SECTION 7 OF THE CLAYTON ACT
WITH EMPHASIS ON RECENT DEVELOPMENTS

Dissertation

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By

Robert Demming Myers, B.A., M.A.
The Ohio State University
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Approved by:

[Signature]
Adviser
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INTRODUCTION

This dissertation surveys the economic, legislative and judicial record of Section 7 of the Clayton Act. This study will be restricted to private industrial and commercial enterprises as these terms are interpreted by the financial reporters. The term "Fourth Merger Movement" is common in the recent literature relating to mergers.\footnote{Federal Trade Commission, \textit{Report on the Merger Movement}: A Summary Report, Washington: (1948), p. v.} The current merger movement dates from 1940 and is still in the process of development. For the purposes of the study of the "Fourth Merger Movement" collation of materials will be restricted to the period 1940 - 1952. It is appreciated that this may not comprehend the entire period of the "Fourth Merger Movement", but it will document that portion.

Because there are three Federal Statutes (exemption statutes and extra-jurisdictional statutes excepted and not considered herein) pertaining, in part, to the subject of
mergers, it is necessary to indicate the general import of each and the resulting effect upon the treatment of this dissertation.

The Sherman Act comprehends offending mergers irrespective of the devices used to effect the merger. The Clayton Act comprehends offending mergers utilizing the devices of stock or asset acquisitions.¹ The objective of the latter act was to "cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding".² The Federal Trade Commission Act provides for enforcement provisions of the pertinent parts of the Sherman Act and the Clayton Act, by the Federal Trade Commission.

Inasmuch as the concept of mergers, from the judicial, legislative and economic viewpoints, is likely to be the same, whether it be a proceeding under the Sherman Act or the Clayton Act, the writer has used, where necessary, appropriate material as it developed under the various antitrust acts. The general objective of this dissertation is to build an integrated structure applicable

¹The latter was included in the 1950 amendment to Section 7 of the Clayton Act.

to Section 7 of the Clayton Act.

The specific objectives of this study are to record a summary of the data relating to private industrial and commercial mergers; report the current economic doctrine; analyze the legislative and judicial history; and indicate the executive and administrative policies relating to such events.
CHAPTER I

HISTORICAL SUMMARY TO 1940

General

Definition of A Merger

The term merger has been used in many forms of
dress. For example, mergers have been treated under such
diverse headings as Problems of Small Business, Economic
Concentration, Monopoly, Combinations, Regulation of In-
dustry, Antitrust, Competition, Free Enterprise, Concentra-
tion of Economic Power, Unfair Trade Practices, Rigness
in Business, Consolidations, Monopoly Power, Economic
Control, Social Control of Industry, Cartels and Corporate
Acquisitions. One is mindful of the words spoken in the
Book of Genesis: "The voice is Jacob's voice, but the
hands are the hands of Esau."

There is no agreement among the students of this
subject as to the definition of a merger. Probably, de-
pending upon the objective to be served, many definitions
serve their purposes. To indicate one of many, reference
is made to that of Professor Watkins, which places emphasis on the relation of the combination or acquisition to the establishment or extension of unified control in the industry concerned. 1 Both Professors Handler and Oppenheim consider mergers under the terms "tightly knit combinations" or "con federations". Their concept of mergers and consolidations is essentially the strictly legal one. 2

This dissertation adopts the intent of the language used in H.R. 2734, 3 an Act adopted December 29, 1950, as an amendment to Section 7 of the Clayton Act, as its definition of mergers. That is, an acquisition, directly or indirectly, of the whole or any part of the stock or share capital or the acquisition of the whole or any part of the assets of another corporation, except where the sole purpose in stock holdings is for investment or the formation of subsidiaries and agencies or extensions thereof for the actual carrying on of the immediate business of the acquiring corporation. 4 "Acquisition, as the word is


3 Popularly referred to as the Anti-Merger Act of 1950.

4 Condensed from paragraphs 2, 3 and 4 of H.R. 2734.
used in that statute [former Section 7 of the Clayton Act] means ownership; ownership involves title, and title is of two kinds, legal and equitable.¹

¹ 'Investment' as used in this section [former Section 7 of the Clayton Act] must be given its ordinary meaning of the use of money to purchase property for any purpose for which income or profit is expected presently or in the future, speculatively or permanently, and should not be limited to the purchase of property for the sake of a direct return from such property.² In the event that one corporation acquires all the stock of another it is most difficult to show that it was for investment purposes.³

Although the above definition of merger does not comply with the strictly legal definition, it corresponds with that in general use by students of the subject who have been required to adopt a definition of mergers as a tool in measuring physical data and in standardizing their


concepts.¹

It seems desirable, at this point in the dissertation, to insert Section 7 of the Clayton Act. The following is a composite of the original Section 7 and of the amended Section 7.

The Celler Anti Merger Act

(Public Law 899—81st Congress)
(Chapter 1184—2nd Session)
(H. R. 2734)

AN ACT

"To amend an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, (38 Stat. 730), as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 7 and 11 of an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," approved

¹The definition of a merger by Black's Law Dictionary, 3rd. Edition, (1933), p. 1181, is: "The uniting of two or more corporations by the transfer of property of all to one of them, which continues in existence, the others being swallowed up. In regard to the survivorship of one of the constituent corporations, it differs from a 'consolidation', wherein all the consolidating companies surrender their separate existence and become parts of a new corporation." The language in Section 8623-67 of the General and Foreign Corporation Act of Ohio, treats both merged and consolidated corporations under the term "consolidated corporation". By implication it appears that the term "merger" would equally refer to either merged or consolidated corporations. Charles S. Tinnett and Shaw Livermore adopt this concept in their book Business Organization and Control, D. Van Nostrand Co., Inc., New York, (1932), p. 321.
October 15, 1914, as amended (U.S.C., title 15, secs. 18 and 21), are hereby amended to read as follows:

Sec. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or to tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or to tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions

1The language of the original law is shown in roman type, while the language stricken by the amended statutes is enclosed in black brackets. New matter is shown in italics. Only Section 7 is given in the text. Section 11 appears in the Appendix of this dissertation.
thereof, or from owning and holding all or a part of
the stock of such subsidiary corporations, when the
effect of such formation is not to substantially
lessen competition.

Nor shall anything herein contained be construed
to prohibit any common carrier subject to the laws to
regulate commerce from aiding in the construction of
branches or short lines so located as to become feeders
to the main line of the company so aiding in such con­
struction or from acquiring or owning all or any part
of the stock of such subsidiary corporations, when the
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of the stock of such subsidiary corporations, when the
effect of such formation is not to substantially
lessen competition.

Nothing contained in this section shall be held
to affect or impair any right heretofore legally ac­
quired: Provided. That nothing in this section shall
be held or construed to authorize or make lawful any­
thing heretofore prohibited or made illegal by the
antitrust laws, nor to exempt any person from the
penal provisions thereof or the civil remedies therein
provided.

Nothing contained in this section shall apply to
transactions duly consummated pursuant to authority
given by the Civil Aeronautics Board, Federal Com­
munications Commission, Federal Power Commission, Inter­
state Commerce Commission, the Securities and Exchange
Commission in the exercise of its jurisdiction under
section 10 of the Public Utility Holding Company Act
of 1935, the United States Maritime Commission, or the
Secretary of Agriculture under any statutory provision
vesting such power in such Commission, Secretary, or
Board.
The Merger Movements

There are two major difficulties in delimiting the merger movements. First, there is no agreement among the students of the subject as to when the separate movements occurred; and second, most of the periods used contain a mixture of combinations, including mergers. Holding companies are to some students to be classed basically as mergers.

The First Period, 1879 - 1896

Mergers had their impetus with the growth of the large-scale production of this period and the corollary thereof, widened markets. However, the establishment of large-scale production was accomplished, within the limits of technology, before the merger in its most concentrated form appeared. Most of the constituent enterprises in American industry, during this period, were family businesses already achieving the full benefits of large-scale production. After the occurrence of the merger, sometimes a decade or so passed before the plant scale of production
was changed.¹

Those responsible for the merger, in this period, were the operating executives, not the professional promoters or the bankers.² There was a substantial lull in merger activity from 1892 to 1897, due in part to the uncertain status of the law relating to trusts, a business depression, falling prices, political uncertainties and a possible lack of faith in the fortunes of mergers. The states of Ohio and New York had unequivocally held that a corporation could not be a member of a voting trust, where the members were in the same business.³ A number of well-known trusts were formed in this period, including the Standard Oil Trust and the Sugar Trust.⁴

The Second Period, 1897 - 1903

The attention of management was called to a statute of the state of New Jersey (1889) enabling the creation of


²Hoagland, op. cit., p. 615; and Seager and Gulick, op. cit., p. 49.

³Seager and Gulick, op. cit., p. 54.

⁴Ibid., p. 51.
holding companies. Under the provisions of this Act mergers could occur without running afoul of the voting trust difficulty. The result for the corporation would be the same as under the trust agreement. Most of the early trusts found shelter in this device.¹ With this tentative anchor and the favorable decision in the sugar case² the promoters and financers were ready, when favorable events occurred, to touch off this second merger movement.³

The election of McKinley in 1896, who was reputed to favor big business, and the enactment of the Dingley Tariff cleared the way for another and more powerful upsurge of merger activity.⁴

Among the factors which contributed to the ending of this period were the adverse Northern Securities decision of 1903, stock market inactivity, the combination of the most likely enterprises and the failure of the promised huge profits, from mergers, to materialize.⁵

¹ Seager and Gulick, op. cit., p. 57.
³ Seager and Gulick, op. cit., p. 58.
The Interim Period, 1904 - 1920

This period did not attain the stature of a separate movement, according to most students, but it is worthy of notice because of the activities of merged companies. The early part of this period, to 1914, was characterized by exploitation through strategic market and financial advantages. This exploitation gave rise to Federal trust-busting campaigns, The Progressive Movement and distrust of mergers by the public and investors alike.¹

The strategic advantages were primarily related to the control of raw materials and the markets for products, or both. Prices to the merged companies, in the raw material markets, were lower than to others, because of the great size and buying power of these companies. This was especially true in the sugar and tobacco combinations. The control and ownership of the raw material sources, by the mergers, was common and less complicated in aluminum, nickel, asbestos, and iron and steel manufacturing. The basic objective of the merger was to obtain leverage on product prices. This leverage arose from overpowersizing.²

¹Temporary National Economic Committee, Monograph No. 13, op. cit., pp. 133, et seq.
²Ibid., pp. 135, et seq.
Although few mergers occurred during this period, principally, General Motors Corporation, Aluminum Company of America and Paramount-Famous-Laskey Corporation, this period was considered important because of the market abuses which became apparent. The passage of the Clayton Act and the Federal Trade Commission Act, both in 1914, are indicative of the temper of the times. World War I obscured the activities of the mergers. The scene was being set for the third merger period, which was quite unlike the preceding movements.¹

The Third Period, The 1920's

The methods, sphere and objectives of this merger movement differed considerably from those of the preceding periods. It was a less spectacular process. With some exceptions, absorptions were on a one-at-a-time or piece-meal basis. The beginning of non-competitive, non-integrated types of mergers is found in this period. The sphere was broader. It encompassed not only basic manufacturing, but distribution, processing and packaging,

service trades (hotels, movies and restaurants), banking, and public utilities. This was in contrast to the earlier periods when mergers related principally to the railroad, mining or manufacturing industries. The major influence in this period was related to distribution considerations. An outstanding example of the latter was the merger of the Colgate-Palmolive-Peet companies in the soap industry. Some genuine economies occurred, in this merger, from the elimination of duplicating selling facilities, cross freights, advertising expenditures and the pooling of trade names and trade-marks. Many "chains" followed this line of logic in absorbing competitors. As to the strategic domination of the market, sometimes it was incidental to the genuine economies, and sometimes it did not exist. Here, as with the second merger movement, activities of already created mergers were a significant characteristic of the period.\textsuperscript{1}

The data indicate extensive mergers in the metal, steel, auto and amusement industries during this period, totalling in assets acquired about $2 billion.\textsuperscript{2} Studies

\textsuperscript{1}Temporary National Economic Committee, Monograph No. 13, op. cit., p. 136.

\textsuperscript{2}A.A. Berle and G.C. Means, The Modern Corporation and Private Property, Macmillan, New York, (1932), Appendices D, E and F.
by the Twentieth Century Fund indicate that in the wholesale trade single units dominated, as to net sales. In the retail trade "chains" accounted for about one-fifth of the total sales in 1929. The greatest advances of the chains, by merger, were in the department store, the combination grocery and meat store, the cigar store and the drug store fields. It was in the variety store field that the concentration of business was greatest—91 percent. Retail shoe "chains" accounted for 46 percent of total sales, while in other lines, such as jewelry, concentration did not exist to an appreciable degree.¹

Two monumental court decisions at the beginning of this period opened the way, in part, for important merger activity.² Predicated upon the "rule of reason" the Supreme Court of the United States held that a very comprehensive merger of competing corporations was not in itself a violation of the antitrust laws. The dispute over the original merger resulting in the formation of the United Shoe Machinery Company was adjudicated under the Sherman Act. The court found fault with certain activities of the company,


but this was in no way directly connected with the merger concept and resulted in no dissolution decrees.\(^1\) The advent of the 1930 depression brought an end to this period, except for the concluding phase mentioned in the next paragraph.

Although there may be a dispute as to whether a minor merger period developed during the late 1930's, it seems to the writer that the concluding phase of the third period was merely a carry-over from the 1920 merger period. Evidence, at least as to the distributive phases, seems to indicate this. There were features of the mergers of the 1920's which did not exist in the late 1930's. By and large the same basic problems remained. One study gives this period the status of an independent merger movement.\(^2\)

Included among the merger groups of this concluding phase were: Morton Salt Company, Leslie Salt Company, Eagle-Picher Lead Company, Pyr-Fyter Company, Mead Corp., Bethlehem Steel Corporation, Republic Steel Corporation, Allied Chemical and Dye Corporation, National Dairy Products Corporation, General Foods Company, and Standard

\(^1\)United States v. United Shoe Machinery Co., 247 U.S. 32 (1918); and United States v. United States Steel Corp., 251 U.S. 417 (1920).

As of 1937, the Temporary National Economic Committee found that one-third of the total value of all manufactured products was produced under conditions where the leading four producers of each individual product manufactured from 75 to 100 percent of the value of product. Concentration among a few producers in terms of major products, not as to value, but in aggregate units produced, indicated higher ratios than those based on the value of production.2

The Fourth Period, 1940 - 1952

Because this merger movement is the main concern of this dissertation only a brief mention of its nature is necessary here. It is included at this point because it completes the structure of the merger movements. This movement seems to be encouraged by the accumulation of large wartime working capital, by the unbalanced activities of many companies, and by the desire to achieve a strong strategic position before the return to a buyer's

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market.  

A summary of the various threads which seem to form the pattern of the first three merger movements will be attempted. First, minor businesses of inefficient scale were merged in the earliest period until they reached an optimum plant size. The merger of these units created a substantial number of our currently well-known corporations. These corporations added to their size in later periods, but the basic overwhelming structure as to size and the domination of the industry and the markets was already there.

Second, financial manipulation has always been a major thread, either as cause or effect. Third, the political climate greatly influenced both merger formation and merger activity. Fourth, sometimes prosperous years, sometimes depression years gave rise to merger formation. Certainly the prosperity of the 1920's and the depression period of the late 1930's are incongruous. Fifth, public hostility, brought about by publicity, acted as a barometer of merger formation and activity. Sixth, the evolution from manufacturing and mining mergers to diverse forms was evident. Seventh, there were judicial meanderings in these

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periods which will be examined in later pages. Eighth, running through all the periods there was a modicum of desire to effectuate operational economies. Ninth, the burden of easing competition was always present. Tenth, methodology in acquisitions ranged from the violent to the almost quiescent type. Eleventh, mergers and acquisitions, measured numerically, indicate a cyclical pattern with peaks in 1888, 1898, 1902, 1920, 1926, 1929, and thereafter until 1940, almost none. The cumulative total shows a 45 degree rise to 1931 with a leveling off thereafter.\(^1\) Twelfth, there is disagreement as to the effect of mergers on competition.\(^2\)

Because Dr. Thorp feels that the financial manipulation motive was dominant in these mergers he suggests that, for the future, the Securities Exchange Commission should coldly scrutinize the share issues of corporations involved in merger formation. Speculative enthusiasm might be dampened and expansion then would depend either upon making a positive case for a merger or upon plowing back

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\(^1\)Federal Trade Commission, Report on the Merger Movement, op. cit., Chart 2. Also, Seager and Gulick, op. cit., Ch. V.

earnings.\(^1\)

**Legislation**

**The Sherman Act**

Because the Clayton Act is predicated on the Sherman Act a brief statement of its objectives is necessary.

At an early stage in the Congressional discussions of his bill Senator Sherman explained the bill's objects as follows:\(^2\)

It declares, that certain contracts are against public policy, null and void. It does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.

But, associated capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination, commonly called trusts, that seek to avoid competition by combining the controlling corporations, partnerships and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of one man called a trustee, a chairman or a president.

The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to

\(^1\)Temporary National Economic Committee, *Monograph No. 27*, op. cit., pp. 231 et seq.

increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interests of the consumer, . . . .

It must be noted that Senator Sherman and his colleagues were referring to unlawful combinations. It is true that the "trust" was the prime target of Senator Sherman's time, but it takes no great stretch of the imagination to apply the same principle of reasoning to the holding company and the merger.

The Federal Trade Commission Act And Clayton Act-Introduction

For the purposes of this dissertation, the Federal Trade Commission Act is important as a source of enforcement of the Clayton Act. Since these two Acts were being considered by Congress at the same time, were based upon the same philosophy and were referred to by the members of Congress as companion bills, it is necessary from the standpoint of clarity to examine their legislative history.

The Sixty-third Congress convened for its second session in December, 1913, with antitrust legislation as its chief appointed work. The Presidential campaign of 1912 had been waged largely upon the issue of trusts. "Mr. Wilson specifically attacked the Progressive Party for tolerating, under its proposals of regulation, the existence and development of business units and combinations
so large as to constitute substantial dominance in their respective industries.¹

The Federal Trade Commission Act

Some type of a Trade Commission was proposed in the platforms of the three major political parties of 1912. The Progressive Party campaign emphasized the severity of the Sherman Act and the economies of big business. This stand seemed to weaken their cause. The Democratic Party, influenced by the study of the United States Steel Corporation by the Stanley Committee, proposed legislation which would specify certain acts as inso facto violations of the antitrust laws. The Republican Party, influenced by the report on antitrust legislation of Senator Cummin's Committee, in 1912, in general followed the Democratic proposals, but declared more definitely than the Democratic Party for specific legislation as supplementary to the Sherman Act. The language of the latter platform was:

"... to enact legislation supplementary to the existing antitrust act, which will define, as criminal offenses, those specific acts that uniformly mark attempts to restrain and monopolize trade."²

¹Stetson, op. cit., p. 275.
²Ibid., pp. 275-276.
It seems advisable to examine the temper of Congress in 1914. As a partial result of the oil and tobacco decisions of 1911, there was a crystallization of thought that the Sherman Act needed amendment. On July 26, 1911, the United States Senate delegated its Interstate Commerce Committee to investigate the need for such amendment. The United States Senate Interstate Commerce Committee's Report of February 27, 1913, indicated that, because the Supreme Court had promulgated the "rule of reason" in the oil and tobacco cases, amendment was imperative. The burden of complaint was to the effect that the "rule of reason" created too great and too ill-defined power in the Court. The Committee suggested the creation of a commission to assist in the enforcement of antitrust legislation. Further, it seemed desirable to formulate a set of conditions for engaging in interstate commerce, and in furtherance thereof, to prohibit certain known types of combinations.\footnote{Senate Report No. 1326, 62d. Congress, 3rd. Session.}

Immediately following President Wilson's message to Congress, January 29, 1914, Mr. Clayton, Chairman of the House Judiciary Committee, announced four tentative bills relating to substantive amendments to the Sherman Act.\footnote{Seager and Gulick, op. cit., pp. 413-414.}
Tentative Bill No. 4 proposed to prohibit intercorporate stockholdings under certain circumstances; and may be called the forerunner of Section 7 of the Clayton Act.¹

The Federal Trade Commission Bill was prompted by the sharp cleavage between two groups in Congress. The one group believed that monopoly was the inevitable result of industrial evolution, and that such monopolies should be declared as "affected with a public interest" and so regulated. The other group insisted that competition could be preserved and that a commission could assist this effort. It was the views of this second group which prevailed in the bill introduced by Mr. Clayton.²

The Clayton Act

Mr. Clayton, on April 14, 1914, introduced a bill which included, in most part, the provisions of his tentative bills, mentioned above. The bill passed the House on June 5, 1914.³ The Senate Judiciary Committee reported the bill, with amendments, on July 22nd. The amendments included provisions giving the Federal Trade Commission

¹Stetson, op. cit., p. 279.
²Seager and Gulick, op. cit., p. 415.
³H.R. 15657, as became Public Law 212, Sixty-Third Congress (38 Stat. 730).
and the Interstate Commerce Commission, within their respective authority, the power to enforce compliance with those sections relating to intercorporate stockholding. Although there was a close vote in the Senate, 35 to 24, the bill became law on October 15, 1914.¹

The pertinent provisions of the bill that were the subject of considerable debate are now considered. House Report No. 627 recommended banning certain acquisitions by one corporation of the stock of another as an effective means of controlling holding companies. The Report states: "A holding company is an abomination and in our judgment is a mere incorporated form of the old-fashioned trust. This section is designed to eliminate this evil, so far as it is possible to do so, making such exceptions from the law as seem to be wise, which exceptions have been found necessary by business experience and conditions, and the exceptions made are those which are not deemed monopolistic and do not tend to restrain trade."

