence which alone is sufficient to establish the fact for which it is offered, although it is not conclusive evidence of such fact but may be rebutted.[82]

The most difficult element of section 5(a) to apply is with regard to the issues in the treble damage action as to which the judgment in the prior criminal proceeding is prima facie evidence. As noted previously, section 5(a) defines this element as being "all matters respecting which said judgment . . . would be an estoppel as between" the Government and the defendant.

The Supreme Court has confirmed what is obvious from this wording, that the general test is one of collateral estoppel. In *Emich Motors v. General Motors,*[83] a treble damage action, the Supreme Court wrestled with the question of the evidentiary effect under section 5 (a) of a prior conviction for violation of the Sherman Act based on a general jury verdict. The Court concluded that such evidentiary effect "is thus to be determined by reference to the general doctrine of estoppel."[84] The Court then proceeded to define "estoppel" in accord-

82. See, *e.g.,* WIGMORE, EVIDENCE § 2494 (3d ed. 1940); Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709 (9th Cir. 1959), *cert. denied* 361 U.S. 961 (1960); Loew's, Inc. v. Cinema Amusements, Inc., 210 F.2d 86 (10th Cir. 1954), *cert. denied* 347 U.S. 976 (1954); Dal International Trading Co. v. The S.S. Milton J. Forman, 171 F. Supp. 794 (E.D.N.Y. 1959). In Philadelphia Electric Co. v. Westinghouse Electric Corp., Civil No. 30015, E.D. Pa., 1964, one of the treble damage actions in the Electrical Cases, the jury was instructed regarding the meaning of prima facie evidence as follows:

> Prima facie evidence is that evidence which in and of itself is sufficient to establish the facts alleged. It may be rebutted by other evidence but it remains throughout the case and would be sufficient in itself without other evidence to prove the facts. . . . Record p. 7705.

83. 340 U.S. 558 (1951).

84. *Id.* at 568.

ance with its generally accepted meaning,[85] *i.e.*, that only matters which have actually been determined in a prior proceeding are conclusive between the parties:

> Such estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution. . . . In the case of a criminal conviction based on a jury verdict of guilty, issues which were essential to the verdict must be regarded as having been determined by the judgment. . . . Accordingly, we think plaintiffs are entitled to introduce the prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based.[86]

Thus, the matters on which a final judgment in the criminal proceeding constitutes prima facie evidence are the same matters which would be covered by the principle of collateral estoppel if the subsequent proceeding were between the Government and the defendant.

The importance of determining the extent to which a final judgment based on a guilty plea in a Sherman Act prosecution prima facie evidence in a subsequent treble damage action may be seen from the detailed and comprehensive nature of the indictments in the Electrical Cases. The indictments were essentially the same in form, but for purposes of illustration the indictment covering power switchgear assemblies is considered.[87] Paragraph 14 alleges that "beginning at least as early as 1958 and continuing thereafter at least to September 23, 1959," the defendants had engaged in a "combination and conspiracy in unreasonable restraint of the aforesaid interstate trade

85. See, *e.g.*, RESTATEMENT, JUDGMENTS § 68 (1942):

> (1) Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subesquent action on a different cause of action. . . .
>
> (2) A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action.

This is to be distinguished from res judicata under which matters that might have been but were not litigated between the parties in a prior action are conclusive in a subsequent proceeding based on the same cause of action. *Id.*, comment *a*.

86. *Supra* note 83 at 569. The common law principle of collateral estoppel applies only between the same parties and it has applicability in a treble damage action in which one of the parties, the plaintiff, was not involved in the prior criminal proceeding only because of the specific provision in section 5(a) of the Clayton Act.

87. United States v. Westinghouse Electric Corp., Criminal Action No. 20399, E. D. Pa., filed June 22, 1960.

and commerce in power switchgear assemblies, in violation of Section 1 of the . . . Sherman Act." Paragraph 15 then alleges that this "combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants . . . the substantial terms of which were" to fix and maintain prices, to allocate sales to governmental agencies, to submit rigged bids to governmental agencies and electric utility companies, and to restrain from selling certain types of power switchgear assemblies to other manufacturers of electrical equipment. Paragraph 16 sets forth many detailed acts alleged to have been done "for the purpose of forming and effectuating the aforesaid combination and conspiracy," including dates and places of alleged meetings among the defendants.[88] Para-

88. The following is the full text of paragraph 16 of this power switchgear assemblies indictment:

During the period of time covered by this indictment, the defendants, co-conspirators and other persons to the grand jurors unknown, for the purpose of forming and effectuating the aforesaid combination and conspiracy, did among other things, the following:

(a) On or about October 8, 1958, following previous discussions, representatives of defendant corporations (other than defendant Allis-Chalmers Manufacturing Company) met at the Hotel Astor in New York City to discuss increasing the price levels for power switchgear assemblies.