House Report No. 627, part 2, minority views, stated that if the Sherman Act was properly enforced the objectives of the antitrust laws would be satisfied. Further, the new standards so suggested would require years for complete judicial interpretation and would result in

¹Stetson, op. cit., p. 282.
substantial uncertainty and embarrassment in the business community. Part 3 of the minority report indicated that the proposed act was weak in its handling of monopoly. The bill really assailed little business, it said. Part 4 of the minority report complained that the proposal was not sufficiently specific. Furthermore, it continued, if all provisions became law they would not destroy a single monopoly, reduce the size of the great corporations or materially lessen their power to arbitrarily control prices. Complaint was voiced against the lack of plan, breadth or comprehensiveness of the bill.

*Senate Report No. 698* stated the theory of the bill. It stated there was no purpose to alter, amend or change any provision of the original Sherman Act. The purpose was to supplement all the antitrust acts. In general, it stated, the bill seeks to prohibit and make unlawful certain trade practices, which as a rule, singly and in themselves, are not covered by the Sherman Act or other antitrust acts. In this fashion trusts, conspiracies and monopolies would have their creation arrested in their incipiency and before consummation.

An examination of some of the language in Section 7 is now in order to ascertain the thoughts of Congress. The following language is common to Sections 2, 3 and 7 of the
Clayton Act: "... may be to substantially lessen competition ... or tend to create a monopoly in any line of commerce." The meaning of these phrases must be examined. In Mr. Clayton's tentative bill Number 1, this language did not appear; but in tentative bill Number 4 (original Section 7) the phrases are incorporated. This seems to mark their genesis. Similar language appears in the antitrust statutes of many states.\(^1\) No such language appeared in the Sherman Act. According to the thoughts expressed in the debates on the floor of Congress, the intention was to add something new or supplementary to the Sherman Act and therefore Congress used distinguishing language for a special identifying purpose. Some writers feel that, even if this was so, Congress misapprehended the meaning of the Sherman Act, which, as construed by the Courts, comprehended such language as being synonymous with "restraint of trade or commerce" or "monopolize or attempt to monopolize."\(^2\)

In comparing the phrase "substantially lessen competition" as it appears in Sections 2 and 3 of the Clayton Act, with analogous phrases in Section 7, there appears,  

\(^1\)Stetson, \textit{op. cit.}, p. 296.  
\(^2\)Ibid., pp. 295, 300.
relating to intercorporate stockholdings, the words 
"... substantially lessen competition between the cor­
poration whose stock is so acquired and the corporation 
making the acquisition" and "substantially lessen com­
petition between such corporations, or any of them whose 
stock or other share capital is so acquired ... ." This 
shows that Congress had no intention to mean substantially 
lessen competition simply between any two concerns, except 
as to Section 7.1

Mr. Gilbert Montague believes that the standards 
relating to intercorporate stockholding did not merely 
restate the standards established by the Sherman Act, but 
were intended to be much more strict.2

The phrase "substantially lessen competition" was 
alleged by the opponents of the bill to greatly weaken the 
force of the prohibitions it modified.3 Professor Vernon 
Mund suggests that Congress inserted this phrase because 
of the familiar rule that the law is not concerned with 
trifles, that is, the de minimus doctrine.4

1Stetson, op. cit., p. 301.
2Ibid., p. 302, quoted therein.
351 Congressional Record, pp. 15857, 15935, 16047, 
16117.
4Vernon A. Mund, Government and Business, Harpers, 
Section 15 of the Clayton Act provided for enforcement of the provisions of the Act by the Attorney General. Thus, Section 7 may be enforced by either the Federal Trade Commission or the Attorney General.

Judicial History

Introduction

Since both the Sherman and the Clayton Acts deal with mergers a summary of the legal concepts relating to mergers will be made. This summary will be limited to the common law antecedents, the interpretations of the Sherman Act and the interpretations of the Clayton Act.

Summary of the Common Law

The courts had not enunciated any clear doctrine of the common law relating to mergers and their objectives. It does seem clear that some distinction was drawn between conspiracies and mergers. Even though the common law seemed to be more favorable to mergers than to conspiracies, always in the background was the theme that the public must not be injured thereby, and that the power to injure was prohibited as well as the act of injury. In discussing the precepts of the common law the Supreme Court of the United States had indicated that: "... monopoly and the acts
which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade.\(^1\) Be that as it may, the Sherman Act was ushered onto a scene where the common law was the purported mother, but her exact identity was unclear.

Summary of the Sherman Act

The Sherman Act, in its generality, prohibited three types of methods for achieving a prohibited end. One method was the merger. The measure of infringement of the law by this method is uncertain, as evil economic consequences do not, per se, flow from a merger.

One study suggests that the status of mergers was determined in three stages of judicial opinion.\(^2\) This study indicates that in the period 1890-1904 mergers were untouchable by the law. In the period 1904-1911 mergers of competitors were, per se, unlawful. In the period following the announcement of the "rule of reason", 1911, mergers were unlawful only if formed with an intent to

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\(^1\) Quoted in S.C. Oppenheim, Cases on Federal Antitrust Laws, op. cit., p. 116, from the majority opinion in Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

violate the basic precepts of the Sherman Act.¹ The court in the Standard Oil decision indicated that the scope of a merger in an industry might, per se, create a strong presumption of intent to monopolize.² At this point the court had reverted to the concepts of the common law.³ The revolutionary evolution of judicial opinion may be explained by saying that the courts, in part, were feeling their way, and, in part, were reflecting the social and economic evolution of the times. The vagaries of judicial opinion are recited by many students.⁴

The study⁵ made by the National Industrial Conference Board indicates the following propositions as to the state of judicial opinion, as of the end of the 1920's:

a. If, or to the extent that, a merger involves only the consolidation under one common ownership and management of business units operating in distinct fields, or producing essentially non-competitive products, it does not by its formation violate any rule of law, even though in some department of its activities it may exercise, perhaps by virtue of patents, a substantially complete control of production.

(citing cases)

¹National Industrial Conference Board, Mergers and the Law, op. cit., p. 29.
²221 U.S. at p. 75.
⁵Mergers and the Law, op. cit., pp. 303-306.
b. Though a merger may involve a consolidation of a sufficient number of thencefore competing business units to give it a predominant position in an industry, the combination is not of itself unlawful. (citing cases)

c. If in the process of formation of such a merger as is described in the second proposition, however, the proposed consolidation is challenged as a violation of the anti-trust laws, the size or extent of the contemplated merger may create a prima facie presumption of intent to monopolize. This presumption of intent may be overcome by evidence of the existence of legitimate business opportunities, as in foreign trade, or of productive economies, as by integration of processes, which can only be realized by an organization upon the scale proposed. (citing cases)

d. But if such a combination as is described in proposition two has grown up naturally and has been allowed to operate over a considerable period of years, the circumstance that it occupies a dominant position in the industry, has a dominating percent of the entire output in that line, does not of itself create a prima facie case of intent to restrain trade or to monopolize. In such circumstances it is incumbent upon the government to allege and prove, by evidence drawn from the course of conduct of the consolidation over a period of years, that it has exhibited the power to manipulate prices, a purpose to exclude others from the trade by unfair and oppressive tactics, or an intent to monopolize by some other means than the mere exertion of its industrial power as a large producer. (citing cases)

e. A large and powerful corporation, whether or not its size and power originated from combination, has practically a responsibility placed upon it by the anti-trust laws, scrupulously to avoid acts or policies which may be interpreted as indicating a purpose or intent to exclude rival concerns from the field. (citing cases)
Other rules have been suggested, such as the rule of "business expediency"; the "natural and probably consequences" measure; that some contracts regulate rather than restrain trade; large companies are held to more rigorous standards of conduct than small companies; and, chain types of mergers are usually lawful. Another study, in general, verifies the above concepts. The latter study comments that the "rule of reason" has been more important in merger cases than in other classes of prohibited transactions. Intent is the magic word. Intent is to be inferred "from the history of the merged companies, the methods used to obtain control, the extent of market control and the manner in which control was exercised and maintained against outside competitors."

The depression of the 1930's saw competition become a scapegoat. The National Industrial Recovery Act was a legalized cartel system. Finally, after various

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1 Seager and Gulick, op. cit., pp. 452, 463.
5 Idem.
experiments and the decision in the Schechter case the Sherman Act revived in its old form.\textsuperscript{1} Socony-

The Standard Oil-Vacuum merger of 1931 gave rise to a prosecution under the Sherman Act. More attention was given to the subject of market control than was usual in merger cases. The usual run of cases under the Sherman Act, as they related to mergers, conceived of monopoly as a restriction of competition, not merely the control of the market. Specifically, in this decision, the court considered such items of market control as potential competition, the merged concern's share of sales in the local market, and the inter-company competition in the local market (including size of the companies, area of sales and changes among the various competitors as to their share of the market).\textsuperscript{2} This analysis is in line with later decisions, but does show a break with the past.\textsuperscript{3}

The Socony-Vacuum case\textsuperscript{4} indicated the revival of a stern policy by the Supreme Court. Although this case

\textsuperscript{1}Stocking and Watkins, \textit{op. cit.}, p. 283.


\textsuperscript{4}\textit{United States v. Socony-Vacuum Oil Co. Inc.}, 310 U.S. 150 (1940).
involved a "loose combination" the Court left the impression that any combination formed with the purpose and effect of raising, depressing, fixing, pegging, or stabilizing prices was illegal per se.¹

Summary of Section 7 of the Clayton Act

In the enforcement of the Sherman Act it was learned that most mergers occurred through the process of purchasing the capital stock of the acquired company, either by the payment of cash, the exchange of stock in the new company or the issuance of new stock in the new parent company. These processes were particularly common in the great merger period of 1897 - 1905.² Congress, therefore, had hoped, by enacting Section 7 of the Clayton Act, to clarify the status of mergers occurring in such fashion. Congress created in Section 7, an alternative, although not substitutable program, of merger control. The Sherman Act, in legal contemplation at least, would prohibit any merger, no matter how old in years, that violated the fundamental precepts of that Act. It was the piecemeal accumulation of


the power to violate basic antitrust law precepts that
Section 7 of the Clayton Act had as its objective.¹

A listing of the fifty-seven informal investigations
to 1939, and referrals to the Justice Department by the
Federal Trade Commission, with examples, is given in the
Commission's Report on Monopolistic Practices, of March 2,
1939.² The Commission issued, to 1939, sixty formal com-
plaints under Section 7. Orders of divestiture were is-
sued in eleven cases, eight of which were reviewed by the
United States Circuit Court of Appeals. The Circuit Court
of Appeals sustained the Commission's order in six of these
cases. In four of these six cases the Supreme Court re-
versed the Circuit Courts and set aside the Commission's
order.³ In one case⁴ the Supreme Court sustained the
Commission's order and in one case⁵ the Circuit Court

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¹Statement by Judge Evans in Federal Trade Commiss-

²Hearings before Temporary National Economic Com-

³These cases are: (1) Swift and Co. v. Federal
Trade Commission, 272 U.S. 554 (1926); (2) Thatcher Mfg.
Co. v. Federal Trade Commission, 272 U.S. 554 (1926);
(3) International Shoe Co. v. Federal Trade Commission,
280 U.S. 291 (1930); (4) Arrow-Hart and Hegeman Electric

⁴Federal Trade Commission v. Western Meat Co.,
272 U.S. 554 (1926).

⁵Federal Trade Commission v. Aluminum Company of
America, 284 Fed. 401 (1922) and 299 Fed. 361 (1924).
allowed a merger of assets under an acquired judgment for money. These formal complaints appear in the Report cited.¹

The Department of Justice was successful in two cases, filed on behalf of the United States, charging a violation of Section 7 of the Clayton Act.²

Some students feel that this history may be divided into that part dealing with legislative defects and that part dealing with the judicial narrowing of the concepts of Section 7.³ Such analysis will be used, although analyses based upon such concepts as the rights of private property or economic considerations might be used. That there are legislative defects depends upon the intent of the legislature. Also, that there has been judicial narrowing depends upon whether or not one agrees or wants to agree with the court's holdings.

Legislative defects. Section 7 of the legislation relates only to the unlawful acquisition of stock, but does not apply to asset acquisition, except where the stock acquisition precedes the asset acquisition and the Federal

¹Hearings before Temporary National Economic Committee, 76th Congress, 1st Session, Part 5A, pp. 2362-2372.


Mrade Commission's complaint has intervened.\(^1\)

The expression "substantially lessen competition" is vague and has been treated by the courts, at times, as being synonymous with the "rule of reason" of the Sherman Act.\(^2\) Only corporations are covered by Section 7. It seems that other forms of business units might likewise have been covered.\(^3\) The words "in any section or community" are, as they appear in Section 7, vague. The Celler Anti-Merger Act, supra, clarifies this objection. Although merger is treated in Section 7, paragraph one, and the holding company in Section 7, paragraph two, the holding company referred to relates only to a holding of the shares of two or more companies. This makes a holding of one company outside the boundaries of the Act.

Section 7 fails to provide for the exemption of acquisitions arising in the case of a bona fide showing that the acquired company was in a precarious financial condition. Judicial interpretation, in line with the


\(^2\)36 American Jurisprudence, p. 570, fn. 16.

"rule of reason" has accomplished this result, but it would be better to state it in the Act. Section 11 is defective in its failure to give broader powers to the Commission in enforcing its orders. Section 11 specifically should provide for the complaint of the Federal Trade Commission to be coupled with a temporary cease and desist order, similar to a temporary injunction. This would obviate many of the problems created in the judicial history of the Clayton Act. The power of the Commission under Section 11 is limited to a divestiture of the stock held and a cease and desist order. It is this limited power which has been construed narrowly by the courts.

There are apparently alternative means provided for coping with unlawful acts. That is, first, where the effect of such stock acquisitions "may be to substantially lessen competition" between the corporation whose stock is so acquired and the corporation making the acquisition; or, second, to restrain such commerce in any section or community; or, third, tend to create a monopoly of any line of commerce. These three means seem to be substantially

different in concept, but the lack of clarity has led them to be lumped together under the rule of the Sherman Act that requires a showing of a substantial lessening of competition in general.¹

A further difficulty facing the Congress in dealing with this problem was to determine how much stock had to be owned in order that any effective control of the acquired corporation could be exercised. This issue the Congress did not choose to handle. One study suggests that to make the lawfulness of mergers, comprehended under Section 7, dependent upon the lessening of competition between the acquired and the acquiring company is a clear absurdity, as it ignores the competitive situation in the market generally.²

Judicial interpretation narrowing the scope of sections 7 and 11. It is sometimes alleged that the Court construed Section 11 narrowly, by ignoring the plain import of the language authorizing the Commission to act, when it has "reason to believe any person is violating or has

violated. . ." any provisions of the law. The result of this narrowing of the language of the Act would be to legalize asset acquisitions through a swift action, before the complaint was filed, by unlawfully acquiring the stock and then voting the stock so as to secure the assets.

The holding company device, which was to be reached by paragraph 2 of Section 7, may be utilized to bring two competing companies under unified control and common stockholding, and then by redistributing this holding company stock to the shareholders, pro rata, comply with an order requiring a divestiture of the stock originally acquired. This action results in a joint ownership of the heretofore competing companies by the previously independent shareholders. Many students feel this narrowing of the law was the most severe of all. This is particularly true when it is appreciated that the court would refuse a petition for a decree which ordered a return to a competitive status, even though the complaint was filed prior to the divestiture of the stock by the holding company.


As has been pointed out, supra, a basic precept of the Act relates to "substantially lessening competition". The meaning of this language is not clear. Some unnecessary narrowing of this precept has been charged to the courts. It is conceivable that a literal interpretation of the language involved would result in a concept looking towards a slight lessening of competition between the acquired and acquiring corporations. The courts have interpreted this language to mean that to have a violation of the Act there must be substantial competition between acquired and acquiring corporations. The two concepts are quite different in nature. It is not difficult to follow and approve of the Court's logic in this regard, but it still seems to be interpreting the Act in line with rulings under the broad language of the Sherman Act and not under the more specific language of the Clayton Act.

The Temple Anthracite case represents a judicial narrowing of the Act. The acquired companies did not compete directly, but sold to different sales agencies that

did compete. The court, nevertheless, concluded that com-
petition was not disturbed when the two companies were
acquired by a holding company. Their policies, obviously,
would be centralized, but since no direct pre-existing
competition was shown, the court made no effort to apply
the concept of "probable tendency to lessen competition."

The word "may" is not given a specific signifi-
cation as applied to Section 7, but is usually taken to
be included in the term "substantial lessening of com-
petition". This seems, to the writer, to be unfortunate,
because of the preventive character of the Clayton Act.
The courts seem to have narrowed the meaning of the words
in Section 7, paragraphs one and two "... where effect
of such acquisition, ... ", to mean the continued
holding of stock and the evils incident thereto, while the
minority view has been that the word "effect" related to
the results arising from unlawful stock holding.

The above comments, both on the legislative and
the judicial deficiencies, are not meant to be exhaustive
of the points discussed by the courts. It may be appropriate

1United States v. Republic Steel Corporation, et al.,
2Thatcher Manufacturing Co. v. Federal Trade Com-
mision, 272 U.S. 554 (1926).
to quote from Seager and Gulick, as to the methods of avoiding Section 7: "... the purpose of Congress ... was to prevent further use by trust organizers of the holding company device for lessening competition. Obviously this section covers only one of the number of possible methods of securing this object, so that the chief result of its passage has been, as Mr. Henderson neatly phrases it, that 'Since the Clayton Act, consolidations in which the parties are well advised have been effected by some other means than the purchase of stock.'\(^1\)

\(^1\) Seager and Gulick, \textit{op. cit.}, p. 491.
CHAPTER II

THE FOURTH MERGER MOVEMENT

PHYSICAL ASPECTS

General

To obtain the theme for this chapter recourse is had to the Report of the Senate Judiciary Committee on H.R. 2734: "The purpose of the proposed bill, H.R. 2734, is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions."¹ And at another place in the Report: "The enactment of the bill will limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy."²

It seems clear that Congress felt that mergers were mostly responsible for the high degree of economic concentration and by recommending H.R. 2734 for passage, they hoped to

¹Senate Committee on the Judiciary, 81st Congress, 1st and 2d Sessions, (1950), House Report No. 1775, p. 3.
²Idem.
reduce unlawful merger activity. All of the recent administrative and legislative deliberations and recommendations, in connection with H.R. 2734 and its predecessors, are dominated by the data with reference to corporate economic concentration and the relative productive decline of small business participation in most manufacturing industries. It therefore becomes necessary to relate the physical data, herein, to the twin factors of corporate economic concentration and the decline of small business.

To get a "feel" of the period 1940-1952 some economic factors should be listed which bear upon merger activities. This period was marked by the occurrence of the greatest war in history; followed by a short period of peace and incipient depression; and finally more war and war jitters. One of the greatest periods of economic prosperity marked this era. Working capital and profits ballooned during these years, particularly with respect to the very large corporations.¹ Great plant expansion occurred, due partly to private and partly to government initiative. Research facilities, particularly in manufacturing, increased greatly, due in large part to government subsidy

and to the effects of high corporate tax rates. Most of this period witnessed a seller's market. Accumulated savings, both corporate and private, reached record highs. Wages, particularly of industrial, trades and farm workers, climbed at a rate greater than that of other workers, thus creating a high level of spendable funds. The corporate tax structure made almost any corporate acquisition profitable if the acquired company or the acquiring company complemented one another from an income-loss standpoint. Credit was especially loose during most of this period. A boom psychology was in the air. The price level moved ever upward, making all corporate acquisitions seem cheap in the long-run. Population increased rapidly. There were, no doubt, other factors which influenced the Fourth Merger Movement. No documentation is given to most of these factors as they are so well known that academic notice may be assumed.

The Profits-Merger Spiral

As was the case in the preceding three merger periods: when profits are the greatest, so is merger activity. Thus, in the Fourth Merger Movement, large profits and great merger activity have a high percentage of correlation. The following data of this period reflect
this correlation.  

Studies were made by the Federal Trade Commission for the years 1948-1949-1950. The data show that a significant change "has taken place since 1947 in the rates of profit (ratio of income to stockholder's equity) of different size classes of manufacturing corporations, both before and after provisions for Federal income and excess profits taxes."  

Whereas in 1947 the rate of profit had no direct relation to asset size, in 1948, 1949 and 1950 the relationship of rates of profit and size was one. 

The 29,000 corporations having assets of more than a million dollars obtained 85 percent of the aggregate net profit of all active corporations in the United States. The 3,874 largest corporations, those having assets of more than $10 million, obtained 60 percent of the net profits of all corporations.

Since corporate policy, during this period, was to plow back into the corporation perhaps as much as 50 percent,

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3. Idem.

on the average, of these profits, the working capital funds of these corporations became a tool of internal and external expansion.\(^1\)

This is not to gainsay the fact that commonly mergers are accomplished by the process of exchanging stock or cash, or a combination of cash and stock. No matter what the exact consideration for the purchase price may be, either cash or the influence of heavy cash reserves greatly influence merger activity.\(^2\)

According to one study corporate profits, after taxes, averaged $10 billion for the years 1941-1944, or about double the 1939 level. By 1946 profits amounted to 2 1/2 times the 1939 level and by 1947, nearly 3 1/2 times the 1939 level.\(^3\)

The Securities and Exchange Commission found that, for all reporting corporations, net working capital had increased from $24.5 billion in 1939 to $60.4 billion in


1947. The Commission also found that, for the 78 largest manufacturing corporations (assets over $100 million) the net working capital rose from $5.4 billion in 1939 to $10 billion by 1947.

Working capital of such proportions, aside from the dollar increase for goods and wages, might be utilized to acquire competing corporations. Much deferred maintenance is hidden in these working capital figures.

Mitchell and Mitchell report that: "... industry was practically guaranteed against losses for two years after the war; more than $2,250,000,000 was piled up in war taxes which the government would refund to enterprises encountering a drop below their prewar earnings. The corporate excess profits tax was lifted January 1, 1946.

The excess profits tax was reenacted and became effective

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1. Statistical Series Release No. 790, Washington, (March 2, 1948), p. 2. This increase is not greatly in excess of the increase in the price level, during this period.


Large corporate profits became larger, according to Mitchell and Mitchell, if unjustifiable "expenses" were considered. These authors class as extravagant the expenditure of $400 million, in the years 1942-1943, for national magazine and radio network advertising. This conclusion is based on the lack of necessity for any or little advertising during that period.\(^2\)

The following section on the tendency toward economic concentration supplements this section by giving a summary of the data supporting the conclusion that high profits, large working capital and great merger activity go hand in hand.

The Tendency Toward Economic Concentration

The studies relating to absolute economic and corporate concentration and the tendencies thereunto, are in dispute, in part. An effort will be made to give a clear picture of the areas under dispute as well as those not under dispute. The breakdown between concentration due to internal and external expansion is treated, infra.


Of all the corporations in the United States, prior to World War II, one-tenth of one percent owned fifty-one percent of the total assets.¹ Doctors John Lintner and J. Keith Butters report, however, that during the period 1940-1947 the ratio of asset distribution, due to mergers, increased less than one percent. Thus, asset concentration remained unchanged.²

The main conclusions of this study, as summarized by Professor Adelman, were: "(1) Mergers of giants with giants, so prominent in the earlier merger movements, were unknown. (2) For all manufacturing and mining companies, the smaller the companies, the more important were mergers as a source of growth. (3) Among the 1,000 largest manufacturing firms, the lower 500 (assets $7 million to $18 million) grew more proportionately by mergers than the upper half, i.e. there was some slight deconcentration through merger. (4) For the whole field of manufacturing and mining, the Gini coefficient (population assumed constant) increased through merger from .809 to .816, i.e.,

¹House Hearings on H.R. 515, op. cit., p. 15.
²"Effect of Mergers on Industrial Concentrations, 1940-47", reported in Appendix of Senate Subcommittee Hearings on H.R. 2734, 81st Congress, 1st and 2d Sessions, pp. 371-391. This study was conducted at Harvard University under a grant from the Merrill Foundation for the Advancement of Financial Knowledge.
less than one percent in eight years.\textsuperscript{1} In a reply to the study of Doctors Lintner and Butters by Messrs. Blair and Houghton, economists of the Federal Trade Commission, Blair and Houghton concede all but the second point.\textsuperscript{2} Professor Adelman states that he supported the Anti-Merger Act, but not on the grounds of increasing economic concentration.\textsuperscript{3}

Adelman's findings were the target for criticism, both pro and con, by Corwin D. Edwards, George W. Stocking, Edwin B. George and A. A. Berle, Jr. The main criticism by Dr. Edwards is that Adelman, and Lintner and Butters relegate the effects upon economic concentration by merger to a secondary position, and give internal expansion a primary position. Dr. Edwards feels that this position fails to emphasize the important fact that external expansion causes independent entities to disappear, while internal expansion does not.\textsuperscript{4} The remainder of the criticisms are, in most


\textsuperscript{2}51 Review of Economics and Statistics, (February, 1951), pp. 63-67; rejoinder by Lintner and Butters, pp. 67-71; comments by J. Fred Weston, pp. 71-73; rejoinder to Weston, pp. 73-75.


part, an examination of the validity of the methods used by Professor Adelman.

As to manufacturing, as a whole, 113 of the largest manufacturing corporations, with assets in excess of $100 million each, owned $16 billion of net capital assets or 46 percent of the total for all manufacturing businesses, corporate and non corporate, in 1947. Variations in concentration among the various items on the balance sheet show a marked degree of economic strength for the large corporations; for example, a low concentration in inventories in relation to the rest of the industry.  

The Temporary National Economic Committee found that, as of 1937, one-third of the total value of all manufactured products was produced under conditions where the four largest producers in the industry produced from 75 to 100 percent of the value of product.

As to industry concentration, in 1947 the Federal Trade Commission reported that in the "extreme" group (percent of control by three companies, ranging from 64

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2 Ibid., p. 15.

percent to 100 percent) were found meat products, agricultural machinery, biscuit types, motor vehicles, office and store machines, rubber tires and tubes, plumbing equipment and supplies, distilled liquors, cigarettes, copper smelting and refining, linoleum, tin cans and tin ware, and aluminum. In the "high" group (percent of control by six companies, ranging from 60 to 90 percent) were found aircraft and parts, industrial chemicals, primary steel, dairy products, carpets and rugs, and glass and glassware. In the "moderate" group (14 to 15 companies controlling 57 to 60 percent) were found footwear except rubber, canning and preserving, drugs and medicines, grain mill products and electrical machinery. In the "low" group were included bakery products, and woolen and worsted goods. Dominant leaders were found in almost all the industries in the "extreme" and "high" groups.

Merger activity during the period 1940-1952 merits attention. From 1940-1947 financial manuals reported 2450 corporate integrations, involving over $5 billion in assets,

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2 Temporary National Economic Committee, Monograph No. 27, op. cit., p. 21, Table 3. In some industries only a very few producers existed, as in steel rails and beer cans.
representing more than five percent of the total assets of all manufacturing corporations in 1943.\(^1\) Most of the activity occurred during the period 1945-1947, thus paralleling the activity following World War I.\(^2\)

One student made a day-to-day study of the issues of the *Wall Street Journal* between January 2, 1948, and June 30, 1952, of all mergers reported therein.\(^3\) In general, this study shows the dominance of the horizontal merger and the method of acquisition as being mostly by the sale of assets.\(^4\) Both the sale of assets and the sale of stock accounted for similar percentages of acquisitions as to vertical and circular mergers,\(^5\) but in horizontal mergers the statutory merger and the merger by the dissolution of a holding company's subsidiaries became significant.\(^6\) Sale of asset fusions show that the purchase

\(^1\) *Federal Trade Commission, Report on the Merger Movement*, *op. cit.*, p. 17. The source of this data is the *Textile World*, *Moodys*, and *Standard and Poors Manuals.*


\(^3\) James Verner, Jr., *Mergers as a Method of Corporate Expansion*, (unpublished thesis presented in partial fulfillment for the degree of Master of Business Administration, University of Toledo, 1952).

\(^4\) Verner, *op. cit.*, Table 1.

\(^5\) *Ibid.*, Tables 2 and 3.

\(^6\) *Ibid.*, Table 2.
price was paid in cash in 80 percent of the cases. Mergers by stock purchases predominated as to all merger types, but not by a wide margin, except as to vertical mergers.¹

The cumulative effect of merger activity from 1919-1947 indicated the disappearance of 11,500 independent firms by merger in the manufacturing and mining industries.² Chart 2, of this study, indicated the size of the structure of the acquisition by merger. It did not indicate the proportions of industries affected by these mergers.

Industry distribution of the acquisitions, mentioned in the preceding paragraph, indicated the greatest activity in three industries, namely, food and beverages, textiles and apparel, and chemicals including drugs. Thirty-six percent of the total acquisitions appeared in these three groups. Other active industry groups were non-electrical machinery, petroleum, and transportation equipment. These six groups accounted for 59 percent of the mergers during the 1940-1947 period.³

¹Verner, op. cit., Table 6.
³Ibid., p. 17.
It was pointed out in the Senate Hearings on H.R. 2734 that from 1940-1947 the Department of Commerce reported 306,100 concerns entered the manufacturing and mining industries, and that mergers for this period amounted to 0.8 percent of the total of new concerns. This position was rebutted by Dr. Blair of the Federal Trade Commission who stated that these new firms were quite small, whereas the reported acquired firms, used in the analysis of the Federal Trade Commission, were large enough to be listed in the financial manuals.

The study of Doctors Lintner and Butters has no quarrel with the Federal Trade Commission study as related above, but it does disagree as to methodology and conclusions. Insofar as disagreement occurs it is here recorded. The methodology used by the Federal Trade Commission consisted primarily in analyzing data on the number of mergers, while Doctors Lintner and Butters predicated their analysis, additionally, on the size of the companies involved in the merger.

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2 House Hearings on H.R. 2734, 81st Congress, 1st Session, p. 113.

The Lintner and Butters' article pointed out that, during the period 1940-1947, all manufacturing and mining mergers were less significant for the large companies than the small companies.¹ Asset distribution changes, due to mergers, for this period, indicated a 2.1 percent increase for corporations with assets over $100 million and a 2.8 percent increase for those over $50 million. For both the 500 and 1,000 largest manufacturing company groups asset distribution change was very slightly negative. Internal expenditure on new plant and equipment of all corporations with assets over $100 million was eight times the total assets acquired, during this period, by mergers. As to the effect of mergers on the level of industrial concentration, the article concludes it has been very small.²

In order to place their findings in proper perspective Doctors Lintner and Butters made it clear that their findings, as reported above, did not vitiate the findings of the Federal Trade Commission, except as to the

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¹Senate Hearings on H.R. 2734, op. cit., p. 373. Mergers late in this period may change the conclusions. For example, the merger of Kaiser-Willys, Pure Oil-Hickock, International Shoe-Florshiem, National Lead-Doehler Jarvis, U.S. Pipe-Sloss Sheffield, Gillette-Toni and Bethlehem-J.H. Weaver.

²Ibid., p. 374.
effect of mergers on economic concentration. Other factors, such as retained earnings, were suggested as far more potent causes of economic concentration than mergers, at least during the period 1940-1947. The article recognized that mergers may have undesirable effects, such as reducing "independent centers of initiative". The authors recognized circumstances where mergers have been justifiable, such as where competition has been stimulated thereby.

Harrison F. Houghton, economist for the Federal Trade Commission, has raised an important point, that is, whether or not mergers have reduced competition. No conclusion was given as it probably could not be given.

One further study deserves notice. Economist Adelman of the Massachusetts Institute of Technology made a detailed study of this subject, based in part upon his own analysis and upon the data of five independent studies. His conclusions, where pertinent, are here recorded as

follows: (1) The fears of the Federal Trade Commission and Attorney General McGrath (1950) are unfounded, as to increasing industry concentration, either during the World War II or post World War II period. Professor Adelman calls these fears "warmed-over fiction", (2) A slight deconcentration occurred in the World War II period. Small companies grew faster, earned a higher percentage of profit and showed a larger percentage increase in their stockholder's equities, (3) A substantial decrease in manufacturing concentration has occurred since 1901, (4) The findings of Lintner and Butters are supported, (5) The facts necessary to accurately solve such problems are depressingly scant.¹

It would appear that the trend of concentration is up, but there is doubt whether the merger activity, of recent years, has had any appreciable effect, measured either overall, by industry or by product. The reduction of competition, by merger, is an entirely different problem and will be discussed in the following chapter.

External And Internal Growth Of Industry Contrasted

It becomes useful to examine the problem of economic concentration as it develops either from internal or external expansion. It is common knowledge that internal expansion arises, primarily, by financing from retained earnings, loans, the sale of securities and similar methods. External expansion arises first, by acquisitions in the form of mergers, consolidations or combinations and second, by the creation of new types of business forms, such as holding companies and trusts.

The Federal Trade Commission suggests that there is probably no more widely held thought than that business growth has been principally and primarily due to internal expansion arising out of the requirements of modern plant technology and the expansion of markets. The Commission maintains that this concept is erroneous; that the role of external expansion has been unduly discounted; and that a very large part of the growth of economic concentration has been due to mergers.¹

The Commission surveyed the history of mergers, particularly those at the turn of the century and during the 1920's, and this indicated conclusively that many of our most concentrated industries of today obtained their concentrated form at the turn of the century.\(^1\) This dissertation has heretofore pointed out such matters. As this, however, is water which has long ago flowed over the dam, the various companies, if vulnerable under the Sherman Act, should be attacked from that quarter. The pertinent question for today is: To what extent is external expansion, of the present, creating more economic concentration?

The Commission insists that, during the current period, evidence of economic concentration by external expansion is clear. This evidence is predicated on the following: (1) Traditionally "small business" industries have been affected, such as textiles and apparel, food and kindred products, steel drums, tight cooperage and wines,

\(^1\)Federal Trade Commission, Report on the Merger Movement, op. cit., pp. 23-25. A special study of the steel industry, confirming the conclusion that long-term growth has been effected by merger, as to 25% of the industry, is indicated at Ibid., pp. 24-25 and Appendix I. As to the steel industry, the Commission felt that its findings would be an understatement as to industry, as a whole, because integrated line operations in this industry would lessen the desirability of making scattered acquisitions. Ibid., p. 25, En. 36.
(2) In steel drums, tight cooperage and wines almost all, or a substantial part, of the industry has been taken over by large companies, (3) Large corporations have bought out small companies.¹

According to the Commission's analysis of data, drawn from Moody's Investor's Service, and Standard and Poor's Corporation Manuals, more than 70 percent of the total number of firms acquired during the period 1940-1947, in manufacturing and mining enterprises, have been absorbed by corporations with assets of over $5 million. Of this 70 percent, three-sevenths (604) were acquired by corporations with assets over $50 million (152) and four-sevenths (854) were acquired by corporations with assets ranging from $5 million to $49 million (413). About 16 percent (365) of the firms acquired were absorbed by corporations having assets of from $1 to $4 million (246). The remaining 14 percent (239) of the acquired firms were absorbed by those corporations having assets under $1 million (156).²

As to the size of concerns acquired, in the 1940-1947 period, in manufacturing and mining, 70 percent (1468)

²Ibid., p. 28 and Chart 3.
of the acquired concerns had assets of less than $1 million, 22 percent (425) had assets less than $5 million, but more than $1 million, about 3 percent (58) had assets of more than $5 million but less than $10 million, 4 percent (66) had assets of more than $10 million but less than $50 million, and less than 1 percent (15) had assets in excess of $50 million.¹

Evidence also appeared that the 200 largest manufacturing corporations in the United States have accounted for 27 percent of the firms acquired. The Federal Trade Commission concluded that smaller, independent concerns have been absorbed by large corporations, thus increasing corporate concentration by external expansion.²

As was reported, supra, the findings of Doctors Lintner and Butters throw considerable doubt upon the findings of the Federal Trade Commission both as to the trend of economic concentration and the relative economic concentration, brought about by the mergers of the 1940-1947 period. Internal expenditures on new plant and equipment of all corporations, with assets over $100 million, was eight times the total assets acquired by

²Ibid., p. 28.
merger. This figure indicates only a 12 percent increase of assets by merger. The increase in assets, due to merger, may be more significant in certain industries, where acquisitions are larger than in others.

A summary of additional findings by Doctors Lintner and Butters follows. Where the data of the Federal Trade Commission were ranked by size classes (for the 1000 largest companies), then the average percentage of growth in the assets of the acquiring company, as to each size class, was regularly and substantially smaller for larger buyers than for smaller buyers. This was true for manufacturing as a whole, for all durable and non-durable manufacturing and for each of the 10 major manufacturing groups. External expansion percentage-wise was found to be greater for small companies than large companies, with assets being the basis of comparison in all size groups. The average contribution, per merger, in asset increase was 15 percent for the acquiring corporations included in the 751-1000 asset size group. For the ten largest corporations only 1.5 percent was added to their 1939 assets, by merger. The average percentage growth for all acquisitions, taken together, was

\[ \text{Average contribution, per merger, in asset increase} = \frac{15\%}{1000} \]

\[ \text{For the ten largest corporations only} = \frac{1.5\%}{1000} \]

\[ \text{The average percentage growth for all acquisitions, taken together, was} \]

\[ \text{\cite{Senate Hearings on H.R. 2734, op. cit., p. 364.}} \]

\[ \text{\cite{Ibid., p. 387 and Chart 5. Italics supplied.}} \]
substantially less for larger than for smaller acquirers. In the 250-500 asset size group the average percentage growth for acquiring companies was over 40 percent.¹

Lintner and Butters discovered that, as to the percentage total growth in acquirer's assets in the period 1939-1946, by size groups, the 10 largest companies showed a 5 percent growth; the asset size group 751-1000, a 12.5 percent growth; and the asset size group 251-500 a 24.4 percent growth. Separate industry groups showed no consistent relationships. External expansion seems to be quite significant for acquiring corporations in the under $50 million group and for most industrial groups, such as petroleum and coal, textiles, transportation equipment, and primary metals.²

The above data, conclusions and comments relate to studies which are admittedly incomplete. As to trends they may be significant. Further study, on a primary basis, is indicated. Demonstrable data are almost completely absent as to the effect of mergers on competition.

¹Senate Hearings on H.R. 2734, op. cit., p. 387 and Chart 5.

²Senate Hearings on H.R. 2734, op. cit., pp. 387-388 and Chart 5 and Tables 9 and 7 (page 386). Professor George J. Stigler contends that the largest steel companies have not added customers relatively in 50 years, by as much as 4 percent, except by merger. Study of Monopoly Power, 81st Congress, 2d Session, (1950), Part 4A, p. 996.
The Divergence Between Plant And Company Concentration

There has existed a dispute for many years, among students, as to whether or not corporate concentration is the inevitable result of necessary plant concentration. That is, whether or not the technological requirements of large-scale production has brought the giant corporation into existence. Proponents for the affirmative list, among their number, Professor Arthur R. Burns;\footnote{The Decline of Competition, McGraw-Hill, New York, (1936), pp. 2, 8, 9, 525.} while the opponents list, among their number, Professor Frank A. Fetter.\footnote{Temporary National Economic Committee, "Relative Efficiency of Large, Medium Sized and Small Businesses", Monograph No. 13, (1941), Appendix D. pp. 399, 402, 404-405, 406. Also David C. Coyle, "Big Cannot be Free", 179 Atlantic Monthly, (June, 1947), p. 72, to the effect that big business is not only inefficient technologically, but also unnecessary.}

In order to resolve their problem, both from the standpoint of the theory of the structure of industry and from the standpoint of providing more adequate bases for intelligent antitrust policy, the Federal Trade Commission undertook a study of this problem, which was reported December 12, 1950.\footnote{Federal Trade Commission, Report on the Divergence Between Plant and Company Concentration, 1947, Washington, (1950).} As far as this writer could learn,
this study marks the first published attempt to thoroughly explore this problem.

In order to delimit the boundaries of their investigation the Federal Trade Commission made it clear that control over industry has three dimensions: (1) Control over the production, sales or productive capacity of a certain industry, (2) Control of a sequence of productive or distributive processes (vertical integration), (3) Control of an assortment of different undertakings, neither in the same industry nor in vertically related processes (conglomerate bigness). It is the first type of control, involving either oligopoly or monopoly, with which this study is concerned.¹

It is the Commission's thesis that where there is an excess of company concentration over plant concentration such excess was occasioned by factors other than productive efficiency. Some of these factors are certain financial or market control advantages for the owners and managers.²

"Plant concentration" refers to the number of plants serving a certain industry, always assuming that each plant is a technologically efficient unit. "Company concentration"


²Idem., fn. 1.
refers to the number of companies serving a certain industry. The plant data were measured in terms of "value added by manufacture", while the company data were based on "value of product".¹

A divergence index was devised which measured the difference between plant concentration and company concentration in 163 manufacturing industries, each having value added by manufacture of over $100 million, in 1947 (the last fully tabulated Census of Manufacturers). The two curves which were drawn were made up first of the number of plants and their output, and second the number of companies and their output. The area between, measured by a planimeter, indicated the divergence. An index based upon the median industry (ball and roller bearings) was constructed. The industries were then ranked by these indices.²

The greater the divergence the greater was the number of plants per company unit. Conversely, the lesser the divergence the smaller was the number of plants per company unit. For example, the divergence index for condensed milk was 65.3, with 4 companies producing 49.6 percent of the total value in this industry. In lighting fixtures the


²Digested from various parts of this document.
divergence index was 3.38, with four plants producing 18.1 percent of the product value. The conclusion, in part, would be that in the condensed milk industry there are extensive multi-plant operations and in the lighting fixture industry there are almost no multi-plant operations.

The stated purpose of this study was "merely to ascertain what importance large plants may have for the concentration problem and what limits they may set for a policy of deconcentration". This dissertation is interested in the conclusions of the study as they may bear upon the ultimate legality of mergers with which Section 7 of the Clayton Act is concerned.

The two sources of information available on this subject are the study of the Commission and the Hearings Before the Subcommittee on the Study of Monopoly Power of the Committee on the Judiciary of the House of Representatives.

Without going into the methodology used to obtain data and the statistical result, several conclusions were

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2Ibid., pp. 1-2.

381st Congress, 1st Session, (1951).
1) Different patterns of divergence appeared, for which different remedies, if any, might be suggested.

2) There were five types of divergence patterns. First, was the "high divergence" pattern. The maximum divergence between plant and company concentration was found in those industries characterized by either small-scale operations or extensive multiple-plant operations (compressed gas). Other industries showed high concentration (distilled liquors). Still other industries showed relatively low company concentration which was well above the level of plant concentration (fertilizer mixing).

3) Second, were two "low divergence" patterns. In the first group the number of companies was only slightly higher than the number of plants, but had small-scale operations and a large number of plants (saw-mills). The second group also had only slightly more companies than plants but the plants were small

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4) The different divergence patterns suggest different types of public policy. Only those conclusions appropriate to this dissertation are included. Among those industries with high company concentration and "high divergences" there was need to guard against monopoly. The available remedies would include breaking up such businesses. In those industries with high company concentration and "low divergence", monopolistic concentration cannot be broken up, but may require "public utility" types of regulation.\footnote{Ibid., p. 35.}

It was in such an economic climate, as it evolved and was likely to evolve further, that the professional economist had to spin his theories, the legislator devise public policy and the jurist interpret the law, as applied to Section 7 of the Clayton Act. Applicable economic theory is considered in the following chapter.
CHAPTER III

THE FOURTH MERGER MOVEMENT

ECONOMIC THEORY

General

The objective of this chapter is to record the pertinent economic theory, applicable to Section 7 of the Clayton Act, where such theory has been formalized.