(b) On or about November 9, 1958, a meeting was held at the Traymore Hotel, Atlantic City, New Jersey, at which representatives of all of the defendant corporations agreed, among other things, that:

(1) In the sale of power switchgear assemblies to electric utility companies, private industrial corporations, and contractors, all of the defendant corporations, except Federal Pacific Electric Company, would sell power switchgear assemblies at "list" or "book" price levels;

(2) In the sale of power switchgear assemblies to electric utility companies, private industrial corporations, and contractors, (except low voltage drawout metal-enclosed switchgear assemblies sold to private industrial corporations) defendant Federal Pacific Electric Company would be permitted to quote prices at a specified differential below the prices quoted by the other defendant corporations;

(3) Representatives of all of the defendant corporations would meet periodically and allocate bids to Federal, State, and local governmental agencies according to the following approximate percentage shares:

General Electric Company	39 per cent
Westinghouse Electric Company	35 per cent
I-T-E Circuit Breaker Company	11 per cent
Allis-Chalmers Manufacturing Company	8 per cent
Federal Pacific Electric Company	7 per cent

(c) On or about November 14, 1958, at New York, New York, another meeting was held for the purpose of establishing a systematic pro-

graph 17 then alleges the "effects of the aforesaid combination and conspiracy" to be that prices of power switchgear assemblies had been

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cedure for carrying out the agreements reached at the November 9, 1958 meeting. At this and subsequent meetings, the defendant corporations agreed that the General Electric Company price lists would be the "book" or "list" prices for power switchgear assemblies. At this meeting they also agreed that metal-clad switchgear assemblies would not be sold to switchboard assemblers;

(d) Following the November 14, 1958 meeting, a series of periodic meetings were held throughout the United States attended by representatives of all of the defendant corporations. At least 25 such meetings were held between the middle of November 1958 and October 1959 at various cities, including:

Philadelphia, Pennsylvania
New York, New York
Chicago, Illinois
Pittsburgh, Pennsylvania
Detroit, Michigan
Newark, New Jersey
Louisville, Kentucky
Milwaukee, Wisconsin
Cherry Hill, New Jersey

(e) At these periodic meetings, a scheme or formula for quoting nearly identical prices to electric utility companies, private industrial corporations, and contractors was used by defendant corporations, designated by their representatives as a "phase of the moon" or "light of the moon" formula. Through cyclic rotating positioning inherent in the formula one defendant corporation would quote the price, others would quote intermediate prices and another would quote the high price; these positions would be periodically rotated among the defendant corporations. This formula was so calculated that in submitting prices to these customers, the price spread between defendant corporations' quotations would be sufficiently narrow so as to eliminate actual price competition among them, but sufficiently wide so as to give an appearance of competition. This formula was designed to permit each defendant corporation to know the exact price it and every other defendant corporation would quote on each prospective sale;

(f) At these periodic meetings, a cumulative list of sealed bid business secured by all of the defendant corporations was also circulated and the representatives present would compare the relative standing of each corporation according to its agreed upon percentage of the total sales pursuant to sealed bids. The representatives present would then discuss particular future bid invitations and designate which defendant corporation should submit the lowest bid therefor, the amount of such bid, and the amount of the bid to be submitted by others;

(g) In connection with the meetings and understandings described above, precautionary measures were adopted by representatives of defendant corporations to avoid detection, such as minimizing telephone calls, avoiding leaving notepapers in hotel rooms where meetings

fixed, that competition in the sale of power switchgear assemblies had been suppressed, and that purchasers of power switchgear assemblies had been deprived of the benefits of free competition.[89]

There were five corporate defendants named in the power switchgear assemblies indictment and each of them entered a plea of guilty to the indictment. Similar pleas were entered to some of the indictments covering other products. On the point of the present discussion, the problem is to determine the evidentiary effect of such guilty pleas in subsequent treble damage actions in terms of the indictments to which such guilty pleas were entered. In other words, section 5(a) of the Clayton Act states that the final judgment in the criminal proceeding shall constitute prima facie evidence with regard to matters for which there would be an estoppel between the Government and the defendant; but what are those matters? What matters out of a detailed and comprehensive indictment, such as the indictments in the Electrical Cases, are subject to the principle of collateral estoppel when the final judgment arising from that indictment was based on a guilty plea?

Even since the advent of the Electrical Cases, there does not appear to have been any reported decision in which this exact point has been considered. There are, nevertheless, some guidelines that may be considered. Foremost among these is the decision of the United States Supreme Court in *Emich Motors v. General Motors*[90] which was referred to previously. This was a treble damage action brought by a former General Motors dealer who alleged that his franchise had been cancelled pursuant to a conspiracy between General Motors Corporation and General Motors Acceptance Corporation and that the defendants had been convicted of the same conspiracy in a prior Sherman Act criminal proceeding. In the criminal case, the jury had returned a general verdict finding both corporate defendants guilty under an indictment which had charged the defendants with a conspiracy to force GM dealers to use GMAC financing on the sale of automobiles.

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were held and avoiding contacts among such representatives in the hotels where meetings were being held. In addition, code numbers identifying defendant corporations were used in documents effectuating the "phase of the moon" formula referred to above.

(h) Pursuant to these agreements, the defendant corporations submitted in 1958 and 1959 to various Federal, State and local governmental agencies and other awarding authorities throughout the United States.

89. Paragraphs 1 through 13 and paragraph 18, which are not summarized in the text, are more routine in nature and contain allegations regarding the product, the defendants, the co-conspirators, the nature of the trade and commerce, and jurisdiction and venue.

90. *Supra* note 83.

The indictment was detailed and comprehensive and alleged many courses of action on the part of the defendants calculated to force the dealers to use GMAC financing.

The issue before the Supreme Court in the treble damage action in *Emich Motors* was the evidentiary use which could be made, under section 5(a) of the Clayton Act, of the prior criminal judgment. After stating the principle that the doctrine of estoppel was the general rule to be applied and, accordingly, that the prior judgment was prima facie evidence of "all matters of fact and law necessarily decided by the conviction and the verdict on which it was based," the Court then continued:

> The difficult problem, of course, is to determine what matters were adjudicated in the antecedent suit. A general verdict of the jury or judgment of the court without special findings does not indicate which of the means charged in the indictment were found to have been used in effectuating the conspiracy. And since all of the acts charged need not be proved for conviction, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), such a verdict does not establish that defendants used all of the means charged or any particular one. Under these circumstances what was decided by the criminal judgment must be determined by the trial judge hearing the treble-damage suit, upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts.[91]

The Court of Appeals in *Emich Motors* had held that the prior criminal judgment was prima facie evidence only of the fact of a conspiracy by the defendants to restrain interstate trade and commerce in General Motors automobiles for the purpose of monopolizing the financing of those automobiles.[92] The Supreme Court went further and held that the criminal judgment was prima facie evidence not only of this general conspiracy, but "also of its effectuation by coercing General Motors dealers to use GMAC."[93] The Supreme Court based this conclusion on statements in the opinion of the Court of Appeals in the criminal proceeding that the jury had determined that the defendants employed coercive acts against its dealers.[94]

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91. *Supra* note 83 at 569.