There are direct factors which enter into the competitive picture and which, in part, will be adverted to herein. These include the character of markets, the role of substitute goods, potential competition, the fear of Federal incorporation, commodity standardization, compulsory grading, greater mobility of capital and greater mobility of labor.¹

Introduction To The Theory

A passage from the work of Dr. Corwin D. Edwards will serve to center the issue in theory:

¹Stocking and Watkins, op. cit., Ch. 15.
In a thorough attack upon excessive concentration, dissolution and divestiture would be the principal means of action at the outset in an effort to recover lost ground by clearing away existing concentrations of power. A broad use of such devices is a formidable undertaking. Remedial action is costly because there is some temporary waste associated with the reorganization of a going concern and because it entails the maximum conflict with vested interests. Nevertheless the need for such action is as real as the abuses that spring from concentrated power. But even if the destruction of existing concentration were to be incomplete or sporadic, the principal purpose of an attack upon concentration could still be achieved. The techniques of prevention would be more important than those of cure. As the economy grows in total size, and as technological research and improved means of transportation and communication break down the boundaries of existing markets, the significance of an enterprise of a given size is reduced. Existing concentrations of economic power are likely to become less important if they can be prevented from growing larger. Hence the primary emphasis should be upon means to prevent future growth.1

The Three Schools of Thought

The First School

The school of thought, represented by C. D. Edwards, George J. Stigler, and others, predicates its theory upon the

1 Corwin D. Edwards, Maintaining Competition, McGraw-Hill, New York, (1949), p. 154. Italics are supplied. That economic power may become concentrated in other ways, than by merger, was recognized, Ibid., Ch. 4. especially, pp. 133-153. Dean Neal H. Jacoby, in a review of Dr. Edward's book, supra, concluded that the book merely shows how the concentration of economic power could be used disadvantageously to society, but does not show that it is being so used or that it even possesses such power. 48 Journal of Political Economy, (February, 1950), p. 67.
structural bases of the markets.¹ To effectuate satisfactory competition, within most markets, Dr. Edwards would prescribe the following: (1) Appreciable number of sources of supply and customers for the same product, (2) No trader so powerful as to be able to coerce rivals or bar them from competitive activity, (3) Traders must be responsive to the incentives of profit and loss and so must not be made secure financially or market-wise by means of size, diversification and so forth, (4) Commercial policy must not be collusive, (5) Free entry must exist, (6) Free access to both sides of the market must be had, (7) No preferential status for certain traders must occur. "Where markets are so organized, competition affords a rough and limited but effective safeguard for certain interests of those immediately involved and for certain aspects of the public interest."²

Professor Stigler prescribes the following for a competitive market: (1) Considerable number of firms selling closely related products in each important market area, (2) Firms not in collusion, (3) The long-run average cost curve for a new firm must not be materially higher than that for established firms.³

³Markham, op. cit., p. 355.
Thus, as the writer understands this approach, if the structural market characteristics were changed, from an oligopolistic character to those suggested, competition would be revived. Presumably Section 7 of the Clayton Act, along with other laws, might effectively create such structural changes and thus create new market characteristics.

Dr. Edwards recognized three types of concentrated economic power. The first, that of monopoly or monopsony, may be found either in a simple or complex form. Inadequate empirical study exists with regard to the complex forms. In general, oligopolistic rivals, indirectly or directly, foreclose the markets to both rivals and customers; bargaining advantages and high prices result; aggressive competition (other than advertising) would merely invoke retaliation; lowered prices are followed by competitors, with lowered profits for all; a dominant concern, in a market with a large number of firms of lesser size, will not create competition; increasing the size of a rival in an oligopolistic industry is thought not to create more competition. The conclusion is that only where the producers are small enough and sufficiently numerous will competition maintain its vigor.

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The second type of concentrated power arises through the vertically integrated enterprise. So long as a concern is merely self-contained its economic power springs solely from its position at each horizontal level of operations. Where it is disproportionately integrated the "squeeze" may be applied at various levels. For example, a supplier of raw materials may establish high prices for those materials but counter with low mark-ups in some stage of the fabrication. Empirical data on this point is alleged to be quite weak.¹

The third type of concentrated power is derived from bigness. The giant corporation, either of the monopolistic, vertically integrated, or conglomerate type, derives its strength from the power to withstand economic disasters, the variety of economic tactics at its command, extensive advertising power, important financial power, and the effective domination of local markets. Some, but not broad enough, empirical evidence exists as background for this theory of giantism.²

behave like monoplists is recorded by Professors Stocking and Watkins. These authors list seven factors which each oligopolist may consider in his business decisions and which may cause him to act as though he were a competitor instead of a monopoly partner: (1) His rival's reactions to his own decisions, (2) Differences in the interpretation of the elasticity of demand, (3) Differences in his position in the market, (4) Differences in the scope and character of operations, (5) Differences in cost accounting methods, (6) Differences in production processes. In spite of these vagaries in economic theory the merger has brought into being conditions closely approximating the theorist's model of oligopoly.

Professor Oppenheim summarizes the position of this school as follows: "The assumed causal connection between oligopoly structure and oligopoly behavior . . . leads the proponents of this viewpoint to the conclusion that the . . . remedies (antitrust) are applicable to the companies in an oligopoly industry, comparable to cases involving a single firm monopoly or direct proof of abuses of concentrated

1Stocking and Watkins, Monopoly and Free Enterprise, op. cit., p. 112. Dean Neil H. Jacoby, in a review of this book, stated that the book was disappointing in that the study had not advanced the evidence on market structure or habits. 59 and 60 Journal of Political Economy, (December, 1951), p. 514, reply and rejoinder, (June, 1952), p. 257.

2Stocking and Watkins, op. cit., p. 110.
Pricing and price policies in oligopolistic markets must be considered, for the reason that it is usually in price matters that the competitive problem becomes most acute. "The typical industry structure in our economy involves a 'group of interdependent monopolists'." This group breaks down into three subclasses, that of differentiated oligopoly, that of pure oligopoly and that of monopolistic competition. Monopolistic competition is not considered herein, because it is not relevant.

1) Differentiated oligopoly is the most important market category, wherein a few firms are rivals in selling differentiated but close substitute products, such as in soap products, cigarettes and radios. As to fewness of sellers, this would include either very few sellers; a heavy dominance by a few sellers; or quite a few sellers, say 20, of about equal size, but where each recognizes some interdependence in pricing. The barriers that are erected to

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entry are: (a) Dangers of overproduction, (b) Established brands and goodwill, (c) Patent ownership and the control of strategic resources. These barriers to competition lead to a condition where the concentrated structure is stable or very slowly changing. ¹ Pricing by the differentiated oligopolist discloses: (a) An elastic demand-price curve, (b) Inability to change prices without supposed retaliation (no independent demand curve), (c) Uncertainty of the effect of changes in price on his sales. The result will be a monopoly price, but not necessarily a maximum monopoly price. In arriving at the "satisfactory" price, collusion of a concious nature prevails, whether of a formal, subrosa, price leadership, formula or price-matching type. ² Such concurrent pricing tends to the single-firm monopoly level. There are important qualifications to this conclusion: (a) Combined demand for substitutable goods is less

¹Bain, Pricing, Distribution and Employment, op. cit., pp. 177-180.

certain than for monopoly goods, (b) Price shifting due to demand is at a minimum, (c) Price leadership may not always work, (d) Potential new entry may have a stronger effect on oligopolists than monopolists, thus forcing them to maintain a price level that will not encourage entry. These oligopoly equilibria demonstrate that both price-marginal cost relationships and the relationship between aggregate industry output-cost and minimum attainable aggregate cost can be extremely variable. With a price established, the share of the market which an oligopolist receives is based either upon collusion or upon non-price forms of competition. Price warfare to reestablish shares, of course, is well known. Product variation obviously adds to the cost of the final product, but it may be favorable to the consumer if design or quality are improved. Mere fashion or "buyer interest" changes may result in no

value, except a "release from boredom" value. Alternate choices are increased with product variation. Because of waste motion the costs of non-price competition tend to be high.\textsuperscript{1} An optimum size of plants in oligopolistic industries is likely to exist although this is not inevitable. Progressiveness characterizes the oligopolistic type of industry, although some show definite laggard patterns.\textsuperscript{2}

2) Pure oligopoly is found in such industries as steel, copper, cement and processed building materials. It is, thus, found mostly in the producer goods industries. The setting for price-output determination resembles that for differentiated oligopoly. The lack of product differentiation makes the interdependence of prices very close. Non-price competition is essentially useless and therefore not costly. Shares of the market are potentially quite unstable. Monopoly pricing, accompanied by market sharing and price inflexibility, tend to exist especially where concentration is

\textsuperscript{1}Bain, \textit{Pricing, Distribution and Employment}, \textit{op. cit.}, pp. 199-209.

\textsuperscript{2}Ibid., pp. 209-218.
high and entry is effectively blocked. Price will generally exceed the marginal costs of production, although threats of new entry or innovations may lead to equilibrium. Progressiveness depends upon the threat of new entry.¹

That Professor Bain is not entirely wedded to the first school of thought is evidenced in a recent article by that writer.² Professor Schumpeter has criticized the doctrines of this school primarily because he thinks it to be the static and concerned mostly with the "present" rather than, as it should be, with the evolutionary and revolutionary future.³

Professor Clark suggests that the "attack on size by this school is best limited to growth by merger."⁴ Professor Vernon Mund, of this school, accuses the mergers of destroying certain organized markets, eliminating price competition in the basic industries, exercising monopoly

power through discrimination, being slow in developing mechanical or technical innovations, and aggravating and prolonging periods of depression by stabilizing prices.¹

The Second School

The followers of the second school of thought are referred to as the exponents of the "effective or "workable" competition theory. Professors Mason, Clark, Oppenheim, Meriam, and others subscribe to this doctrine.²

This theory places greater emphasis upon the actual behavior and the performance results of an industry, than upon industry structure. Professor Clark formally initiated this concept in 1940.³ This approach is not concerned with the size or fewness of the members of an industry, but with how they behave. It is granted by this school that the oligopolists' economic power may be great, but, from the standpoint of public policy, there may be "workable"

¹Vernon A. Mund, Open Markets, Harpers, New York, (1948), Ch. XII.


competition if the companies are active rivals on the basis of economy and efficiency.¹

Standards of acceptable behavior are embodied in the following questions: (a) Are the units technologically progressive? (b) Are cost reductions passed on to the consumer? (c) Is investment excessive? (d) Are profits reasonable? (e) Has production and employment been at the proper levels? (f) Do the purchasers have available alternative goods and sources of supply?² These standards have been recognized as requiring extensive industry studies to evaluate them.³ Many such industry studies have been made by private persons and governmental agencies. The studies of the rayon industry⁴ and of the steel industry⁵

¹S. C. Oppenheim, "Divestiture as a Remedy Under the Federal Antitrust Laws", op. cit., pp. 126-127. Professor Oppenheim also referred to this doctrine as a "rule of reason" technique. Ibid., p. 129.


³Professor Clifford L. James takes a dim view of such investigations: "Also any detailed verification of certain practices and consequences in an industry at a given period is likely to be rendered obsolete in the near future by continuous dynamic changes." Quoted from Economics, op. cit., p. 237.

⁴Markham, op. cit., p. 349.

are examples.

Professor Clark argues that imperfect competition may be too strong as well as too weak; and that "workable" competition needs to avoid both extremes.\(^1\) Professor Clark elaborates, further: "While extreme quality differentials approach monopoly, more moderate ones may be workably competitive, especially with further growth of closer substitutes and better knowledge of qualities on the part of buyers."\(^2\)

The concepts of the market structure enthusiasts are denied by this school on the ground, in part, that technology in some industries requires large units, (such as automobiles and basic aluminum) and changing from three oligopolists to six oligopolists would in no way affect their behavior as oligopolists or otherwise.\(^3\)

Stocking and Watkins are critical of this school of thought. They catalogue these doctrines as follows, with regard to workable competition: "(1) That it is preferable to the best alternative 'competitive' arrangement

\(^1\) Clark, "Toward a Concept of Workable Competition", op. cit., p. 241.

\(^2\) Idem.

\(^3\) Justice Knox, in the Alcoa case, infra, relied on many factors, other than mere market structure.
practically attainable: (2) that such market control as sellers can exert is slight and, under the particular circumstances, does more good than harm. This latter doctrine, according to these critics, relies on potential competition, substitute products, and the desire to expand sales at some sacrifice of immediate profits, in order to keep prices close to that obtained in a competitive market, in the long-run. Stocking and Watkins do not entirely discount the effect of new products but feel that such an attitude accepts the status quo without any positive effort to increase the number of sellers and reduce the monopoly elements in industrial markets. In the short-run, they contend, the proponents of this policy recognize the need for the antitrust laws, but feel that price stability, criticized by the first school, prevents prices from falling to marginal costs. This latter concept was denied by Stocking and Watkins as it leads to a non-adjustable economy. It was this slighting or ignoring of the function of price, as the mechanism for regulating the uses of resources, which Stocking and Watkins allege to be the fatal

\[\text{Monopoly and Free Enterprise, op. cit., pp. 97-98.}\]

Like Clark, Professor Schumpeter believes in the efficacy of potential competition in the long-run. His short-run explanations do not agree with this school, for he believes that a price premium must be paid to induce short-run risk capital investment.\(^2\)

The non-workability of competition in oligopoly may be indicated where, (a) The profit rate averages almost perpetually well above or below the going rate for investment, (b) Scales of many firms are seriously outside the optimum, (c) Considerable chronic excess capacity exists, allowing for secular change and stand-by requirements, (d) Selling costs, of a competitive variety, exceed the usual proportion of total cost, (e) Cost reducing changes and product changes, advantageous to buyers, either are not adopted or are suppressed.\(^3\)

Professor Pegrum, in an oblique manner, recognizes the irrevocably changed character of certain markets in a discussion of Professor Vernon Mund's article on "The


\(^2\)Stocking and Watkins, op. cit., pp. 104-105. This alleged freedom of innovation was criticized, in that economic dynamism may not spring from monopoly elements. Ibid., pp. 106-107.

\(^3\)Bain, "Workable Competition in Oligopoly", op. cit., p. 37.
Application of Economic Analysis to Antitrust Law Policy:¹ "Both the competitive and monopolistic aspects of modern enterprise must be recognized."²

A variant to the thought of this second school is expressed by one student. He predicates his thoughts upon the notion that the passive acceptance of high level industrial concentration leads to industrial facism, while an atomized industry could be maintained only by a strong police power. Neither of these results was considered acceptable. Rather, that writer would shift the emphasis from a specific set of structural characteristics to an appraisal of a particular industry's over-all performance against the background of possible remedial action.³

Professor M. A. Adelman concludes that "workable" competition has no close connection with the size of business firms or the concentration of an industry. It is compatible with many small firms, as in apparel; with a few large ones, as in automobiles; and with large and small ones together, as in distribution."⁴

¹Proceedings of the 20th Annual Conference of the Pacific Coast Economic Association, (December, 1941), p. 75.
²Ibid., p. 83.
³Markham, op. cit., p. 349.
Dr. A. D. H. Kaplan, of Brookings Institution, writing on the "Influence of the Size of Firms on the Functioning of the Economy" states: ". . . these considerations . . . do not reveal visible limits to the size to which the large firm may attain and still contribute to the workability of an economic system that may remain both dynamic and competitive."\(^1\) Dr. Kaplan concludes that any change in the "large business" structure would require corresponding changes in the law and the institutional environment.\(^2\)

The Third School

The third school of thought has no name and represents the concept of this writer in attempting to synthesize the thoughts of several well-known writers. Adherents to this school include S. C. Oppenheim, R. S. Meriam, Blackwell Smith, David E. Lilienthal, Kenneth Galbraith—some of these adherents such as Oppenheim and Meriam might be classed in two schools.

The boundaries of this school are quite ill-defined. Certainly they flow over the boundaries of the other two schools, but are not synonymous with them in basic concept.

\(^1\) In 40 American Economic Review, (May, 1950), p. 84.
\(^2\) Ibid., p. 83.
Because the members of this group have concepts of a heterogeneous nature, harmony, for the purpose of associating these people in one school, may be found in the fact that both broad public interest elements and the diverse elements of the other two schools of thought are blended.

Professor Oppenheim suggests the coining of a new term "interactionists" to represent his concepts. He believes that the "rule of reason" applied to "workable" competition tests would contemplate that market structure, market behavior, and industry accomplishments be weighed in the context of the circumstances of the particular case. Professor Oppenheim believes that Stocking and Watkins underestimated the feasibility of the reconciliation of the other two schools of thought.

Another member of this school is Professor Blackwell Smith of the New York University School of Law. He would also weld the doctrine of "effective" competition to a statutory "rule of reason". He states it to be his belief that this approach could be made equally applicable to all the antitrust laws, including Section 7 of the

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2 Ibid., p. 1191, fn. 138.
Clayton Act.  

Professor Smith suggests a Procedure, which seems to be a complex of economic, political, and technological factors. Therein, Professor Smith, in common with others of this school, has followed the public interest philosophy of England and the members of the British Commonwealth of Nations. Technology or efficiency, plus political necessities, are at the bottom of this concept. The Procedure follows:

In determining whether any commercial practices or courses of conduct promote Effective Competition or are unreasonably injurious thereto, all relevant circumstances shall be considered, including such actual or probable results of the conduct, under like circumstances in the market, as the increase or decrease of:

1) Alternatives available to customers or sellers;
2) Volume of production or services;
3) Quality of the services or goods;
4) Number of people benefited;
5) Incentives to entrepreneurs;
6) Efficiency or economy in manufacturing or distribution;
7) The welfare of employees;
8) The tendency to progress in technical development;
9) Prices to customers;
10) Conditions favorable to the public interest in defending the country from aggression;
11) The tendency to conserve the country's natural resources;
12) Benefits to the public interest assuming the relief requested by the government in the proceedings.

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2 "Effective Competition", op. cit., p. 441.
Professor Smith's proposals would embark the country upon new policy standards for the antitrust laws. Maybe the country wants new policy standards, maybe it does not.

Similar doctrine was enunciated by David E. Lilienthal, in his recent popularly written book. Peter F. Drucker, while approving, in general, of Mr. Lilienthal's approach, does question his complete absolution of Big Business and the halo which has been placed on its head. Time magazine commented that Mr. Lilienthal was "apparently unworried that it would also mark a transition from limited government regulatory power over business to virtually unlimited government power to 'guide' the business community along whatever lanes an incumbent Congress and executive might believe to represent 'the public interest'."

Another writer who belongs in this school of thought is John K. Galbraith, author of American Capitalism, (1948), who developed this concept from the standpoint of the economic theorist. Big Business is necessary to reach the political and economic goals of the liberals, according to Professor Galbraith.

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1 Big Business: A New Era, Harpers, New York, (1953), particularly Ch. 21.


3 Issue of (February 23, 1953), p. 27.

4 Drucker, op. cit., p. 530.
Congress, representing the people, has never seen fit to accept such doctrine and there is nothing in the record of Congress that indicates that it will do so in the near future. The concepts of "small business," the right to compete, the distrust of giant industry and the "rural" approach still dominate Congressional thought.

The Economic Theory Of Vertical Integration

One investigator has concluded that the chief complaints against vertical integration, per se, have proved to be groundless. Vertically integrated concerns neither earn double profits, secure their raw materials at cost, sell their goods below the going rate, or consciously exclude their non-integrated competitors. Monopolistic elements in an integrated structure are admitted to be unfavorable to competition. This reasoning is based on long-run rather than short-run considerations.¹

Professor Adelman says of vertical integration: ". . . once regarded as 'natural growth' and almost as a positive good in itself, is now regarded as a neuter, a possible source of economies but also abuses. The emphasis

has been on injury to customers or competitors rather than to the ultimate consumer.¹

The disagreement between the two articles, supra, is simply that the first approaches vertical integration from the standpoint of the consumer, while the latter approaches it from the standpoint of the competitor.

The conditions for effective mergers of this type shed light upon the applicable economic theory. Such vertical mergers can be made economically effective only in a few industries. The special conditions required are: (a) The units acquired must be equally efficient at all levels, (b) The raw material source should not be subject to constant depreciation or oversupply, (c) The ultimate products must not be subject to sharply shifting demand or substitution, (d) Acquisition of raw materials should not be undertaken where strong producers already exist.²

Rowman and Bach recognize that integration, either vertical or horizontal, has product diversification as a direct corollary. Such a product diversification may become a tool in building up a tight network of control which will increase the power of the individual concern in dealing


with those from whom it buys and those to whom it sells, and in eliminating and excluding rivals." On the other hand such product diversification may be based upon serving the customer's needs or upon operating efficiency,¹

**Conglomerate Merger Theory**

A start on conglomerate merger theory has been made by Professor R. E. Heflebower of the University of Chicago. A conglomerate enterprise is envisioned somewhat like an investment trust, but for a commodity area. The constituent corporations are usually financial "blue chips" and can borrow at the lowest non-governmental rates. Such conglomerates may also be referred to as "management financial corporations". The departure from this concept may be found in their active participation in management and their "role in initiating new fields of production and sale".² Their financial and management power is internal in character. The diversification of activities of these concerns cause them to look to the new fields rather than


to the old ones. Management is forced to decentralize because of size and diversification. Thus, the cramping effects of size on management are averted and competition in the markets is invigorated to create the largest possible profit.¹

Conclusions

The three important schools of economic theory are in agreement, generally, on the preservation of sanctions against conscious price manipulation. From that point departures in theory range from the strict adherence to classical oligopolistic theory to a complete renunciation of such theory and a reliance upon the "rule of reason" in each case. The "rule of reason", itself, would by one school of thought be formalized through a statutory enactment and greatly broadened to include non-economic elements. The outstanding fact, in all theoretical discussion, seems to be the paucity of empirical data upon which inductive reasoning may be based. As these data are expanded, so may we expect our theory to become more accurate.

¹Heflebower, op. cit., pp. 263-264.
CHAPTER IV

THE FOURTH MERGER MOVEMENT

LEGISLATIVE HISTORY

The Defense And World War II Period

Recommendations Of The Temporary National Economic Committee

Although the Temporary National Economic Committee was not authorized to report on legislation, it was authorized to recommend legislation. Its recommendations relative to Section 7 of the Clayton Act provide that the acquisition of capital assets and property by competing corporations should be prohibited, unless it could be shown:

(1) That acquisition is in the public interest and will be promotive of greater efficiency and economy of production, distribution, and management;
(2) That it will not substantially lessen competition, restrain trade, or tend to create a monopoly (either in a single section of the country or in the country as a whole) in a trade, industry, or line of commerce in which such corporations are

1The use of legislative history in determining the intent of the Congress in antitrust cases is discussed in Schwabmunn Bros. v. Calvert Distillers Corp., 71 S. Ct. 745 (1951).
engaged; (3) That the corporations involved in such acquisitions do not control more than such proportion of the trade, industry, or line of commerce in which they are engaged as Congress may determine; (4) That the size of the acquiring company after the acquisition will not be incompatible with the existence and maintenance of vigorous and effective competition in the trade, industry, or line of commerce in which it is engaged; (5) That the acquisition will not so reduce the number of competing companies in the trade, industry, or line of commerce as materially to lessen the effectiveness and vigor of competition in such trade, industry, or line of commerce; (6) That the acquiring company has not, to induce the acquisition, indulged in any unlawful methods of competition or has not otherwise violated the provisions of the Federal Trade Commission Act, as amended.

The Committee also recommended a fine, for violations, not to exceed $50,000; supervision by the Federal Trade Commission of acquisitions by holding companies or competing companies where the assets of the acquired company were $1,000,000, or the assets of the acquiring company were $5,000,000, or more; a presumption of illegality where the merger controlled 15 percent or more of either capacity, output, or volume of sales in any line of commerce.


2 Ibid., p. 40.
The Committee indicated that these proposals would:

(1) Outlaw the stock acquisition and holding company methods of combining competing corporations without disturbing the legitimate use of the holding company device in the relations between parent and subsidiary companies; (2) Strengthen the administrative authority of the agencies entrusted with the administration of the new law thus avoiding the vexatious limitations upon the powers of enforcement of the Federal Trade Commission; (3) Clarify to a degree the substantive standards governing the legality of the combinations of competitors; (4) Employ the administrative rather than the judiciary in the initial application of standards which are as much economic as legal; and (5) Substitute prevention for punishment by requiring approval in advance of any integration rather than compulsory dissolution after the evils of concentration have been suffered by the public.¹

At another point the Committee said:

Limitations on corporate size, however, confuse bigness with monopoly. The adoption of any mathematical standard in respect to the permissible degree of control of any industry would straightjacket our economy and would achieve certainty only at the expense of that flexibility without which the legal control of economic life cannot succeed.²

Monograph No. 38, published by the Temporary National Economic Committee, gives the views of Professor Handler relative to the above stated suggestions. Particularly, he felt that these suggestions were following the

¹Temporary National Economic Committee, Final Report and Recommendations, op. cit., p. 41.

basic precepts of both the Sherman Act and the Clayton Act. Prior administrative approval, in certain cases of mergers, is the kernel of his thought.¹

Effects Of The Defense And War Statutes And Executive Orders On Merger Activity

Although the intent of the statutes and executive orders of this period was to do nothing which would create a favorable atmosphere for any present or future violations of the antitrust laws, the intent either was not or could not be carried out.² It is now necessary to briefly record the findings of several public authorities as to the ineffectiveness of these laws.

The studies of the Smaller War Plants Corporation³ indicated that small business acted only as contract suppliers for the large prime contractors, because various government contracting agencies found it more convenient

¹At pp. 15-17.


³These studies are criticized as being unrealistic by Robert E. Wilson, "We the Accused", 225 The Saturday Evening Post, (January 24, 1953), p. 28.
to deal with one going concern than with many small concerns. Then the prime contractor parcelled out the subcontracts, thus reducing the efforts of the government contracting officers. As a practical matter most of the small producers were in non-war essential industries and found conversion impractical, both in a physical and in a financial sense. Leases, with options to buy, and subsidies for research went to big business; neither the administrative agencies nor the Attorney General interfering to a marked degree. Again, expediency was the logical excuse. "Scrambled" facilities made the congressional intent impossible to attain, inasmuch as such facilities were physically attached to pre-war existing plants. Usually, only the dominant concern in an industry was able to or cared to make an acceptable purchase offer for government surplus property.¹

The action of the Attorney General, in approving the sale of the government-owned Geneva steel plant to the United States Steel Corporation, may be a case in point.²

The fears of the Smaller War Plants Corporation were held to be justified, in another study, where it was


stated that to January 1, 1947, about 53 percent of the
government facilities disposed of by that date had been
acquired by corporations listed among the 250 largest
manufacturing corporations.¹ A congressional committee
stated that surplus plant disposal had improved the relative
positions of these large companies compared with 1939.²

In an address before the Institute on Post-War
Reconstruction at New York University, in 1943, Thurman
Arnold, Associate Justice of the United States Court of
Appeals and former United States assistant attorney general
in charge of antitrust matters, charged that World War II
was being used as an excuse to soften the provisions of the
laws against trusts. Judge Arnold assailed both the pro-
ponents of cartelized industry and government planners who
would place concentrated industry under the control of a
government bureaucracy. He further held that the all-out
production for war threatened the concentration of indus-
trial power which created our great depression. Monopoly,
he said, must be attacked wherever or whenever it raises

¹Harrison F. Houghton, "The Progress of Concentra-
tion in Industry", 38 American Economic Review, Papers and

²United States Versus Economic Concentration and
Monopoly, pursuant to H. Res. 64, 79th Congress, (1946),
p. 8.
It must not become a partner, with government, in setting production plans, quotes and the policies of all units of independent industry, under the guise of assisting the war effort. In brief, Judge Arnold was hitting at plans, conceived in war legislation, which would create and perpetuate a cartel philosophy, with government a willing and forceful partner.\(^1\)

A study made by the War Assets Administration indicated that, through June 30, 1946, "although the large corporations (250 largest) have acquired the great bulk of the big and costly plants, the preponderant share of other plants has gone to smaller companies."\(^2\)

The Second Report of the Attorney General Under the Defense Production Act of 1950, given April 30, 1951, stated that the World War II experience in channeling contracts to a limited few had become more intensified during the period covering the hostilities in Korea.\(^3\)

\(^1\)Reported in the *New York Times*, (November 25, 1943), p. 43.


The Kefauver Bills

H.R. 4810,¹ H.R. 5535,² and H.R. 3736³ are popularly known as the Kefauver bills, because the principal sponsor was Representative (later Senator) Kefauver. Other active sponsors of these bills were The Federal Trade Commission and Senator O'Mahoney.

A brief consideration of these bills is necessary because they represent the evolution of Congressional thought in searching for a standard to curb corporate economic concentration effected through the use of the merger device.⁴

Each of these bills was approved by the full Judiciary Committee of the House of Representatives.⁵ The


³Hearings before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, 80th Congress, 1st Session, on H.R. 3736 (H.R. 515), (1947); and House Report No. 596 on H.R. 3736, 80th Congress, 1st Session, (1947). The companion bill to H.R. 3736, in the Senate, was S. 104 which was reported favorably (May 17, 1948).


Rules Committee of the House never granted a rule to call the bills before the House. Hostility to these bills, by the Rules Committee, was charged by the sponsors thereof.\(^1\)

H.R. 4810 represented, in substance, the recommendations of the Temporary National Economic Committee, to amend Sections 7 and 11 of the Clayton Act.\(^2\) During the evolution of these bills the moderates within the Judiciary Subcommittee gained the initiative.\(^3\) When H.R. 5367 was approved it was in almost the identical form which was taken by H.R. 2734 (Celler Anti-Merger Act).

Several conclusions may be made with regard to these bills. First, there was almost unanimous bipartisan support of them.\(^4\) Second, very extensive hearings were had, with proponents and opponents having their full say.\(^5\) Third, the committees were in general agreement as to the

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\(^1\) 93 Congressional Record, p. 7183; House Report No. 596 on H.R. 3736, op. cit., (minority).


\(^4\) The subcommittee vote as recorded in House Report Nos. 1480, 1820 and 596, op. cit.

\(^5\) More than 1,000 pages were devoted to testimony.
need for some new measuring device to ascertain the existence of mergers which were being formed contrary to public policy. Fourth, the Alcoa case of 1945 and the Tobacco case of 1946 were cited, by the opponents of these bills, as representing such a new interpretation of the Sherman Act as to render these bills unnecessary. Fifth, the proponents refused to be bound by the intent of the framers of original Section 7 of the Clayton Act. Sixth, the majority report on H.R. 3736 insisted that the basic concepts of effective competition have moral and spiritual aspects, as well as economic aspects.

The Celler Anti-Merger Act of 1950, H.R. 2734

This Act became law December 29, 1950. When President Truman signed this bill he is reported to have

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1 "Section 7 of the Clayton Act: A Legislative History", op. cit., p. 766.
2 United States v. Aluminum Co. of America, 148 F. 2nd. 416 (1945).
6 Idem.
said that he would rather see 1,000 banks of $5 million of assets than one National City Bank (New York City) with assets of $5 billion. This Act marks the first major amendment of Sections 7 and 11 of the Clayton Act. Because of its importance to this dissertation detailed attention will be given to its legislative history. One study suggested that Congress adopted H.R. 2734 because of three conclusions made by Congress:

1) That the competitive system was being jeopardized by the increasing concentration of economic power brought about through merger,

2) That the Sherman Act had demonstrated its inability to cope with this problem, and

3) That original Sections 7 and 11 of the Clayton Act had likewise shown complete inability to handle the situation.

In the 81st Congress, 1st Session (1949) there were introduced several bills dealing with Section 7. In the Senate, S. 56 (O'Mahoney and Kefauver) - received no action. In the House there were introduced H.R. 988 (Jackson), H.R. 1240 (Mansfield), H.R. 2006 (Hobbs) and H.R. 2734 (Celler), all of which received no action, except H.R. 2734.


H.R. 2734 was introduced by Representative Celler on February 15, 1949. This bill was referred to the House Committee on the Judiciary and was in turn referred to the special subcommittee of which Mr. William T. Byrne was chairman. Representative Celler was chairman of the full Committee on the Judiciary.\(^1\)

The sponsors of the bills in the House (Celler) and in the Senate (Kefauver) testified and among others, made the following points: (1) The Justice Department has lost the Consolidated Steel\(^2\) case, thus proving the Sherman Act was not sufficient to handle the merger trend, (2) H.R. 2734 was not offered as a complete remedy but will help to remedy the evil of the big fellows swallowing the little fellows, (3) Both major political parties, in their platforms of 1944 and 1948, approved legislation such as proposed by H.R. 2734. Presidents Hoover, Franklin Roosevelt and Truman have urged approval of such proposed legislation.\(^3\)

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\(^3\)House Hearings on H.R. 2734, op. cit., pp. 11-18.
The testimony of the proponents of H.R. 2734 indicated a lack of faith in the power of the Sherman Act to cope effectively with the increasing concentration of corporate economic power.\(^1\) This conclusion was predicated on the decision in the Columbia Steel\(^2\) case. In other words, H.R. 2734 was meant to establish a different test for unlawful mergers than that inherent in the Sherman Act.\(^3\)

Other testimony developed the problem of the "administered price" industries, which, were alleged, in part, to accelerate depressions by curtailing production. This reaction was claimed to be characteristic of oligopolistic industries and not of those industries having many producers.\(^4\)

The piecemeal acquisitions of competitors was thought, by another witness, to be the very heart of the problem to be attacked by H.R. 2734. To remove the possibility of misunderstanding this simple idea the witness

\(^1\) *House Hearings on H.R. 2734, op. cit., p. 27.* (Testimony of Assistant Attorney General Herbert A. Bergson).

\(^2\) Also popularly referred to as the Consolidated Steel case. This case is treated in detail in Chapter V, this dissertation.

\(^3\) *House Hearings on H.R. 2734, op. cit., p. 27.*

\(^4\) *Ibid.*, pp. 31-32. (Testimony of Dr. John D. Clark, President's Council of Economic Advisers).
suggested that the Committee make this point clear in its Report. The witness suggested: "That you intend the bill to apply to acquisitions which have been [had] such effects as the substantial reduction in the number of competitors, or the reduction of that number to such a point as to restrict unduly the variety of choices available to persons who must deal with the remaining concerns, or provisions of a decisive advantage of one business enterprise over its rivals, or encouragement toward the adoption of policies calculated to maintain prices by reducing output." ¹

An opponent of H.R. 2734, Mr. Gilbert Montague, took serious issue with those who held that the Columbia Steel decision, infra, had effected a reversal of the Aluminum decision (1945) and the Tobacco decision (1946). It was the witness' position that the court place great and possibly dominating weight upon the Attorney General's approval of the acquisition of the government-owned Geneva steel plant. This decision stands upon its own peculiar facts, said Mr. Montague, and a reading of United States v. Paramount Pictures ² should be convincing. ³

¹House Hearings on H.R. 2734, op. cit., p. 42. (Testimony of William T. Kelly, General Counsel, The Federal Trade Commission.)

²334 U.S. 131 (May 3, 1948).

³House Hearings on H.R. 2734, op. cit., pp. 48-49.
H.R. 2734 was reported favorably by the full Committee on the Judiciary of the House, with amendments, and by unanimous vote, on August 4, 1949. House Report No. 1191 gives the Committee's report. Since H.R. 2734 is practically a duplicate of H.R. 3736 of the 80th Congress this Report adds little to the Report on H.R. 3736. The amendments by the Committee are of a minor corrective nature. The Committee adopted the data and conclusions of the Federal Trade Commission on economic concentration.

It is appropriate to record briefly the questions posed and the answers made by the Committee to assist all to understand their intentions. To the question would this bill prohibit a company in a failing condition from selling to a competitor, the answer was no. To the question would this bill forbid the merger of small corporations to afford greater competition to larger corporations, the answer was no. To the question have recent decisions of the Supreme Court made this proposed amendment unnecessary, the answer was no. To the question would the bill apply only to those acquisitions and mergers between competitors or to all which substantially lessen competition or tend to create a monopoly, the answer was that it applies to

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1Pages 1-2 of the Report.
all merger types, only when they have the specified effects of substantially lessening competition - or tending to create a monopoly. The conclusion of the House Committee was that all forces of monopoly must be dealt with, no matter whether an earlier Congress intended one thing or another as to the principal purpose of Section 7. The debates on the bill, in the House, will now be noted.

On August 15, 1949, Representative Celler moved to suspend the rules and pass H.R. 2734. There was no objection, so debate was limited. Upon the debate much of the material treated in the hearings by subcommittees and in committee reports, both pro and con, was stated for the benefit of the entire House. It is especially important to note the following: (1) That H.R. 2734 violates the "due process" clause (Jennings), (2) That the "loophole" in original Sections 7 and 11 is a vehicle for legalizing many other proscribed competitive practices (Carroll), (3) That expansion externally more completely eliminates competition than expansion internally (Yates), (4) That this "loophole" in original Sections 7 and 11 has rendered the Sherman Act less effective (Yates).

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1House Report No. 1191 on H.R. 2734, op. cit., pp. 6-12.
2They appear in 95 Congressional Record, pp. 11484-11507.
(5) That "small business" is economically and socially more desirable for the country (Bryson), (6) That piecemeal acquisitions are hard to unscramble after new alignments have been formed in the merged companies and within the industry (Yates).

The vote to suspend the rules and pass the bill, as amended, was Yeas - 223, Nays - 92, Not Voting - 117.\(^1\)

So, two-thirds having approved, the bill was passed. It is to be noted that this was the first time since 1914 such legislation had come to a vote in the House or Senate.\(^2\)

On August 16, 1949, under House Rules, the House sent H.R. 2734 to the Senate Judiciary Committee, which immediately referred it to the subcommittee made up of Senator O'Connor (D) Chairman, and Senators Kilgore (D) and Donnell (R).

The testimony of several of the witnesses, before this Committee, serves to develop salient points. In distinguishing the Sherman Act from Section 7 of the Clayton Act, Mr. Kelley of the Federal Trade Commission stated that the words "lessening", "tend" and "may be", appearing in Section 7, created the preventive approach as contrasted

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\(^1\) 95 Congressionl Record, p. 11507.

\(^2\) Hearings Before a Subcommittee of the Committee on the Judiciary on H.R. 2734, United States Senate, 81st Congress, 1st and 2nd Sessions, (1950), p. 20.
with the cure approach of the Sherman Act. Mr. Kelley cited the Columbia Steel case as an example of the non-applicability of the Sherman Act, but where proposed H.R. 2734 would likely be effective.¹

An interesting exchange between Senator Kilgore and Mr. Montague may be found in the Hearings. The most important issue related to whether or not an acquisition of stock followed by an acquisition of assets was legally or economically the same as the acquisition of assets alone. Mr. Montague seemed to have the better of the legal issue, but Senator Kilgore finally got an admission from Mr. Montague that the practical effect on competition would be the same.²

The testimony of Dr. John D. Clark requires comment.³ Dr. Clark disagreed with Senator Donnell, who claimed that stock control was more effective than the purchase of assets in foreclosing competition. It was the witness' position that because of the tax laws the purchase of

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¹Senate Hearings on H.R. 2734, op. cit., p. 24.
²Ibid., pp. 169-196.
³Dr. Clark is an attorney, a Ph.D in Economics, former President of Mid-West Refining Company and former Vice-President of Standard Oil Company of Indiana. He is also the author of Federal Trust Policy, Baltimore, (1931), and a member of the President's Council of Economic Advisors (1950).
assets must be followed by the final liquidation of the selling company, otherwise severe tax penalties would arise. Therefore, competition was completely foreclosed. Whereas, if the stock alone was or could be acquired so that the acquired company remained as a going-concern-subsidiary, competition might continue, sometimes unabated.¹

Dr. Clark also thought that the injunction provisions of the Sherman Act could not be utilized to restrain a proposed sale, which might be, if consummated, a violation of the law.² In this respect Mr. Montague and Dr. Clark are in disagreement. As Dr. Clark sees it, H.R. 2734 would be capable of acting in the prevention of the proposed illegal transaction or in effecting the divestiture of stock or assets, without the intervention of a court. In other words, the Sherman Act required judicial proceedings to implement it, while the Clayton Act did not.³

Those appearing in behalf of H.R. 2734 included Dr. John Blair of the Federal Trade Commission, Representative Celler, Dr. John D. Clark, Senator Kefauver, William Kelley of the Federal Trade Commission, Senator

¹Senate Hearings on H.R. 2734, op. cit., p. 320.
²Ibid., p. 355.
³Idem.

On June 21, 1950, the Judiciary Committee of the United States Senate, Senator Donnell dissenting, reported H.R. 2734 favorably, with minor amendments, as indicated in Senate Report No. 1775.

The views of the subcommittee (and comments thereon) are summarized:

1) The amendments to Sections 7 and 11 of the Clayton Act were "to prohibit the acquisition of the whole or any part of the assets of another corporation when the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly.";¹ to enact a new section exempting transactions consummated pursuant to the authority vested in certain administrative agencies; to permit

¹Senate Report No. 1775 on H.R. 2734, op. cit., p. 2.
intervention by the Attorney General in any proceeding brought, under Section 7, by any agency including the Federal Trade Commission; to delete the requirement of lessening of competition between acquired and acquiring corporations as a test of violation; to leave out the word "community" and comprehend commerce in any "section" of the country.¹

2) In addition to the above, paragraph 2 of Section 7 was amended so as to delete the word "two" so that the proscribed result of such merger activity is applicable to the acquisition of one or more companies. The strict holding company concept was therefore applied to one or more companies.²

3) Tests of the effect on competition were detailed in the Committee Report. The Committee intentionally has detailed this and other material in its Report for the purpose of removing doubts in the mind of all who may have occasion to be concerned with new Sections 7

²Ibid., p. 8.
and 11.

a) The present wording of H.R. 2734 was intended to cover more than was prohibited by the Sherman Act and yet to stop short of the stated test of original Section 7 of the Clayton Act. That is, the Sherman Act test was not strict enough, but H.R. 2734 was not intended to go so far as the acquired-acquirer test of original Section 7.  

b) To accomplish the objectives of (a), supra. H.R. 2734 deleted any reference to the effect on competition between the acquiring and the acquired firms. The word "community" was deleted. The Committee felt that these two features of original Section 7 were primarily responsible in forcing the courts to revert to the Sherman Act test in all cases involving

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Section 7.1

c) The bill was not intended to revert to the Sherman Act test.2 The intent "is to cope with monopolistic tendencies in their incipience and well before they have attained such effects as would justify a Sherman Act proceeding."3

d) Under original Section 7 the courts required the showing of a lessening of competition between acquired and acquiring corporations,4 therefore only horizontal integrations fell under this rule. Vertical integrations were comprehended under the language in Section 7: "... tend to create a monopoly in any line commerce".5 By virtue of H.R. 2734 any

1 Senate Report No. 1775 on H.R. 2734, op. cit., p. 4.

2 Idem.

3 Ibid., pp. 4-5.


type of merger may be found to create an unlawful result.\(^1\)

e) One writer suggests that H.R. 2734 merely reenacts the test under original Section 7. A considerable array of evidence is produced to substantiate this position.\(^2\)

f) In order to give the bill broad application to acquisitions that are economically significant the phrases "in any section of the country" and "in any line of commerce" were made applicable to both the lessening of competition and to the tendency to create a monopoly. In original Section 7 the phrase "in any line of commerce" applied only to the tendency to create a monopoly. Thus, competition in either a section of the entire country or in any line of commerce, now is covered. The latter phrase would comprehend conglomerate acquisitions "whether or not that

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\(^1\) The American Bar Association specifically objected to this effect of H.R. 2734. 74 Reports of American Bar Association, (1949), pp. 204-209.

line of commerce is a large part of the business of any of the corporations involved in the acquisitions."\(^1\)

g) The words "may be to substantially lessen competition" are interpreted by the Senate Committee as not applying "to the mere possibility but only to the reasonable probability of the proscribed effect, as determined by the Commission in accord with the Administrative Procedure Act."\(^2\) The Committee felt that "a requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints."\(^3\)

h) Since Congress thought new Section 7 would overrule the Columbia Steel decision,\(^4\) a merger of such character would presumably be unlawful under H.R. 2734.