92. 181 F.2d 70 (7th Cir. 1950).

93. *Supra* note 83 at 570-71.

94. 121 F.2d 376 (7th Cir. 1941).

When the judgment in a Sherman Act conspiracy case is based on a guilty plea it is difficult to see how the judgment could be prima facie evidence of anything more than the general conspiracy charged in the indictment, which would be the same evidentiary effect as determined by the Court of Appeals in *Emich Motors* for a judgment based on a general jury verdict. In such a case, there are no pleadings, other than the indictment, and no evidence, instructions or opinion upon which the trial judge in the treble damage action may determine a greater evidentiary effect, as the Supreme Court did in *Emich Motors*. All that the trial judge has for guidance are the indictment, the general plea of guilty and the judgment. Consequently, only the general fact of a conspiracy in violation of the Sherman Act logically can be said to have been determined by a guilty plea. Accordingly, this should be the extent of the facts for which the judgment constitutes prima facie evidence.[95]

Another useful guideline in considering the evidentiary effect of guilty pleas under section 5(a) of the Clayton Act may be found in a series of Government civil cases which have considered, under the common law rule of collateral estoppel, the issues determined by a prior criminal judgment based on a guilty plea to an indictment under the False Claims Act.[96] The courts in these cases have been con-

95. Cases subsequent to *Emich Motors* have taken a rather restrictive view of the evidentiary effect to be derived from section 5(a). In Monticello Tobacco Co. v. American Tobacco Co., 197 F.2d 629, 631-32 (2d Cir. 1952), a treble damage action following a criminal proceeding under the Sherman Act in which the jury returned a guilty verdict, the court stated:

> . . . whatever is crucial to the treble-damage case and is not distinctly determined in the previous government suit must be proven by direct evidence. . . . Section 5 does not permit a haphazard use of a criminal judgment merely for its aura of guilt, or 'to imply new wrongdoing from past wrongdoing.'

In Eagle Lion Studios v. Loew's Inc., 248 F.2d 438, 444 (2d Cir. 1957), a treble damage action following a civil trial in which the government obtained injunctive relief against violations of the Sherman Act, the court stated:

> In determining, under that section, the effect of a judgment in a prior anti-trust suit it is not our function to consider inferences, whether reasonable ones or not, that might be drawn from the language of the prior judgment. Under section 5 a judgment in a prior suit is *prima facie* evidence 'as to all matters respecting which said judgment * * * would be an *estoppel as between the parties thereto* * * *' (Emphasis added.) Thus, in construing a prior judgment for purposes of this statute the court in the subsequent action does not sit as a trier of fact, *i.e.*, it does not have wide license to draw inferences from the judgment and record in the prior litigation. Rather, the court is circumscribed by the relatively narrow limits of the doctrine of estoppel.

96. United States v. Guzzone, 273 F.2d 121 (2d Cir. 1959); United States v. Ben Grunstein & Sons Co., 127 F. Supp. 907 (D.N.J. 1955); United States v. American Packing Co., 113 F. Supp. 223 (D.N.J. 1953).

sistent in holding that as a result of the criminal judgment based on a guilty plea the defendant is estopped from denying the fact of the conspiracy in its essential terms and the defendant's participation therein, but that the defendant is not estopped from denying particular overt acts alleged in the indictment. This is stated fully in *United States v. Ben Grunstein & Sons Co.,* for example, as follows:

> It is well settled that a conviction based on a verdict settles all issues 'essential to the verdict'. *Emich Motors, supra* [340 U.S. 558, 71 S.Ct. 414]. But since in a criminal conspiracy case proof of the unlawful agreement between the parties, plus the commission of any overt act, not necessarily all those alleged, suffices to support a verdict of guilty, no conviction of a criminal conspiracy, whether on verdict or plea, suffices of itself, without further evidence, to prove that defendant either admitted, or was found guilty by the jury, of committing any particular overt act. Nor, if the conspiracy is alleged to have been effectuated, as in *Emich Motors,* by a number of means, each of which would have sufficed therefor, can it be determined on a plea of guilty to such count, which of such means were admitted by the defendant to have been adopted for that purpose. *Emich Motors, supra.* All that such plea admits is 'the existence of the consuiracy as charged * * * as well as participation therein by the defendants so pleading.' *United States v. American Packing Co., supra* [113 F.Supp. 225]. But, of course, the conspiracy as charged means the admission of that particular conspiracy in its essential nature, else the pleading defendants could not later plead double jeopardy to another indictment of that same nature.[97]

Another area of law to be considered on this point is the use of a prior guilty plea as a common law admission in a civil action. Even aside from section 5(a) of the Clayton Act, a plea of guilty to a Sherman Act indictment probably would be admissible in the subsequent treble damage action as an "admission" under the common law

97. 127 F. Supp. 907, 910 (D.N.J. 1955).