\(^1\) Senate Report No. 1775 on H.R. 2734, op. cit., p. 5.

\(^2\) Ibid., p. 6.

\(^3\) Idem.

1) By statutory analogy, identical language in Sections 2, 3 and 7 of the Clayton Act, that is, "to substantially lessen competition", would require similar construction by the courts. A substantial body of law appears in this area. It may be that the recent Standard Stations case will give some clue to the interpretation of these words. This case was decided after the House hearings on H.R. 2734, but not before the House Report No. 1191 was published. The Standard Stations case was a bone of contention in the Senate hearings. There is little evidence that the Congressional intent was to adopt the Standard Station's test of illegality, as applied to Section 7. Briefly, the

1Standard Oil Company of California v. United States, 337 U.S. 293 (1949). This case interpreted Section 3 of the Clayton Act. There may be a defect in the analogy, inasmuch as some mergers may quicken competition but exclusive dealing contracts almost inevitably foreclose competition.

Standard Stations case held that it was sufficient to show that competition had been foreclosed in a substantial share of a line of commerce and that the substantial share may be calculated by percentages of the market.¹

Six and seven-tenths percent of the market was denied to Standard's competitors, by the use of exclusive dealing contracts; this the Court held to be a violation of Section 3.²

j) The Minority Report of Senator Donnell indicated that he believed the 6.7 percent test of the Standard Stations case would apply, thus creating an indeterminate test and foreclosing mergers of small companies.³

4) The words "section of a country" are impossible to define rigidly but certain broad standards

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¹ Senate Report No. 1775 on H.R. 2734, op. cit., at p. 6 made it clear that it is not necessary to show that an integration has actually diminished competition.

² 337 U.S. 293 at 308-311.

can be set forth to guide the Commission and the courts.¹

a) "What constitutes a section will vary with the nature of the product. Owing to the differences in the size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section, whether such a definition were based upon miles, population, income, or any other unit of measurement. A section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product, such as milk."²

b) "As the Supreme Court stated in Standard Oil Company of California v. United States (337 U.S. 293), 'Since it is the preservation of competition that is at stake, the significant proportion of coverage is that within the effective area of

¹Senate Report No. 1775 on H.R. 2734, op. cit., p. 5.
²Ibid., pp. 5-6.
competition'. In determining the area of effective competition for a given product, it will be necessary to decide what comprises an appreciable segment of the market. An appreciable segment of the market may not only be a segment which covers an appreciable segment of the trade, but it may also be a segment which is largely segregated from, independent of, or not affected by the trade in that product in other parts of the country.¹

1) "It should be noted that although the section of the country in which there may be a lessening of competition will normally be one in which the acquired company or the acquiring company may do business, the bill is broad enough to cope with a substantial lessening of competition in any other section of the country as well."²

In the light of the above, an industrial analysis would clearly be a necessity.

²Idem.
for an adequate consideration of alleged violations of Section 7.¹

d) The legislative history would clearly indicate that a small town was not intended to come within the word "section". To obviate such a result the word "community", which appeared in original Section 7, was deleted from new Section 7.²

5) Any firm in a bankrupt or failing condition should be free to dispose of its stock or assets.³ It has been argued by one writer that this is too liberal an attitude, inasmuch as effective reorganization is frequently possible.⁴

6) "The intent of the present bill is not to introduce new standards of proof, but to reaffirm existing standards".⁵ The Administrative

¹"Section 7 of Clayton Act Amended to Limit Asset Acquisitions", op. cit., pp. 1212-1214.

²Senate Hearings on H.R. 2734, op. cit., various places, such as pp. 67 or 83.


⁴"Section 7 of the Clayton Act: A Legislative History", op. cit., p. 780 and fns. 91-93.

⁵Senate Report No. 1775 on H.R. 2734, op. cit., p. 6 as applied to Section 11 of the Clayton Act.
Procedure Act requires that findings of fact be supported by reliable, probative and substantial evidence. The Rules of the Federal Trade Commission provide for the "weight of the evidence" rule.¹

The minority views of Senator Donnell were:

(1) "There is no showing in the Majority Report, of the existence of economic need for H.R. 2734."

(2) "The Sherman Act already makes illegal such asset acquisitions as shall tend to create a monopoly in any section of the country or shall have the effect of substantially lessening competition in any such section." (3) "The fact that the Clayton Act covers stock acquisitions is no reason for so amending the Clayton Act as to cause it to cover asset acquisitions."²

(4) H.R. 2734 would produce harmful results insofar as: uncertainty in the title to acquired assets would result; uncertainty as to the language "in any line of commerce"; uncertainty as

to the language "may be substantially to lessen competition or to tend to create a monopoly"; and small business would be the hardest hit as it neither could sell to a big company nor merge to compete with a big company.\(^1\)

On December 12, 1950, debate began.\(^2\) The debate, in large part, amounted to an excellent summary, by Senator O'Conor, of the views of the majority of the Judiciary Committee, an insertion in the Congressional Record of the minority views of Senator Donnell and a rebuttal of these minority views by Senators O'Mahoney and Kefauver.

Senator Douglas inserted a table of his own making, purporting to challenge the findings of Doctors Lintner and Butters, \textit{supra}. Senator Douglas argued that the findings of Lintner and Butters confined the computations of percentage growth to the specific companies which acquired additional concerns, rather than to the group of companies within a class of a given size. For example, there were only 246 companies with assets between one million and five million dollars which acquired others. Yet there are thousands of companies, in this size class.

\(^1\)\textit{Senate Report No. 1775 on H.R. 2734, op. cit.}, pp. 19-23.

\(^2\)96 Congressional Record, pp. 16433-57.
By Senator Douglas' table this group gained only 3.7 percent because of mergers, while in the fifty to one hundred million dollar group the gain was 11.6 percent. By the Lintner-Butters' analysis the first group gained 68 percent and the second group 19 percent. Thus, the opposite was shown from that claimed by Lintner and Butters.¹

On December 13, 1950, a roll call vote on H.R. 2734 resulted in 55 yea's, 22 nays and 19 not voting. Although almost all of the nays represented Republican senators there was a strong representation of Republican senators among the yea votes.² On December 14, 1950, the House of Representatives concurred in the Senate Amendments.³ H.R. 2734 was approved by the President on December 29, 1950.⁴

Post Cellar Act Legislative Activity

Post Cellar Act Legislative Activity

Legislative activity occurred in several areas, apropos this dissertation, concurrent with and following the enactment of the Cellar Anti-Merger Act. Although no legislation was attributed directly to this activity,

¹96 Congressional Record, p. 16457.
²Ibid., p. 16508.
³Ibid., pp. 16573-74.
⁴Ibid., p. 17138.
except in one instance, it seems desirable to briefly record the events.

The Study of Monopoly Power

House Resolutions 137 and 156 (81st Congress) created the Subcommittee on the Study of Monopoly Power of the House Judiciary Committee. This Committee had subpoena powers, was directed to make a searching inquiry of the antitrust laws, report its findings and recommend such legislation as seemed desirable. Emmanuel Celler, was the Chairman of this Subcommittee.\(^1\) The magazine Business Week indicated that this study would rank in importance with that of the Temporary National Economic Committee. It was reported that the New Dealers would make bigness the issue.\(^2\)

Many of the witnesses approved of H.R. 2734, which was then pending before the House. These included Senator O'Mahoney, Dr. Walter Adams and Professor Milton A. Handler.\(^3\)

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\(^1\)Hearings Before the Subcommittee on Study of Monopoly Power of the Committee on the Judiciary, House of Representatives, 81st Congress, 1st Session, (1949), Part I, p. III.


\(^3\)Hearings on Study of Monopoly Power, op. cit., Part 1, pp. 2-3.
The testimony developed certain pertinent concepts which require brief consideration. Dr. John Blair of the Federal Trade Commission saw all trust problems, except bigness, as minor in importance. Dr. Walter Adams suggested, as others have done, that in all mergers the burden of proof should be on the acquiring company to show that the acquisition was in the public interest.¹

Professor Handler maintained that it was in relation to the law of mergers that the courts had shown the greatest toleration and the enforcement officials the least vigor. The law, he said, was in confusion, there being precedents both ways on every proposition relating to mergers.² In view of these uncertainties Professor Handler suggested that the formulation of new legislative standards, pertaining to mergers, should be the necessary and paramount objective of all proposed antitrust legislation.³

H. A. Moulmin, Jr., nationally known patent attorney, suggested three steps to control the size of corporations: (a) Divorce of distribution from

²Ibid., p. 537.
³Ibid., p. 546.
manufacturing, (b) Divorce of sources of raw and semi-fabricated materials, (c) Divorce of non-analogous companies.

Adolph A. Berle, Professor of Law, Columbia University, stated it to be his belief that the fundamental question in antitrust policy is corporate economic power. "Bigness may reach the stage where it has to be accepted as dominant, regulated as a servant, or socialized." Professor Berle further said: "... nothing serious would happen if Section 7 of the Clayton Act was amended, as the change would be minor." As the amendment was proposed the opinion of the witness seemed to be correct. It was implicit in his testimony that corporate concentration is primarily not a function of a policy of corporate acquisitions, but of action in the capital markets, which favor only those businesses which are capable of self generation.

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1 Hearings on Study of Monopoly Power, op. cit., Part 1, pp. 445-446.
2 Ibid., p. 228.
3 Ibid., p. 231.
4 Ibid., pp. 231-233. Professor Berle suggested that the Justice Department will attack bigness only if a corporation fails to limit itself to a single industry.
Dr. Philip C. Newman suggested that diversification was not a sufficient excuse for big concerns to buy into many separate industries. They were led to protect each new venture by controlling its supply of raw material and its market outlets. Such conglomerates can afford to lose money in one area and drive out the independents in that area. The witness would apply the principles of the Public Utility Holding Company Act in appropriate cases.\(^1\)

The testimony of Mr. Herman Steinkraus, President of the United States Chamber of Commerce, justifies careful reading. This witness felt that business expansion was essential and that any attacks upon it chilled its expansion ambitions. This witness' conclusions were based largely upon the assumption that the prime governing factors in the markets were the wide range of substitutable products, the alleged freedom of entry by competitors and wide consumer choice. It is natural, said Mr. Steinkraus, for business to try to increase its share of the market, to diversify production, to lose money in some lines, to buy up sources of raw materials and to discriminate among suppliers in times of slack business.\(^2\)

\(^1\)Hearings on Study of Monopoly Power, op. cit., Part 2A, pp. 434 and 439.

\(^2\)Ibid., pp. 810-866.
According to the magazine *Steel*, Chairman Celler was reported as making these comments relative to the monopoly hearings: (1) That the law should provide for the authority to dissolve a corporation upon a showing that it had the size and power to dominate a market or industry and to lessen competition, (2) That proof that a dissolution would lower efficiency would be a complete defense.¹

After the hearings on the steel industry were well under way it was reported by the magazine *Steel* that Chairman Celler had softened somewhat in his attitude towards bigness in business. This was said, by the editor, to be the result of the steel industry's cooperative attitude and the fair presentation of facts. Now, Mr. Celler said: "I would deploreathe breaking into pieces of an efficiently run company. I would oppose the placing of arbitrary limits upon size. I would oppose regarding U. S. Steel or similar corporations as public utilities. I would oppose government regulation by fixing prices or production of a company like U. S. Steel." Chairman

Celler stated he had no proposal, as yet, for handling "too great economic power".¹

The Study of Monopoly Power gives the views of certain witnesses, particularly on bigness in business. It also centers attention upon a sizeable amount of empirical evidence.

The Study and Investigation of the Problems of Small Business²

The Final Report of this Committee was based upon hearings and study during the years 1951 and 1952. The Report was filed December 31, 1952. Where appropriate to this dissertation these findings are used.

The Committee reported that, during the two year period investigated, certificates authorizing rapid tax amortization for new and expanded facilities in the amount of over $23 billion were issued. Of this amount about 10 percent was received by small business even though it accounted for about 42 percent of the total employment


in manufacturing.\(^1\)

The reasons advanced by the Committee for this development were: (1) There was a preponderance of large firms in heavy manufacturing where expanded production was necessary, (2) Large firms were ready and had planned for expansion, (3) Large firms had the capital and "know how", (4) Applications were processed in the order in which they were received, (5) No special provisions were made for small business, either in the over-all planning, the proportioning of certificates or the representation before the certifying agencies.\(^2\) Needless to say the Committee and the Small Defense Plants Administration actively promoted small business. This resulted in small business getting an improved allocation of defense contracts. The pre-Korean war competitive ratio between big and small business suffered substantially as shown by the Report of the Small Defense Plants Administration. The proportion of estimated "fair share" of tax amortization certificates received by small business ranged from 28 percent in primary metals to 107 percent in petroleum and coal. It is significant that in those industries already having the

\(^1\)Ibid., p. 231.

greatest corporate concentration the "fair share" of small business was the least. 1

In the chapter on Small Business and the Antitrust Program it was indicated, by the Committee, that economic concentration was continuing at its post World War II pace. Even the new industries, like plastics, which were in the beginning dominated by small business, lost this characteristic when, upon reaching stability, absorption of the small units proceeded. The Committee pointed out that since the passage of H.R. 2734 about 1,000 alleged violations had been brought to the attention of the Federal Trade Commission. 2 The position of the Federal Trade Commission on economic concentration was adopted by the Committee. 3

Conclusions

Congress achieved a broader and stronger Section 7 of the Clayton Act. It is still too early to tell how effectively this amendment will carry out the hope of its sponsors. Congress is still wrestling with the "big business" problem and seems frustrated in its attempts both

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1 Final Report of the Select Committee on Small Business, op. cit., pp. 223-236, and Chart XVIII.
2 Ibid., p. 250.
3 Idem.
to understand the problem and to treat it so as to carry out the public interest. Congress is particularly chagrined with the Sherman Act and "big business", whether "big business" is accomplished by merger or otherwise.
CHAPTER V

THE FOURTH MERGER MOVEMENT

JUDICIAL HISTORY

For a complete picture of the Judicial History applicable to Section 7, the section on Judicial History in Chapter I, this dissertation, should be reread - this covers the basic court law existing to 1940. This Chapter will bring the law to date through 1952.

Actions Involving Original Section 7 Of The Clayton Act

Reegle Tie Service Co. v. Thomson, etc., et al.¹

Section 7 of the Clayton Act was held not to have been violated since the stock acquisition was not of a competitor, but if it had been it would have made no difference as the company was going out of business. Filed by the Attorney General.


This case involved the purchase by the defendant of the capital stock of a competing picture service. Held, no violation of Section 7, as the competition was not substantial. Filed by the Attorney General.


Upon a motion to dismiss the complaint, where the legal sufficiency of the allegation of a Section 7 violation was at issue, it was held that the acquisition of more than 160,000 shares of stock in a company by other companies related to each other by a common director and stockholder, where there was competition between the companies, would constitute a violation of the prohibition against stock acquisitions which may lessen competition. Filed by the Attorney General.

Ronald Fabrics Co. v. Verney Brunswick Mills, Inc.  

This case was heard on the pleadings only; that is, upon demurrer. The facts briefly were that the plaintiff

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\(^1\) 152 F. Supp. 363 (1943).


brought suit against the defendants for treble damages, alleging a violation of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. The basis for this claim was that both the plaintiff and the principal defendant were competitors in converting textiles and selling them in interstate commerce. The defendants acquired the controlling stock and assets of Cabot Manufacturing Co. Inc., the plaintiff's principal source of supply. Plaintiff then was notified that Cabot would no longer furnish them with goods. The charge of violation was that a conspiracy was entered into to eliminate plaintiffs as competitors. The court held that the statements charged a cause of action under Section 7 of the Clayton Act since this act of industrial integration would be comprehended as a situation where the effect of the acquisition was to restrain commerce or tend to create a monopoly. Citing Aluminum Company of America v. Federal Trade Commission.\(^1\) Certiorari denied.

P. Ballantine and Sons

This company was charged with the acquisition of the stock of a competitor in violation of Section 7 of the Clayton Act; in connection with the manufacture and sale of malt beverages. The company was alleged to be the largest manufacturer of malt beverages in the northeastern part of the United States and one of the largest in the entire United States. Its assets, as of March 31, 1943, were over $13 million. This company was in active competition, in the northeastern part of the United States, with the Christian Feigenspan Brewing Company and subsidiaries. Sales of this latter company were about one-third that of P. Ballantine and Sons. Its assets amounted to more than $6 million.

In 1943 P. Ballantine and Sons acquired all the issued and outstanding capital stock of the Christian Feigenspan Brewing Company for about $5 million in cash. Shortly after the acquisition the respondent took over the assets of the Feigenspan Company and one of its

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subsidiaries, and then dissolved these two companies. It sold the stock of two other subsidiaries of the Feigenspan Company. All Feigenspan brands and distributing agencies were discontinued.

After the taking of testimony the respondent moved for a dismissal on the authority of the Arrow-Hart and Hegeman Electric Company v. The Federal Trade Commission.\(^1\) The motion was granted and the case dismissed, since the acquired company's stock was no longer held by the acquiring company and the assets had been acquired before the complaint was issued. Further, the Commission felt that it had no power to order a divestiture of assets, under those circumstances. It is worthwhile to note that respondent claimed the acquisition "did not and could not result in any substantial lessening of competition or tendency in any section to create a monopoly".\(^2\)

\(^1\) 291 U.S. 587 (1934).

Consolidated Grocers Corp.\(^1\)

The respondent began business in 1941 as the South Street Co., and immediately acquired the capital stock of the C. D. Kenny Co. of Baltimore, which was a large wholesale grocer operating principally along the Atlantic seaboard and as far west as Indianapolis. Soon after this purchase the South Street Company changed its name to C. D. Kenny Co. In July, 1942, the respondent acquired all the capital stock of Sprague-Warner and Co., itself the result of several mergers. In October, 1942, the respondent changed its name to Sprague Warner-Kenny Corp. The business of the acquired companies was handled under their separate names.

By August, 1944, the respondent directly and indirectly controlled almost all the capital stock, by purchase, of The Western Grocery Company. Western was a product of many mergers of companies engaged in the business of wholesaling and manufacturing foods. On May 24, 1945, respondent changed its name to Consolidated Grocers Corp.,

and then on June 1, 1945, acquired all the common shares of Reid Murdock and Co., a nation-wide wholesale and manufacturing grocer. On June 1, 1945, respondent acquired 98 percent of the common shares of Dannemiller Grocery Co., of Canton, Ohio, the largest wholesale grocer in that area.

As a result of these acquisitions the respondent became the largest wholesale grocer in the United States, with total assets of $20 million, annual sales volume of $100 million, 100,000 customers and held a dominant position in the trading areas of Chicago, Baltimore and Canton.

Subsequent to the issuance of the complaint the respondent had surrendered to the Western Grocery Co., Reid Murdock and Co., and Dannemiller Grocery Co., all the stock received from them and had taken a transfer of all the assets of these companies.

On the authority of the Arrow-Hart and Hegeman case the complaint was dismissed. The decision implies that dismissal was because the assets had been acquired prior to the issuance of the complaint, and therefore the case would not fall within the jurisdiction of the Federal Trade Commission. This writer believes such implication to be a misapprehension of the applicable law.
Dismissal was correct because the stock was divested and the Commission then had no jurisdiction over the subsequent acquisition of the assets. That was the ruling in the Arrow-Hart and Hageman decision.¹

As a result of the problems posed by the P. Ballantine and Consolidated Grocers cases the Commission "gave up hope of achieving effective results under the existing law".²

United States v. Libbey-Owens-Ford Glass Co., et al.³

The terms of a consent decree provided that the prohibitions of the antitrust laws comprehended offending mergers of competing units whether accomplished by the purchase of stock or assets. This action involved, among other statutes, Section 7 of the Clayton Act. Filed by the Attorney General.

¹This writer's position is in accord with the language found in the Federal Trade Commission, Report on the Merger Movement, op. cit., p. 5.


The acquisition of the assets of competitors, and not merely the acquisition of stock was prohibited in consent decrees by the defendants. These were not proceedings under Section 7 of the Clayton Act. Accord: United States v. New York Trap Rock Corp.; United States v. H. P. Hood and Sons, Inc., et al. All cases were filed by the Attorney General.

Board of Governors v. Transamerica Corp. et al.