Contrary to the statement in *Ben Grunstein,* the conspiracy or agreement alone is sufficient for a criminal offense under the Sherman Act and it is not necessary that there be any overt act in furtherance of the conspiracy. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-25 (1940); Nash v. United States, 229 U.S. 373, 378 (1913); United States v. Gasoline Retailers Assn. Inc., 285 F.2d 688, 691 (7th Cir. 1961); United States v. New York Great Atlantic & Pacific Tea Co., 137 F.2d 459, 465 (5th Cir. 1943).

rules of evidence.[98] Similar to the effect given by section 5(a), the use of a guilty plea as an admission has the status of prima facie evidence, *i.e.,* it is not conclusive on the fact for which it is used, but, if not rebutted, it is sufficient to establish the fact.[99] It also would appear that the general principle governing evidentiary effect is the same whether a plea of guilty is used as a common law admission or whether a final judgment based on a guilty plea is used under section 5(a). For example, in *Corpus Juris Secundum,* it is stated that a plea of guilty to a charge of criminal conspiracy admits only the existence of the conspiracy and the defendant's participation therein and does not constitute an admission of the various alleged deeds done as part of the conspiracy.[100] Thus, the law relating to the use of a prior guilty plea as an "admission" in a civil action lends further support to the conclusion that a minimum evidentiary effect should be given under section 5(a) to a judgment based on a guilty plea.

Referring again to the indictment in the Electrical Cases covering power switchgear assemblies, it would seem clear under the general principles set forth in *Emich Motors* and in cases such as *Ben Grunstein* that the alleged effects of the conspiracy as set forth in paragraph 17 of that indictment were not determined by the guilty pleas and, therefore, would not be within the matters for which the judgment is prima facie evidence in the treble damage actions. These allegations could in no sense be considered, in the words of *Emich Motors,* as "necessarily decided" by, or "essential" to, the charge of

98. See, *e.g.,* Dunham v. Pannell, 263 F.2d 725 (5th Cir. 1959); Smith v. Kurtz, 34 Pa. D.&C. 439 (C.P. Bucks Co. 1938); Annot., 18 A.L.R.2d 1287 (1951). In Simco Sales Service of Pennsylvania v. Air Reduction Co., 213 F. Supp. 505, 507-08 (E.D. Pa. 1963), a civil antitrust action, one of the defendants moved to strike from the complaint all references to a guilty plea which the defendant had entered in an earlier criminal contempt proceeding instituted for violation of a prior consent decree. In refusing to grant the defendant's motion, the court stated:

> Whether or not the guilty plea is admissible under § 5 as prima facie evidence, it may, depending on the terms of the consent decree and the violations thereof alleged in the citation for contempt, be admissible under common law rules of evidence as an admission against interest.

Nevertheless, a logical argument might be advanced on behalf of defendants to the effect that section 5(a) should be construed to have superseded the common law principle of admissibility entirely, on the ground that the policy of encouraging capitulation cannot fully be effectuated so long as defendants feel that guilty pleas might be utilized against them in later actions, either under section 5(a) or as common law admissions.

99. Bruce v. McClure, 220 F.2d 330 (5th Cir. 1955); Greenfield v. Tuccilo, 129 F.2d 854 (2d Cir. 1942); WIGMORE, EVIDENCE § 1055 (3d ed. 1940).

100. 22 C.J.S. *Criminal Law* §424(3) (1961).

a Sherman Act violation and the guilty pleas to that charge. Likewise, the detailed facts regarding the conspiracy, as alleged in paragraph 16 of the power switchgear assemblies indictment certainly are not matters for which the judgment is prima facie evidence. The allegations in neither of these paragraphs concerned essential elements of the Government's criminal case. This leaves paragraphs 14 and 15 to be considered.

Paragraph 14 of the power switchgear assemblies alleged that during a certain period of time the defendants had engaged in a conspiracy in unreasonable restraint of trade in power switchgear assemblies in violation of section 1 of the Sherman Act. Paragraph 15 alleged that this conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants to fix prices, to allocate sales to governmental agencies and to submit rigged bids to governmental agencies and electric utility companies. On the one hand it could be argued that the allegations of paragraph 15 are not a matter of prima facie evidence since proof of the conspiracy alone, as alleged in paragraph 14, would have been sufficient for conviction if the criminal case had gone to trial.[101] On the other hand, it could be argued that the allegations of paragraph 15 are a matter of prima facie evidence because they are necessary in order to constitute the "conspiracy in its essential nature."[102] It could also be argued that even paragraph 14 is too broad to constitute prima facie evidence in its entirety for the reason that it alleges a conspiracy "beginning at least as early as 1958 and continuing thereafter at least to September 23, 1959," whereas in the criminal action it would not have been necessary for the Government to have proved that the conspiracy continued for the entire period charged in the indictment.[103]

The foregoing comments thus indicate the nature of the task facing a trial judge in a treble damage action when the judgment from a prior criminal antitrust proceeding based on a guilty plea is offered in evidence. The determination of these matters is largely dependent upon the form and wording of the indictment, but it would seem in all cases that the trial judge should take a conservative or restrictive approach to these matters in the interests of fair play and due process. As stated in *United States v. American Packing Corp.*:

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101. See note 97, *supra*.

102. United States v. Ben Grunstein & Sons Co., 127 F. Supp. 907, 910 (D.N.J. 1955).

103 "Since the agreement itself constituted the offense, the additional allegation in the indictment that the conspiracy was 'continuing' did not set forth an essential element of the crime." Pittsburgh Plate Glass Co. v. United States, 260 F.2d 397, 401 (4th Cir. 1958), *aff'd* 360 U.S. 395 (1959). See also Cooper v. United States, 91 F.2d 195, 198 (5th Cir. 1937).

> In matters affecting criminality, not only statutes but also pleas of guilty must be construed strictly and must be limited to the narrowest confines consistent with an intelligent interpretation of the effect thereof.[104]

B. *Application in Electrical Cases*

With the practical problems in mind as discussed above, consideration is now given to the actual evidentiary use of the guilty pleas permitted by the trial judges in the four treble damage actions in the Electrical Cases in which trials have been concluded.[105]

In the first of these cases to be tried, *Philadelphia Electric Co. v. Westinghouse Electric Corp.* in the Eastern District of Pennsylvania,[106] Judge Joseph S. Lord, III permitted the plaintiffs to read to the jury only the paragraph of the power transformer indictment which is comparable to paragraph 14 of the power switchgear assemblies indictment, that being the paragraph which alleged that during a certain period of time the defendants had engaged in a conspiracy in unreasonable restraint of trade in power transformers in violation of section 1 of the Sherman Act. The Judge informed the jury at that point in the trial that the defendants had entered pleas of guilty to the indictment and he then gave a summary instruction as to the effect thereof as prima facie evidence.[107] In his closing instructions to the jury, Judge Lord read the same paragraph and instructed the jury that "the defendants pleaded guilty to that indictment and I charge you that that plea of guilty is prima facie evidence that the defendants did at some time at least between 1956 and 1960 conspire to violate the Antitrust Act in respect to power transformers."[108] Thus, Judge Lord allowed the use of only the one basic paragraph of the indictment and did not permit any use to be made even of the next succeeding paragraph containing the allegations that the conspiracy was to fix prices and allocate sales.

Even with the admission in evidence of only this basic paragraph, there remains the question of properly charging the jury as to when the conspiracy existed. The paragraph from the power transformer

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104 113 F. Supp. 223, 225 (D.N.J. 1953).

105 See note 3, *supra*.

106. Civil No. 30015, E.D. Pa., 1964.

107. The practice of giving a preliminary instruction to the jury at this point in the trial was recognized and approved by the Supreme Court in *Emich Motors*.

108. For the full text of Judge Lord's charge to the jury, see 1964 CCH Trade Cases, Para. 71,123.

indictment, for example, alleged that the conspiracy was during the period "beginning at least as early as 1956 . . . and continuing thereafter up to and including the date of the return of the indictment." In charging the jury in a treble damage action, there are three possible approaches available to the judge with regard to the time element. He could charge to the effect (1) that there was a conspiracy and that it existed at least between 1956 and 1960 (thus, implying that the effect of the judgment might extend even prior to 1956), or (2) that there was a conspiracy between 1956 and 1960, or (3) that there was a conspiracy at some time between 1956 and 1960.

The first approach clearly would be erroneous. The fact of a conspiracy prior to 1956 is certainly not an "essential" element of a judgment based on a guilty plea to this indictment and no implication of such fact should be given to the jury. The defendants in the *Philadelphia Electric* case argued that this implication was in fact given when Judge Lord instructed the jury that the prima facie evidence was that the defendants conspired 'at some time at least between 1956 and 1960."[109] Although it is possible that this instruction was ambiguous and could have given this implication, it is clear that Judge Lord did not feel that the criminal judgments constituted any evidence of a conspiracy prior to 1956. He expressly stated in his charge that "it is not evidence of any conspiracy before 1956."

A more likely area for debate is between the second and third approaches to the question of when the conspiracy existed, *i.e.*, "between 1956 and 1960", or "at some time between 1956 and 1960." It is not clear which of these two views was taken by Judge Lord in the *Philadelphia Electric* case. The latter possibly was intended when Judge Lord instructed the jury that the defendants conspired "at some time at least between 1956 and 1960." A few moments later, however, the Judge stated to the jury that the prima facie evidence was "for the years involved in that plea; namely, at least from 1956

109. The defendants argued that this instruction was to the effect that the defendants conspired "at some time, at least between 1956 and 1960." In reading the charge in print, it seems to be a matter of where a comma belongs. As stated in the next succeeding paragraph in the text, it is possible that Judge Lord intended the meaning to be that the defendants conspired "at some time, at least, between 1956 and 1960" or, more simply, "at some time between 1956 and 1960." The correct interpretation cannot be made without having heard the Judge speak the words, and it is doubtful whether reliance can be placed upon a proper use of commas by the court reporter. The issue could be avoided in future cases by eliminating the words "at least" and simply charging that the defendants conspired "at some time between 1956 and 1960." This would eliminate both an inference of a conspiracy prior to 1956 and an inference of a conspiracy during the entire period from 1956 to 1960.

to 1960."[110] Under the rule given by the Supreme Court in *Emich Motors* that only "issues which were essential to the verdict" must be regarded as having been determined by the criminal judgment, it is difficult to see how the prima facie evidence can be broader than the fact that the conspiracy existed *at some time* between 1956 and 1960. Because the simple act of entering into a conspiracy constitutes a criminal violation under the Sherman Act, it would not have been necessary for the Government to have proved that the conspiracy continued for the entire period charged in the indictment, but only that the conspiracy existed at some time during the period. If the criminal case had actually gone to trial so that the judge in a subsequent treble damage action would have had available a record from which he could determine that the Government's proof pointed toward a conspiracy existing throughout the entire period, then it might be proper to conclude that the continuation of the conspiracy during the entire period necessarily was determined by the jury verdict. But when the judgment is based on a guilty plea, the judge does not have such extrinsic aids. The only basis upon which he can make a determination of the evidentiary effect of the judgment is an analysis of the essential elements of the criminal offense as contained in the indictment. It would seem to be an inescapable conclusion, therefore, that the prima facie evidence extends only to the fact that the conspiracy existed at some time during the period alleged in the indictment, and not that it existed during the entire period.