The Court set aside the divestiture order of March 27, 1952. In part, the decision was that the prohibited effect on competition comprehended in the language "may be substantially lessened", as such language appears in Sections 3 and 7 of the Clayton Act, does not result


5 184 Fed. 2d. 31 (C.C.A.-9, 1950).
in the same measure of competition for both Sections.\(^1\)

In other words the strict rule stated in the Standard Oil of California case, supra, may not be transferred to cases involving violations of Section 7.

**United States v. Celanese Corp.\(^2\)**

Defendant acquired the assets of a competitor (Tubize). Held, that Section 7 of the Clayton Act was not involved, as mergers by assets do not represent an indirect acquisition of stock, even though the stock acquisition may be incidental to the acquisition of assets. The secret holding of stock was the evil prohibited by Section 7. Filed by the Attorney General.

**Fargo Glass and Paint Co. v. Globe American Corp.\(^3\)**

A distributor who acquired the capital stock of the only manufacturer of heat retained gas ranges, created a monopoly in violation of Section 7 of the Clayton Act, where it appeared that exclusive dealing contracts were executed between the distributor and the manufacturer.

\(^1\)C.C.H. Trade Cases, 1953, para. 67,536.


This case would exemplify a vertical integration problem. Filed by the Attorney General.

Selected Cases Arising Under The Sherman Act And The Clayton Act - Other Than Section 7 Of The Clayton Act

A number of cases arose under the Sherman and Clayton Acts which are pertinent, in part, to the problems and concepts of Section 7 of the Clayton Act. They are summarized herein and the points of pertinency developed.

Pure Monopoly Situations

Although such situations do not pose a characteristic problem under Section 7, they do contain procedures and concepts which round out certain parts of the case structure relating to Section 7. In particular it can be said that the language "tend to create a monopoly" appearing in paragraph one of Section 7 of the Clayton Act is roughly analogous to the concepts of Section 2 of the Sherman Act. The main point of difference is that the Clayton Act refers to a tendency to a monopoly whereas the Sherman Act, as administered, is concerned with the monopoly as accomplished. The latter represents the last step in the evolution of control of a market, while the former represents the intermediate steps taken with monopoly as the final
or likely objective.

The two most important cases of recent date involving pure monopoly conditions are: (1) United States v. Pullman Co. et al; ¹ (2) United States v. Aluminum Co. of America.²

The pure monopoly position of the Pullman Company led the Court to conclude that no excuse existed, under the provisions of the antitrust laws, for such monopolizing, even though such a monopoly was benevolent and free from unlawful practices.³ The dissolution procedure, used by the Court, raises a serious question as to the effectiveness of such procedure, wherein one monopoly is substituted for a prior monopoly.⁴

The Aluminum decision is considerably more important to this dissertation than the Pullman case. Specifically, Alcoa was charged with conspiring and monopolizing in violation of Sections 1 and 2 of the Sherman Act. The "abuse" theory of mergers was adopted by District Judge


³67 S. Ct. 71 (1946).

⁴Idem.
Caffey, causing him to find in favor of the defendant in all respects.\textsuperscript{1}

The Circuit Court unanimously reversed the lower court, in part, finding the defendant guilty on both counts.\textsuperscript{2} The Court found that about 90 percent of the aluminum ingot market was controlled by Alcoa, which fact inevitably gave it domination over the production of aluminum fabrication and the operations of aluminum salvagers.\textsuperscript{3}

It was in this case that Judge Learned Hand made his now famous remark that 90 percent control of a market constituted monopoly; it was doubtful if 60 or 64 percent would be enough; and certainly 33 percent was not.\textsuperscript{4} Professor Handler contends that percentages of market control are only one factor in determining the economic strength of a combine. "In practice the facts of the particular case has dominated the decision."\textsuperscript{5}

In the 1950 Alcoa decree Judge Knox surmised that the percentages stated by Judge Hand established only

\textsuperscript{1}44 F. Supp. 97 (1941).
\textsuperscript{2}48 F. 2d. 416 (1945).
\textsuperscript{3}Ibid., p. 415.
\textsuperscript{4}Ibid., pp. 416, 424.
prima facie standards.  

Judge Hand felt that great capacity for production would, per se, constitute an exclusion of competitors, entirely aside from the expressed intent of the company.  

Professor Rostow insists that the Court held that size was the essence of the offense.  

Because of the government's surplus property disposal program which, in 1945, led the Circuit Court to believe that new basic aluminum producers would enter the field the need for the dissolution of Alcoa was to be determined by the District Court at a later date. Accordingly, in 1950 District Judge Knox ruled upon the need for such dissolution.  

Judge Knox quoted, with approval, the language of Judge Brandeis and Judge Hand, wherein the potential for abuse inherent in the possession of sizeable market power

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1 191 F. Supp. at p. 234 and Table VI, (1950).

2 148 F. 2d. 416 at 431 (1945).


6 United States v. District Court for Southern District of New York, 171 F. 2d. 286 (1948).
was recognized. The Court implied that this language represented the present judicial concept of "effective competition". It must be always kept in mind, said Judge Knox, that "the possession of monopoly power is something other than the status, in the market, of a dominant firm. The dominant firm may have neither the power to exclude competitors, nor the power to fix prices". Judge Knox adopted the criteria for measuring permissible market power which are remarkably similar to those proposed by Professor Smith, which are recorded in Chapter III of this dissertation.

In line with the adoption of the stated criteria Judge Knox made an extended analysis of all criteria. He concluded that, even though two new and large producers had entered basic aluminum manufacturing, due to government war surplus disposal, further entry on a truly competitive level was unlikely as long as Alcoa continued at its present size. The Court ordered the divorcement of Alcoa Limited, observing that this would likely give rise to a

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1 Approved in American Tobacco Co. v. United States, 328 U.S. 781 at 813 (1946).
4 Ibid., p. 398.
competitive market. This decision was in accord with the "fruits" doctrine which justifies a divorcement of the fruits of earlier illegal activities.

The various pronouncements of the Courts in the Aluminum case make it clear that the prevention of prospective competition was prohibited by the Sherman Act. Many of the opponents of the Celler Anti-Merger Act have contended that these pronouncements made unnecessary further legislation. The administrative processes became available, however, only through the Celler Anti-Merger Act.

Oligopoly Situations

The market position of the oligopolist and the dominant firm approximate the practical problem, in its most aggravated form, posed under Section 7 of the Clayton Act. Several cases of recent date have been decided, bearing on the question of the effect on the market and on the entry of competitors of an oligopolistically dominated industry.

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1 91 F. Supp. 399-402 (1950).

There seemed to be, for the first time, in the American Tobacco case of 1946 an agreement between judicial and economic theory on the concept of oligopoly and oligopsony. By bringing into court all the dominant members in the oligopolistic and oligopsonistic tobacco industry and then applying to them, collectively, the oligopolistic theory of economics, the Court found that, by being such oligopolists, they violated Section 2 of the Sherman Act. It is true that the Court also found that the defendant tobacco companies had engaged in unlawful market practices, over a period of years. The Court also found that the "intent" to "monopolize" may be implied from the fact that such unlawful market practices had been utilized in concert with others, or were a part of a conscious line of action to exclude competitors from the tobacco markets. This was particularly true, the Court said, where the oligopolists possessed the continuing power, although not continually exercised, to engage in such unlawful market practices. The Court fined the defendants but did not

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2 328 U.S. 781 at 790-808.
3 Ibid., pp. 809-810.
4 Ibid., pp. 809, 811.
decree a dissolution, as the Attorney General had requested.  

Mr. Montague thinks that the American Tobacco case ruling was not restricted to conspiracies.  

He relies on the decision in the Griffith case, which states: "Section 2 is not restricted to conspiracies or combinations to monopolize . . . ."  

Another observer feels that the American Tobacco case holds that unanimity of action, by the dominant members of an industry, may result in a conspiracy, per se, to violate Section 2 of the Sherman Act.  

Professor Rostow contends that the Court comes close to saying that the economic fact of monopoly is the legal proof of monopoly.  

Mr. L. I. Wood, Antitrust Counsel for the General Electric Company, feels that the Court is saying that if a corporation is strong it is in the wrong.  

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1 328 U.S. 781 at 815 (1946).  
2 Senate Hearings on H.R. 2734, op. cit., p. 199.  
Later cases diluted the seemingly strong rule announced in the *American Tobacco* case. The decision in the *Paramount Film* and *Borden Company* cases interpreted the rule in the *American Tobacco* case as applying to oligopolistic industries only if a conspiracy, in fact, was shown to exist, either expressed or implied from the actions of the oligopolists. A common course of reaction, by oligopolists, to ward off competition, unaccompanied by conscious collective action, is not unlawful.

The Courts seem to have paid lip service to the 1946 *American Tobacco* case, but when it comes to applying the principle of that case against collective dominant oligopolies they avoid it and instead require proof of the abuse of oligopolistic power, to support a finding of unlawfulness. Thus, the abuse theory of mergers and size seems not to be dead.  

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Oligopolies And Subsequent Mergers By Them.

When an oligopolistic company merges with another company, especially one which is a competitor on the same horizontal level, a characteristic problem, under Section 7 of the Clayton Act, is posed. The outstanding recent example of such a merger involved the acquisition of the assets of the Consolidated Steel Corporation by the Columbia Steel Company, by contract dated December 14, 1946. Consolidated was the largest independent steel fabricator on the West Coast. Columbia, which was a wholly owned subsidiary of the United States Steel Corporation, purchased the assets of Consolidated for the sum of $8 million.1

The United States, through the Attorney General, sued under Section 4 of the Sherman Act to enjoin this acquisition. The position taken by the United States was that such acquisition would result in substantially restraining trade and monopolizing in the sale of rolled steel products, in the manufacture and sale of fabricated steel products in the "Consolidated Market".2


2Idem.
The District Court found that the essential facts were not in sharp dispute; that only the conclusions to be drawn from these facts gave difficulty. The District Court stated that it would be necessary for the United States to show that a substantial "line of commerce" in a relevant area was affected, by the proposed acquisition, with an intent to restrain trade or monopolize commerce. This Court found that in "structural fabrication" there would result, from this acquisition, a substantial lessening of competition in the relevant market area. Sales of raw materials to Consolidated would also be made solely by United States Steel subsidiaries.

The District Court felt that the United States had failed to prove unlawful intent because Consolidated's stockholders wanted to sell out, United States Steel had just acquired the huge Geneva plant from government surplus and required immediate expansion of fabricating facilities on the West Coast, and United States Steel merely wanted to expand in the West Coast market.

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2 334 U.S. 495 at 517.
4 Ibid., pp. 676-677.
5 334 U.S. 495 at 677-679.
The defendants contended that this merger was dictated by sound business policy and that the meagre competition preceding the acquisition would not be changed as a result of the acquisition.\(^1\)

The Attorney General insisted that the result of the acquisition was the test, not the reasons or intent of the acquiring parties.\(^2\) The Supreme Court rejected this contention, \textit{relying on the "rule of reason"}.\(^3\) The opinion of the District Court approved of the practice of applying the principles of Section 7 of the Clayton Act to alleged violations of the Sherman Act: "It must be assumed, however, that the public policy announced by Section 7 of the Clayton Act is to be taken into consideration in determining whether acquisition of assets of Consolidated by United States Steel with the same economic results as the purchase of the stock violates the provisions of the Sherman Act against unreasonable restraints."\(^4\)

\(^1\) 74 F. Supp. 671 at 672-673 (1947).
\(^3\) Idem.
\(^4\) Ibid., p. 507, fn. 7. It is clear that the Court considered asset acquisition, under certain circumstances, an unreasonable restraint of trade under the Sherman Act. One study suggests that this statement is dictum. "The Columbia Steel Case", Notes, 58 \textit{Yale Law Journal}, (1949), pp. 770-772.
The dissenting opinion, by Judge Douglas, concurred in by Judges Black, Murphy and Rutledge was bitter in tone. The dissent claimed that this case was important because it "reveals the way of growth of monopoly power - the precise phenomenon at which the Sherman Act was aimed." The dissent further emphasized that: "At other times any number of 'sound business reasons' appear why the sale to or merger with the trust should be made." The core of the thought of the dissenting opinion is found in the following: "The holding of the cases . . . is that the requisite purpose or intent is present if monopoly or restraint of trade results as a direct and necessary consequence of what was done."

A number of students have commented on the Columbia Steel case. Professors Mund, Stocking and Watkins feel that the Court has reactivated the "rule of reason" approved in the Steel (1920) and International Harvester (1927) cases. It is also the thought of these observers that the government prepared its case poorly, relying on

1334 U.S. 534 (1948).

2Idem.

3Ibid., p. 539.
"paper" evidence rather than provable market data.¹

Messrs. Zlinkoff and Barnard charge that the Court looked primarily to the effect on the national market rather than the effect upon the "Consolidated Market", of this merger.² These writers contend that the Court confused the idea of building new facilities as compared with absorbing a competitor.³ The extreme narrowness of application of the Columbia Steel decision was recognized on the motion for reargument in the Standard Oil of California case.⁴

Another commentator has expressed his views on the significance of the Columbia Steel decision, to the effect that relatively small acquisitions are now lawful and that an efficiency test was adopted.⁵ Professor Rostow believes

¹Mund, op. cit., pp. 179-181; Stocking and Wakins, op cit., pp. 304-305. This writer cannot agree that the Court was not appraised of some of the market factors.


³Ibid., p. 173.


the Court reaffirmed the "market power" test. ¹

The United States Senate Committee's feeling on the Columbia Steel decision must be restated, to make clear the Congressional intent. Senator O'Connor said that the amended Section 7 would forbid acquisitions such as those related in the Columbia Steel case. ² The close relationship between certain Sherman Act cases and Section 7 of the Clayton Act should now become clear.

**Mergers Resulting In Vertical Integration**

Mergers which form the whole or a part of a vertical integration were mentioned by a Congressional Committee as being of special concern to public policy. This Committee indicated that amended Section 7 of the Clayton Act might prohibit certain vertical integration, per se. ³ The exact circumstances wherein the per se rule would operate were not explored by the Committee.

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The Courts have, in five recent cases, followed the earlier doctrine of condemning vertical integration only when the economic power of the integration was abused. These cases, in general, found vertical integration to be illegal where monopoly power at one horizontal level of the integration was utilized to squeeze competitors at another horizontal level or to create new illegal monopoly power at other horizontal levels. The unreasonableness is to be measured in terms of the effect of the integration on the opportunities of competitors in the relevant market area.

The "power" test of the Aluminum case of 1945 attacks an illegal vertical integration under the "fruits" doctrine and will, ipso facto, require a divestment of that illegal part. Amended Section 7 of the Clayton Act may be so applied in a direct attack upon acquisitions


which lead to monopoly or restraints at any horizontal level of that integration.¹

**Horizontal Integrations**

Horizontal mergers are of special importance to Section 7, as such merger types are the most numerous. Judge Reed, speaking for the majority in the *Columbia Steel* case, *supra*, said that the test for both horizontal and vertical integrations was the same, namely, whether or not they involved "unreasonable restraint".²

Illustrative of the problem are the facts in the case of *United States v. New York Great Atlantic and Pacific Tea Company*.³ This giant retail food chain has constantly increased its share of the national and specific local markets.⁴ The rate of profit on sales fell from 3 percent to one percent from 1926 to 1946, while the dollar profit increased only from $12 million to $13 million.⁵ One student of this case observed that the basic


²334 U.S. 495 at 527 (1948).


⁵Ibid., p. 103, note 3.
fact of this case was the vertical and horizontal integration power potential. Another observer thought that when the Court based its findings of illegality on specific abuses, it was really talking about the vice of integration.

The two basic characteristics found in both horizontal and vertical integration cases are: (1) The existence of the aspects of price fixing combinations and the dominating firm, (2) The anti-small business attitude.

Conglomerate Mergers

According to the Federal Trade Commission the conglomerate merger represents the most dangerous of all merger types. The House Subcommittee Report on H.R. 2734 specifically made the conglomerate merger a special target for amended Section 7 of the Clayton Act.

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The outstanding example in the United States of a conglomerate enterprise is that of E. I. du Pont de Nemours and Company and its control of General Motors Corporation and U. S. Rubber Company. The United States filed suit against du Pont and many others charging a conspiracy to monopolize certain markets and to restrain trade. The government charged that each of the three main units of the du Pont empire monopolized the market needs of the others. This case has, at this writing, been tried by the Federal District Court at Chicago, but as yet no decision has been handed down. Until a decision appears we will not know if the fact of conglomerate enterprise has any special significance in antitrust actions.

President C. H. Greenwalt of du Pont replied to some of the government's charges in a letter to stockholders. Mr. Greenwalt charged that the government was merely attacking bigness in business, as such. Furthermore he said that du Pont looked upon its holdings in

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2The trial began November 18, 1952.
General Motors and U. S. Rubber as an investment, and that du Pont never interfered in the policy direction of General Motors or U. S. Rubber. 1

**Actions Involving Amended Section 7 Of The Clayton Act**

**Pillsbury Mills, Inc.** 2

Since the amendment of Section 7 the Federal Trade Commission has had several hundred acquisitions under study or investigation. This complaint was the first formal action instituted under the provisions of amended Section 7. 3

Pillsbury Mills, Inc., was charged with a violation of amended Section 7 in that it acquired the assets of the Ballard and Ballard Company (1951) and the assets of Duff's Baking Mix Division of American Home Products Corporation (1952). 4

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1Greenwalt, op. cit., pp. 2142-2148.


4Idem.
The complaint stated that Pillsbury was the second largest flour milling company in the United States, the mills being operated throughout the country. That Pillsbury also manufactured packaged food products having a grain base, including prepared flour-base mixes and various feeds for poultry and animals. That Ballard and Ballard, and Duffs, manufactured either family or bakery flour and/or prepared flour-base mixes. That the Ballard and Pillsbury companies were, prior to the acquisition, leaders in the Southeastern States in the sale of family and bakery flour, and prepared flour-base mixes. That as a result of these acquisitions Pillsbury was charged with controlling 44.9 percent of the sales of prepared flour-base mixes in the Southeastern States and a substantial percentage of the sales of those products throughout the United States. That in 1950 Pillsbury's sales of flour in the Southeast amounted to 3.66 percent of the total sales and that Ballard's sales amounted to 4.65 percent of the total Southeast sales of family flour. That Pillsbury's sales of baker's flour amounted to 4.93 percent and Ballard's sales amounted to 3.62 percent of the total sales in the Southeast. That in the sale of prepared flour-base mixes,

Pillsbury's sales amounted to 22.7 percent, Ballard's 12 percent and Duff's 10.2 percent of total Southeast sales.¹

The complaint further stated that during the period 1940-50 Pillsbury's net sales grew from about $47 million to $201 million; and that Ballard's net sales grew from $8 million to $30 million. The complaint also alleged that during this period Pillsbury had a pattern of acquisitions and a pattern of abuse of its economic power through various predatory actions, the latter arising from its great economic power. That these recent acquisitions would add to this great economic power was also alleged in the complaint.²

This complaint was dismissed, without prejudice, by Hearing Examiner Everett F. Haycroft, May 1, 1953.³ The respondent's motion for dismissal was granted because "the allegations of the complaint are not supported by reliable, probative and substantial evidence in the record as required by the Administrative Procedure Act". The Examiner made it clear that he was expressing no opinion

²Idem.
³Idem. A dismissal without prejudice means that the case may be reinstituted whenever the Commission feels that it can sustain its charges.
as to whether the Anti-Merger Act was, in fact, violated. This writer construes this decision as holding that the allegations of the complaint as to percentages of market control were not properly supported by satisfactory evidence. The Examiner said that amended Section 7 sets up new tests and that "it would be necessary to have reliable evidence in the record to show the percentage of the market controlled by the respondent as a result of the acquisition." The Examiner disagreed with the theory of proof claimed by the Commission, namely, that all that must be shown was that the respondent "is a major factor in the relevant markets and that the companies acquired had substantial business in those markets".

The Examiner adopted the alternative tests of illegal effect stated by the House Judiciary Committee in its Report on H.R. 2734. In brief they were stated as: (1) Elimination, in part, of the competitive activity of a substantial competitor, (2) Increase in the relative size of the acquirer, thus creating dominant competitive power, (3) Undue reduction in the number of competing enterprises, (4) Establishment of relationships between

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2 Idem.
buyers and sellers so that their rivals are deprived of a fair opportunity to compete.¹

The Commission vacated the examiner's order of dismissal and remanded the case for further hearing, on the ground that a prima facie case of violation had been established. Pillsbury has since sold one of the properties (Duffs).²

Hamilton Watch Company v. Benrus Watch Company, Inc.³

This action was brought by the Hamilton Watch Company against the Benrus Watch Company for a preliminary injunction to restrain Benrus from voting the shares of Hamilton alleged to have been illegally obtained, in violation of amended Section 7 of the Clayton Act. An order of divestiture of the illegally acquired stock was also asked. The findings and conclusions of the trial Court sustained the allegations of fact urged by the plaintiff. This was not a full trial of the facts, so that the

²Toledo Blade, January 24, 1954; C.C.H. Trade Regulation Report, (9th Ed.), para. 11, 582.
decision stands as authority only in injunction pro-
ceedings.  

The contention revolved around the effect that the 
acquisition by Benrus of 92,200 shares of Hamilton, would 
have on the competitive status of the watch industry in 
the United States. It was claimed by Benrus that its ac-
quisition of Hamilton's shares was for investment only. 
The trial judge denied this claim and ruled that, when a 
non-controlling interest of voting stock was acquired pur-
suant to a plan or purpose to gain control and the pro-
scribed effect upon competition existed, then the 
acquisition was unlawful.  