In *N.W. Electric Power Cooperative v. Moloney Electric Co.* in the Western District of Missouri, Western Division,[111] another of the treble damage trials in the Electrical Cases, Judge William H. Becker did not allow the plaintiffs to make any reference to the power thansformer indictment and guilty pleas in their opening statements to the jury. The defendants had objected that no useful purpose would be served thereby since the defendants had admitted in a Pretrial Report in this case that a conspiracy in violation of the Sherman Act had existed for a period of time even longer than the period charged in the indictment. Later during the trial Judge Becker ruled that the prior judgments of conviction and the indictment and guilty pleas were inadmissible in evidence. Judge Becker gave his ruling as follows:

> In the interest of a fair and even administration of justice, I have come tentatively to the conclusion that, first, in view

110. In his initial instruction, at the time the plaintiffs read this paragraph to the jury, Judge Lord had made a similar statement: ". . . it is proof only of the existence of the conspiracy during the period charged in the indictment; namely, from 1956 to 1960." Record p. 176.

111. Civil No. 13290-3, W.D. Mo., W. Div., 1964.

of the belated admission of conspiracy, that the judgment of conviction ought not to be admitted in evidence because it is of lesser force than the admission, both in breadth of time and in its effect. . . .

Now, the pleas of guilty in respect to the indictment create a different situation. And I am not certain that I am right about this because of the lack of authority in the form of judicial opinion at a higher level. But I am going to say, first, that unless I am shown some authority which indicates that the plea of guilty to the indictment does more than admit the minimum facts necessary to constitute the offense, I am not going to admit the pleas of guilty, and the portions of the indictment to which they relate. The reason is, that I have tentatively decided that the plea of guilty does not admit anything more than the commission of an offense and the commission of acts, the minimum acts which would be necessary to constitute an offense. The offense is already admitted.

Second, that if I should be wrong on this, and independently, that I feel that the possible misuse of this by the jury, so greatly overweighs any probative effect that it might have that it ought not to be submitted to the jury.

. . . . And there are two reasons besides technical evidence reasons that I am making this tentative ruling.

The first one is, that I want to encourage people in these case [sic] to make admissions even if they are belated admissions. And the second one is, that to serve the policy of the antitrust laws, I want to encourage the entry of pleas of guilty in criminal cases without a consideration by the defendant of the effects of that plea in civil cases other then [sic] the prima facie showing which is provided for by statute.[112]

Consistent with his exclusion of references to and evidence of the prior convictions, Judge Becker did not mention the prior criminal case in his final charge to the jury. Instead, he told the jury that in the Pretrial Report the defendants had admitted a conspiracy in the years 1951 to 1959 and had denied a conspiracy prior to 1951.[113]

112. Record pp. 2764-65.

113. Record p. 8598. For the full text of Judge Becker's charge to the jury, see Record pp. 8585-647.

Because of the admission by the defendants of the conspiracy during a period of time greater than the period charged in the indictment, Judge Becker did not have to make an actual choice regarding the admissibility of the various paragraphs of the indictment, but it is clear that he would not have gone any further than Judge Lord did in the *Philadelphia Electric* trial, *i.e.,* the admission in evidence of the basic paragraph of the indictment in which the general allegation of the conspiracy is contained. It cannot be determined definitely from the record in the *N.W. Electric* case whether Judge Becker, if he had charged the jury in terms of the indictment, would have included the entire period alleged in the indictment within the scope of prima facie evidence, or whether he would have instructed that the prior judgment was prima facie evidence only of a conspiracy at some time during the period. It is noteworthy, however, that Judge Becker felt that "the plea of guilty does not admit anything more than the commission of an offense and the commission of . . . the minimum acts which would be necessary to constitute an offense." This strongly indicates that Judge Becker would have held the prior criminal judgments to be prima facie evidence only that a conspiracy existed at some time during the period alleged in the indictment. Judge Becker's comments following this point should also be noted particularly because they demonstrate the correct approach for the courts to take to this whole question. The jury can make great misuse of the prior criminal judgment and, for this reason, a trial judge should be cautious in permitting the indcitment to be read or given to the jury. Furthermore, as Judge Becker pointed out, defendants in criminal antitrust cases are going to be very reluctant to enter guilty pleas unless they feel secure that a minimum use will be permitted of such pleas as prima facie evidence in subsequent treble damage actions.

In *City of Burlington, Vt. v. Westinghouse Electric Corp.,* in the District Court of the District of Columbia,[114] involving steam turbine generators, the parties had entered into a stipulation as to the pertinent facts in the indictments, the guilty pleas, the judgments entered on those pleas and the statements made by counsel for the defendants in connection with those pleas.[115] The stipulation referred only

114. Civil No. 348-62, D.D.C., 1964.

115. At the time of entry of the guilty pleas, counsel for the corporate defendants made statements similar to the following which was made by counsel for Westinghouse:

> . . . we have assured the Government that Westinghouse will plead guilty to seven indictments, and have received assurance from the Government that it will not oppose Westinghouse's application to enter pleas

to the basic paragraph of the turbine indictment and, accordingly, Judge John J. Sirica in his closing charge to the jury stated that the stipulation was "some evidence, but not conclusive evidence, that the defendants did at some time at least between November of 1955 and June 21, 1960, conspire to violate the antitrust act in respect to turbine generators."[116] Thus, this case is consistent with the *Philadelphia Electric* and *N.W. Electric* cases in using only the basic paragraph of the indictment as prima facie evidence and in not using even the various alleged purposes of the conspiracy as contained in the next succeeding paragraph. In addition, Judge Sirica appears to have stated in his charge that the evidence to be derived from the criminal judgment is that the conspiracy existed at some time during the period from November, 1955 to June of 1960, and not that it existed during the entire period.[117]

The only other treble damage action in the Electrical Cases in which a trial has been concluded at this time is *City of San Antonio v. Westinghouse Electric Corp.* in the Western District of Texas.[118] The claims in this case, which involved steam turbine generators, were settled after several months of trial and prior to the final charge to the jury. Nevertheless, the portions from the prior criminal proceeding which Judge Adrian A. Spears permitted the plaintiffs to introduce in evidence and the Judge's instruction to the jury at that point in the trial enables this case to be used for comparison purposes. It may be noted at the outset that Judge Spears went further in permitting the use of the prior criminal proceeding than was permitted in the other three cases. Plaintiff's counsel was permitted to

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of *nolo contendere* as to those of the remaining thirteen indictments that are applicable to it.

It has also been agreed by the Government . . . that the related eighteen civil suits will be disposed of as to Westinghouse by the entry of ordinary consent decrees . . . with no admission of liability by Westinghouse.

In entering pleas of guilty and *nolo contendere* prior to the taking of any testimony, Westinghouse wishes to make it clear that it does not thereby admit the allegations of any of those indictments but is simply changing its pleas for the purpose of promptly disposing of the mass of pending litigation.

United States v. Westinghouse Electric Corp., Criminal Action No. 20235 and related cases (E.D. Pa., Transcript, December 8, 1960, pp. 394-95).

116. Record p. 4684. For full text of Judge Sirica's charge to the jury, see Record pp. 4651-705.

117. As noted previously in the discussion of the *Philadelphia Electric* case, there is a possibility of a different interpretation because of the words "at least" being used in the instruction.

118. Civil No. 3064, W.D. Tex., 1964.

read to the jury the following portions of the turbine indictment: the caption which included not only the names of the corporate defendants but also the individual officers and employees of the corporate defendants who were indicted; the paragraph which defined the product; the paragraph which described the corporate defendants; the paragraph which alleged that the acts charged in the indictment were done by the officers and employees of the corporate defendants, including the individual defendants, while engaged in the management and control of the affairs of the corporate defendants; the paragraph which alleged the nature of the trade and commerce; the paragraph which alleged that the defendant corporations manufactured and sold a high percentage of the turbine generator units used in the United States, the paragraph which alleged the classes of customers for the product; the paragraph which alleged the volume and interstate nature of the trade; the paragraph, comparable to paragraph 14 of the power switchgear assemblies indictment, which alleged a conspiracy in the general terms of the statute; and the next succeeding paragraph, comparable to paragraph 15 of the power switchgear assemblies indictment, which alleged that the purposes of the conspiracy were to fix prices and to submit rigged bids and price quotations to purchasers.[119] Judge Spears specifically ruled that the plaintiffs could not make references to the paragraphs comparable to paragraphs 16 and 17 of the power switchgear assemblies indictment in which the detailed facts of the conspiracy and the effect of the conspiracy were alleged.[120] Plaintiff's counsel then put into evidence the judgments of conviction which had been entered against the corporate defendants based on their guilty pleas. Judge Spears immediately thereafter instructed the jury regarding the evidence to be derived from the prior criminal proceeding. He read to the jury what

119. Record pp. 227-33.

120. Record p. 156. Judge Spears also ruled that the plaintiffs could not read to the jury what apparently was intended as paragraph 3 of the indictment in which the individual defendants are indentified by their position or capacity with the corporate defendants. During the reading of the indictment to the jury, confusion arose as to whether the Judge had ruled out Arabic three or Roman three of the indictment, Roman three being a major breakdown of the indictment and containing only the paragraph numbered Arabic five in which corporate co-conspirators (who were not indicted) are named. The result of the confusion was that neither paragraph Arabic three nor paragraph Arabic five was read to the jury. There might very likely be prejudicial error in making reference to the individual defendants in the criminal case who were not defendants in the civil action but, as mentioned subsequently in the text, any such error would have already occurred through the reading of the complete caption of the indictment which included the names of the individual defendants. Judge Spears also ruled out of evidence paragraph 14, the concluding paragraph of the indictment, which alleged jurisdiction and venue for the criminal action in the Eastern District of Pennsylvania.

he called the "only parts of the indictment in that case which are at all pertinent in this case." These were the two paragraphs containing the general allegation of the conspiracy and the alleged purposes of the conspiracy. Judge Spears continued by stating that the jury was to "disregard and not consider for any purpose whatever" any part of the indictment other than these two paragraphs. He also instructed the jury that counsel for the corporate defendants, before entering their pleas of guilty, had announced in open court "that such pleas of guilty were being made by them to terminate what would otherwise be most protracted and expensive litigation."[121] He concluded by stating that the criminal judgments were prima facie evidence of the existence of the general conspiracy charged and of the participation therein by the three corporate defendants.[122]

Although Judge Spears was consistent with the other three Electrical Cases in not permitting any evidentiary use to be made of the third and fourth major paragraphs of the indictment in which detailed facts and the effects of the conspiracy are alleged, he did go further than the other three cases in allowing the second of the major paragraphs, regarding the alleged terms or purposes of the conspiracy, to be used in evidence. As mentioned previously in this discussion, it is difficult to see how even this second of the major paragraphs would be "essential" to the judgment. This conclusion is supported even by the portion of Judge Spears' instruction in which he stated that the "judgments are only prima facie evidence in this case of the existence of the general conspiracy charged and of the participation therein" by the defendants. In other words, it would seem that Judge Spears' instruction correctly stated the general rule as to the evidentiary effect of the criminal judgments, but that the admission in evidence of the second of the major paragraphs of the indictment, alleging the terms or purposes of the conspiracy, is inconsistent with this general rule in the sense that this paragraph goes beyond "the general conspiracy charged and of the participation therein" by the defendants.

In addition to allowing the second of the major paragraphs of the indictment to be used in evidence, Judge Spears permitted various portions of the indictment preceding the four major paragraphs to be read into evidence by plaintiff's counsel. This would appear to be unwarranted under the principles enunciated by the Supreme Court in *Emich Motors* since there is nothing "essential" about these allegations insofar as the judgment of conviction is concerned. More

121. See note 115, *supra*.

122. For the full text of Judge Spears' initial charge to the jury, see Record pp. 235-38.

specifically, there would seem to be error in permitting the plaintiff to make references to the indicted individuals through the reading to the jury of the caption of the indictment. There is certainly nothing "essential" in the indentification of these individuals, and it could be argued that this had a tendency to inflame the jurors against the defendants.

Considering the rules handed down by the Supreme Court in *Emich Motors,* and bearing in mind the possibility of misuse of the indictment by the jury as suggested by Judge Becker in the *N.W. Electric* case, it seems clear that the most that should be read to the jury in a treble damage action from the indictment in a prior criminal proceeding in which the conviction was based on a guilty plea would be the basic paragraph containing the general allegation of the conspiracy. This conclusion is supported by the actual results in the *Philadelphia Electric* and *Burlington* cases and by the thoughts expressed by Judge Becker in the *N.W. Electric* case.

Even this basic paragraph creates a problem because of the allegation as to the period of time during which the conspiracy existed. Since the Government in the criminal case in order to obtain a conviction would not have had to prove a continuing conspiracy during the entire period, but only that the conspiracy existed at some time, the allegation of a conspiracy during the entire period is not "essential" to the criminal judgment and should not be within the scope of prima facie evidence in the treble damage action. The prima facie evidence should be confined to the fact that the conspiracy existed at some time during the stated period. This is probably what the judges in the *Philadelphia Electric* and *Burlington* cases intended in the portions of their instructions in which they stated that the criminal judgments were evidence that the defendants had conspired "at some time at least between" the two stated dates. Judge Becker's comments in *N.W. Electric* indicate that he would have given a similar instruction on this point.

Even though the judge instructs that the prima facie evidence is that the conspiracy existed at some time during the period, the jury could still have in mind the allegation from the indictment that the conspiracy existed during the entire period. This leads to the question of what documents from the criminal proceeding should be admitted in evidence. As pointed out at the beginning of this discussion, section 5(a) of the Clayton Act states that the "final judgment" in the prior criminal proceeding "shall be prima facie evidence against such defendant." This seems clearly to provide that the "final judgment" is to be the evidence, rather than any of the paragraphs from the indictment. The criminal judgments in the Electrical Cases, for

example, identified the criminal proceeding, stated that the defendant had been convicted upon a plea of guilty to the charge of violating section 1 of the Sherman Act, and stated that the defendant is adjudged guilty as convicted.[123] This would seem to be all that plaintiff's counsel needs in the record of the treble damage action in order to have the evidentiary benefit of section 5(a). The trial judge would then be in a position, according to the principles set forth in *Emich Motors,* to examine the indictment and to charge the jury as to the prima facie evidence which was to be derived from the prior judgment. This would still permit the plaintiff to "protect" his record while at the same time eliminating the possible prejudice which could result to the defendant from the admission in evidence of portions of the indictment.

V. CONCLUSIONS

Section 5(a) of the Clayton Act unquestionably is inapplicable to criminal judgments entered on *nolo contendere* pleas. Under the authority of recent decisions in the Electrical Industry litigation, however, section 5(a) probably will be held applicable to judgments entered on *guilty* pleas, despite the persuasive evidence that Congress intended both guilty pleas and *nolo* pleas to be excluded by the proviso. The most important questions yet to be answered in this field are the very practical ones involving the evidentiary scope and effect to be accorded by the courts in treble damage actions to judgments entered on guilty pleas. The general test of the factual issues on which a criminal judgment can be utilized under section 5(a) as prima facie evidence in a subsequent private action is whether such facts were necessarily decided by, or were essential to, the judgment. When dealing with a judgment entered on a guilty plea, the trial court can look only to the indictment for the purpose of determining the facts which were essential to the judgment, and logically the court should limit

123. For example, the judgment against General Electric under the turbine indictment provided:

> Judgment and commitment. United States District Court for the Eastern District of Pennsylvania. United States of America versus General Electric Company, number 20401, on this, the 6th day of February, 1961, came the attorney for the government and the defendant appeared in person and by counsel. It is adjudged that the defendant has been convicted upon its plea of guilty of the offense of violation of the Sherman Act, 15 U.S.C. Section 1, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to The Court, it is adjudged that the defendant is guilty as charged and convicted.

the effect of the judgment to the bare factual elements essential to the criminal offense charged in the indictment. Because of the prejudicial effect which the averments ordinarily contained in an antitrust indictment might have on the jury in subsequent private action, the courts should permit in evidence only the *judgment* entered on a guilty plea and should prohibit plaintiff's counsel from making any reference to the contents of the indictment. A practical effect which decisions permitting plaintiffs to make use of guilty pleas in subsequent treble damage actions undoubtedly will have, will be greatly to increase the incentive of defendants in future criminal antitrust proceedings to resist the charges made by the Government and to require the Justice Department to prove its case in a criminal trial, unless they are permitted to enter *nolo contendere* pleas rather than guilty pleas.