The pattern of desire for control was traced by 
the Court. The facts in summary were: (1) Over 
$1,300,000, part of which was borrowed, was spent to 
acquire this stock, (2) Benrus, in a period of six months, 
acquired this stock, when only 40,000 shares per year had 
previously been traded, (3) The shares were bought on a 
rising market, (4) The purchase by Benrus flouts settled 
investment policy, (5) Benrus quit buying as soon as 
Hamilton's voting trust gained control, (6) Benrus'

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2 Idem.
sizeable holdings in Elgin had just been sold, although Elgin was in a much better sales position than Hamilton. The claim by Benrus that Hamilton would be a hedge against higher tariffs on Benrus' Swiss-made parts manufacture was taken by the Court as an indication of a desire to control Hamilton, particularly since Elgin was wholly an American manufacturer. Benrus evidenced hostility towards Hamilton's voting trust.¹

The Court cited Chesapeake and Ohio Railway Purchase² as authority for the proposition that a purchase, not for control but for minority representation, was contrary to Section 7. The Pennsylvania cumulative voting law made minority representation for Benrus a certainty. Finding No. 54 of the Court was to the effect that minority representation on Hamilton's Board of Directors would substantially affect the competitive position of both Benrus and Hamilton. Therefore, since minority representation was a certainty, the irreparable damage requirement for the issuance of a temporary injunction, was present.³

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² 271 Interstate Commerce Commission Reports, 5.
The Circuit Court affirmed the lower Court's decision, upon an appeal by the defendant. The familiar broad discretionary powers of a trial court, in injunction cases, were cited as grounds for upholding the injunction, provided the findings of fact were not "clearly erroneous".¹

The appellate Court stated that it believed that amended Section 7 cast doubt on certain earlier decisions—including *International Shoe Co. v. Federal Trade Commission* and *United States v. Columbia Steel Co.*, interpreting Section 7 as it stood previously. Several law review articles and the *House and Senate Reports on H.R. 2734* were cited as authority. "Interference at an early stage, if possible, seems the paramount aim," said the Court.²

Private harm, mentioned in Section 16 of the Clayton Act, need not be the same as the public harm condemned by Section 7. The injunction was held to have been properly issued.³

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¹ *C.C.H. Trade Cases, 1953*, para. 67,517.
² *Idem.*
³ *Idem.*
In actions involving original Section 7, the Federal Trade Commission was generally unsuccessful in its activities, due primarily to the application of the rule of the Arrow-Hart and Hegeman decision.

The Attorney General, who has concurrent jurisdiction of cases subject to Section 7, was more successful than the Federal Trade Commission. Whether this was due to better trial preparation or better case selection is not clear. The actions of the Interstate Commerce Commission and other agencies with important regulatory powers were generally successful, in cases involving Section 7.

Probably no more important thread ties together the attitude of the courts on original Section 7 than the concept that the Section was enacted primarily to discourage secret stockholdings in competitor companies. That this objective was the sole objective of the Act is open to serious question. Nevertheless, the courts have almost unanimously adopted that theory.

Insofar as they are pertinent to Section 7 of the Clayton Act the Alcoa cases held that a dominant firm may or may not possess monopoly power. The last Alcoa case reconciled the Columbia Steel decision, thus, with
the first Alcoa case. Therefore, the factors relating to monopoly power must be investigated. The Tobacco cases, confused by the element of conspiracy and the implied practices of conspiracy, held that intent may be implied from a common course of conduct entered into consciously or unconsciously by the oligopolists within an industry. United States v. Griffith established that the rule of the Tobacco cases was not limited to conspiracy and combination cases. Some students suggest that the courts now would say the fact of economic monopoly is the legal proof of monopoly. Two courts have refused, lately, to follow such doctrine. However, a common business practice followed by all the oligopolists within an industry, as a solution to a competitive problem, does not, per se, violate the law. A number of cases demonstrated that any segment of commerce, even that in one city, is comprehended by the law.

The courts now seem to follow a policy of declaring vertical integrations not unlawful, per se, but unlawful at any horizontal level where restraints or monopoly has occurred.

Price fixing, the dominant firm, and the anti-small business policy inherent in large horizontal retail integrations have been recognized by the courts as the hallmark of monopoly.
The words "may be", appearing in Section 7, were tied, by the Congressional Committees, closely to the rule enunciated in the Standard Oil of California case. That rule amounted to finding a per se violation upon a mere showing that the proscribed actions would affect a substantial percentage of a substantial line of commerce in any section of the country. Doubt has been cast upon the application of this rule to Section 7 cases. If the courts follow the expressed legislative intent it is difficult to see how they could refuse to follow this rule. This writer feels that Congress intended to catch vertical, tie-in and conglomerate merger types under this rule.

The two proceedings under amended Section 7 lead one to believe that if the Federal Trade Commission and the Attorney General prepare their cases properly, Section 7 may become an Anti-Merger Act, in fact, as well as in name.

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The pro-business position has been stated by Thomas E. Sunderland, General Counsel, Standard Oil Company of Indiana.\(^1\) The writer claims that two dominant trends have become clear of recent date: (1) The disposition to attack big business blindly, (2) The disposition to condemn certain types of competitive conduct as illegal \textit{per se}. Mr. Sunderland contends that size was the material factor in the dissenting opinion in the Columbia Steel case. The court was criticized for its decisions in the Alcoa and Tobacco cases, primarily on the ground that these companies were only doing what all progressive companies should do, that is, hold on to their gains, make more gains and not stagnate.\(^2\) Mr. Sunderland prophesied that amended Section 7 would make the acquisitions of competitors illegal \textit{per se}. The abandonment of a contemplated merger by the Minnesota Mining and Manufacturing Company, shortly after the Act was passed, was cited as being due to the Act.\(^3\)

\textit{A priori} judgments were criticized by Mr. Sunderland. Referring to Dr. C.D. Edward's writings, he said that all


\(^2\) \textit{Tbid.}, pp. 66-67.

\(^3\) Thomas E. Sunderland, \textit{op. cit.}, p. 67.
of his conclusions were based upon non-empirical assumptions. Let us get back to the "rule of reason" was his conclusion.¹

The comments² by Professor S. C. Oppenheim of the University of Michigan Law School deserve attention. This great scholar has recently (1953) been chosen as a member of President Eisenhower's Committee on Revision of National Antitrust Policy, which he proposed in the instant article.

The title of Professor Oppenheim's article is broadly indicative of his objective. That is, he is proposing guides for a new antitrust policy. Presumably the old antitrust policy needs not only revision but new guides. The core of his thought is that possibly the earlier classical concepts of competition must be recast to conform with the newer concepts of "effective" or "workable" competition, now widely accepted by economists.³ With "workable" competition as the type of competition which the antitrust laws seek to foster, the "rule of reason"

¹Sunderland, op. cit., pp. 76-80.


³Ibid., p. 1142. That the preservation of competition was the sole objective of the antitrust laws is open to question. Sociological factors were quite important in the eyes of Congress.
should be the measuring stick of interpretation and application of the general standards, particularly with regard to the problems of industrial concentration.\(^1\)

The trend toward the concept of *per se* violations, especially with regard to conspiracy and with regard to the existence of monopoly power, was deplored.\(^2\) The "rule of reason" would inquire into the "gestalt" of its economic context and show the effects of the action in question.\(^3\) The *prima facie* illegality approach was preferred by Professor Oppenheim.\(^4\)

A coalescence of legal and economic views, on the significance for our antitrust policy of the various forms of industrial concentration, was seen as an outstanding need, by Professor Oppenheim. The various factors over which disagreement exists suggested a check-list which ultimately may be used as points of inquiry in the application of the "rule of reason".\(^5\)

\(^1\)"Guideposts to a Revised National Antitrust Policy", *op. cit.*, p. 1145.

\(^2\)The *Hamilton Watch* case, *supra*, indicates that in practice the courts inquire into the competitive aspects.

\(^3\)S. C. Oppenheim, "Guideposts to a Revised National Antitrust Policy", *op. cit.*, pp. 1148-1156.

\(^4\)*Ibid.*, pp. 1158-1161.

CHAPTER VI

THE FOURTH MERGER MOVEMENT

ADMINISTRATIVE POLICY

The term "policy", as used here, refers to the attitudes in the enforcement of Section 7 of the Clayton Act. The "policy", therefore, of the two enforcement agencies, the Department of Justice and the Federal Trade Commission, will be examined. The attitudes of these agencies toward the substantive phases of the law are of no concern here, as they have been treated elsewhere.

The text for this chapter might well be taken from a statement made by Thurman Arnold, former Assistant Attorney General in charge of the Anti-Trust Division: "... all antitrust law enforcement under any plan depends on the public attitude." Mr. Arnold ventured an opinion that enforcement varied with the business cycle.¹ In the broadest sense it may be said that policy in

antitrust law enforcement is variable in the same manner that public or political opinion is variable.¹

In this broadest sense the pattern of enforcement has followed a path of variability during the Fourth Merger Movement. By 1940 enforcement was almost totally suspended, so as not to interfere with the defense and war effort. The post-war period saw a stepping up of enforcement by the Justice Department in line with the intensified merger activity.²

The Administrative Procedure Act of 1947 gave greater independence to hearing examiners for the Federal Trade Commission and placed the Commission in a less favorable position with regard to the evaluation of testimony than prior to the enactment of this law, at least so far as the initial decision was concerned.³ This post-war period also saw the statutory change in Section 7 and


²It was reported that in the 50 years before 1940, 479 suits were filed. In the 10 years, ending in 1949, 408 suits were started, "How Big Is A Monopoly", Nation's Business, (April, 1950), p. 62.

what appeared to be a revitalization of the power of the Federal Trade Commission over mergers. Finally, after a period of twenty years, a Republican Federal administration took over the reins of government. A "new look" appeared in antitrust enforcement. At this writing the "new look" has no clear outlines. There are some signs that may suggest the nature of these outlines. For example, conservative Professor Oppenheim has been appointed to an antitrust law review committee. Conservative Dean Neil H. Jacoby has been appointed to the President's Council of Economic Advisers.\(^1\) Attorney General Brownell has asked for a study of the antitrust laws and proclaimed that his efforts would be aimed primarily at predatory tactics. President Eisenhower approved of the purposes of the Attorney General's National Committee to study the antitrust laws.\(^2\)

The political columnist, Marquis Childs, has made a pointed comment on these signs. In a newspaper article he stated that the Attorney General's Committee was packed with attorneys for the giant corporations and that the portents seemed to indicate a shift from the traditional antitrust policy of fear of the giant corporation to one of

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\(^1\) These facts have been noted earlier in this dissertation.

classifying it as benign.\textsuperscript{1} The tenor of the articles submitted to the Anti-trust Section of the American Bar Association were distinctly anti-new Section 7, and anti-new Alcoa and new Tobacco decisions. This was particularly true of the position of Senator Homer Ferguson, who was a participant.\textsuperscript{2} It now becomes necessary to take a look at the specific attitudes of the two enforcement agencies.

\textbf{The Federal Trade Commission}

The policy of the Federal Trade Commission may be treated within two time periods. The first period, that from 1940–1951, represented a period of futility insofar as the enforcement of Section 7 was concerned. As reported in Chapter V, herein, there was almost no activity because of the unenforceability of original Section 7. As reported in Chapter IV, herein, the Commission's positive efforts were directed at obtaining an amendment to original Section 7. In this effort they were ultimately successful. The second period, comprising the time since the enactment of amended Section 7, will now be examined.

\begin{footnotesize}
\begin{enumerate}
\item \textit{Toledo Blade}, (September 2, 1953), p. 24.
\item \textit{Proceedings}, (Spring Meeting, 1953), Chicago, p. 41.
\end{enumerate}
\end{footnotesize}
Congress was concerned about the functioning of
the Federal Trade Commission, and accordingly made a study
which was reported June 1, 1951. No special attention was
given to Section 7, but the general disabilities of enfor­
cement were developed. In particular, low employee morale,
inadequate appropriations, slow case action, inadequate
statutory authority, high hours per case, and the necessary
reorganization of the Federal Trade Commission were
recognized. 1

In its Annual Report for 1951 the Federal Trade
Commission stated that the objective of its work was
"The maintenance of free competitive enterprise as the
keystone of the American economic system . . . ." 2 The
independent status of the hearing examiners was explained
in this report. 3 The report further stated that in the
first half of 1951 investigations were made, under amended
Section 7, of steel products, rugs and carpets, valves,
stoves and ranges, flour, paper products, coated abrasives,

1 Antitrust Law Enforcement by the Federal Trade
Commission and the Antitrust Div. Dept. of Justice - Select
Committee on Small Business, House of Representatives,
House Report No. 3236, 81st Congress, 2d Session, (1951),
Part I.

2 The Federal Trade Commission, Annual Report, 1951,

3 Ibid., p. 15.
and pumps.\textsuperscript{1}

The Federal Trade Commission said, in the House Hearings on H.R. 2734, supra, that it would encourage businessmen to consult it as to whether a contemplated sale or acquisition was prohibited.\textsuperscript{2} A communication from D. C. Daniel, Federal Trade Commission Secretary, to the Illinois Law Review, dated March 2, 1951, states: "... the Commission desires to encourage business enterprises which have problems as to the application of the statute to specific circumstances to discuss these problems with members of the Commission's staff. A committee of staff members has been established for this purpose."\textsuperscript{3}

Business Week proclaimed, in 1951, that the power granted to the Federal Trade Commission in the Celler Act was powerless because of a lack of funds to enforce it. President Truman was reported to have asked for $500,000 in early 1951, to enforce the Act, but a fiscal tangle held the sum down to $122,000. One of the top items in the Fall 1951 session of Congress was a plea for $300,000 more.\textsuperscript{4}

\begin{itemize}
  \item \textsuperscript{1}The Federal Trade Commission, Annual Report, 1951, op. cit., p. 45.
  \item \textsuperscript{3}Ibid., p. 462, fn. 108.
  \item \textsuperscript{4}"Powerless Power", Business Week, (October 27, 1951), pp. 118-120.
\end{itemize}
In November, 1951, Congress voted more money to the Federal Trade Commission, and the Commission added 20 lawyers to its antimonopoly division. Chairman Mead threatened to do something about the high rate of mergers, estimated by the Federal Trade Commission to be averaging about 750 per year; and intimated some might be in violation of amended Section 7. The observers, according to Business Week, were in agreement that mergers had increased sharply and steadily in the past decade, and that the recent rate had the proportions of a tidal wave. It was reported that threats would have no effect on mergers, but only action would be effective.¹

Chairman Mead stated that the Commission's investigations, during 1951, showed that more than half of the acquiring companies had assets in excess of $10,000,000, while about a quarter of them had assets of more than $50,000,000.²

Professor Oppenheim has suggested that written opinions of the Commission, in Section 7 cases, would clarify the legal and economic policy upon which its

¹"F.T.C. Turns a Sharper Eye on Mergers", Business Week, (December 1, 1951, pp. 118-120.

²"F.T.C. Preparing Drive", 160 Oil, Paint, and Drug Reporter, (November 26, 1951, pp. 7 and 35.
decisions rest and give interested parties the full benefit of dissenting opinions.  

The Commission expects to begin publication in fiscal year 1953 of a series of annual reports from which the trend of economic concentration could be reliably measured, both in manufacturing in general and in specific industries in particular.  

The Commission has instituted a program which will consist of listing and making preliminary investigations of all mergers coming within the possible purview of Section 7. The elimination of obvious non-violators occurs first. The questionable cases then are investigated, partly through questionnaires and partly through field investigations. The Commission reported that this screening process was unavoidably slow, due to the careful study required. The Director of the Bureau of Antimonopoly is now giving advisory opinions on proposed mergers.

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Although the Federal Trade Commission has had the principal responsibility for the enforcement of Section 7, the Attorney General shares its authority coordinately.\(^1\) Under the provisions of amended Section 7 the Attorney General may intervene in any proceedings initiated under Section 7 by the Federal Trade Commission.\(^2\)

The Justice Department has no formal understanding with the Federal Trade Commission,\(^3\) but impliedly most of the policy relative to Section 7 enforcement has been left to the Federal Trade Commission. The Justice Department has instigated prosecutions in conjunction with alleged violations of the Sherman Act.\(^4\) In other instances Section 7 alone was alleged to have been violated.\(^5\)

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\(^{1}\) Pegrum, *op. cit.*, p. 260. The Federal Trade Commission under Section 11 and the Department of Justice under Section 15 of the Clayton Act have jurisdiction.

\(^{2}\) See Chapter IV herein.


\(^{5}\) *United States v. Fox Theatres Corp.*, Eq. 51-122 (S.D. N.Y.), Commerce Clearing House, *Trade Regulation Reports, Court Decisions*, Supplement III, para 3127 (1931).
The Sherman Act comprehends violations of the same type as Section 7 of the Clayton Act. Some actions of this nature have been instituted by the Department of Justice under the Sherman Act alone.¹

The Department of Justice announced the creation of a so-called "Merger Unit" in the Antitrust Division for the purpose of preventing, by anticipation, the creation of illegal combines.² The primary purpose of this new unit, according to the Attorney General's statement, "was to provide for a preexamination procedure for the business community with reference to proposed mergers. Under this procedure, industry may obtain the view of the Department of Justice in advance upon the submission of all relevant facts regarding a proposed merger."³

Liaison was established between the Federal Trade Commission and the Antitrust Division of the Department of Justice in 1948. In order to avoid duplication and have a consistent policy, investigations are now cross-indexed, information is cross-catalogued and passed on.

¹United States v. Fox Theatres Corp., Eq. 51-122 (S.D. N.Y.), Commerce Clearing House, Trade Regulation Reports, Court Decisions, Supplement III, para. 3127, (1931).

²Department of Justice Press Release, (March 19, 1947).

Nevertheless there appears to be a lack of a common overall program. That this is true is all the worse as the Attorney General must act as solicitor for the Federal Trade Commission.  

The Select Committee on Small Business criticized the Justice Department for bothering too much with "unfair" practices, when the root of the matter, undue concentration of economic power, was being neglected.  

The policy of the Department of Justice towards concentration cases became positive with the Alcoa decision of 1945. This case was followed by a number of significant cases initiated by the Department, particularly those against The United Shoe Machinery Company (1947), The Big Four Meat Packers (1948), The Western Electric Company (1949), E. I. du Pont Company (1949), The Great Atlantic and Pacific Tea Company (1949) and others.

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2 Ibid., p. 77.

3 A request for a general breakup of this company was denied by the Court, as reported in 61 Time, (March 2, 1953), p. 88.

4 "Defeat for United Shoe", 61 Time, (March 2, 1953), pp. 52-55.
Herbert A. Bergson, Assistant Attorney General in charge of Antitrust in 1949, reported that the major antitrust problem was the unlawful concentration of economic power in industries controlled by a few large companies.¹

In 1950 acting Federal Trade Commission Chairman L. B. Mason called for a new attitude by the Department of Justice toward business. Specifically he felt the Department should soft pedal its anti-big business campaign.²

In the Republican 80th Congress antitrust money was boosted 28% - $500,000. For fiscal year 1951 the Democrats boosted the appropriation again - total $3 3/4 million.³

In the light of the administrative enforcement difficulties it has been suggested that the initial enforcement of Section 7 be made by the Department of Justice, by enjoining the merger contract. It was felt that more judicial sympathy for effective enforcement would be

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obtained through such proceedings.¹

Conclusions

There are many areas of enforcement policy where the soft spots are quite apparent. Enforcement could be made effective with a combination of adequate funds, adequate personnel and adequate public support. Policy is a variable of politics and must be assessed accordingly.

CHAPTER VII

SUMMARY AND CONCLUSIONS

The objective of this dissertation was to build an integrated structure for an understanding of Section 7 of the Clayton Act. To accomplish this objective the important elements of the structure were considered, with special emphasis being placed on the period 1940-1952, denominated as The Fourth Merger Movement. It was found necessary to call upon the related histories of the Sherman Act, the Federal Trade Commission Act, and the Clayton Act, to give a structure perspective. That the consideration of these related areas was extensive indicates the similarity of, and the intermingling of fundamental concepts.

The structure was built upon a sound foundation developed from the pertinent history of the period prior to 1940. The foundation materials were composed of relevant economic, legislative and judicial developments.

Upon this necessarily strong foundation was built the superstructure of Section 7, composed of historical data and the analytical consideration of the physical
economic characteristics, the current economic theory, the extensive legislative activity, the variable judicial treatment and the evolving administrative policy pertaining thereto.

In building the foundation it was learned that Section 7 was conceived in response to a feeling of futility over the substantive and procedural weaknesses of the Sherman Act in coping with proscribed mergers and holding companies. Hindsight now makes it clear that the Congress was unable to see the ramifications of the problem. The courts wrestled vainly with the tortured statutory language and ultimately concluded that Section 7 was drawn in such a narrow compass as to include only secret stock acquisitions and then only under a "Sherman Act rule of reason". That the objectives of Congress were unclear seems to be undisputed. Neither the changing physical economic characteristics of our economy, the changing economic theory, nor the vain activities of the Federal Trade Commission and the Justice Department could be supposed to rewrite Section 7, or change its judicial interpretation. Accordingly, this early period was marked by frustration in the enforcement of an unenforceable law.
The proponents of a revised law based their case upon the evils of economic concentration perpetrated by merger. The opponents of revision held that the Sherman Act provided adequate remedies.

In 1940 the makings of a new merger movement (Fourth) were incipient. The impact of the National Defense and World War II activity brought this movement into full flower. Because the events of this period culminated in amended Section 7, they were treated intensively.

The physical data relating to economic concentration - particularly by merger - were considered. Most of these data are uncontroverted. Considerable disagreement emerged as to the effect that mergers had upon economic concentration, with neither faction having a clear advantage in the dispute. The data relating to conglomerate, vertical and hybrid merger types, were given prominence by the proponents of revision. This change in tactics from a consideration of the horizontal merger as the main or sole objective of legislative policy, to an inclusion of other types, foreshadowed a change in legislative attitude.

In the sphere of economic theory, the theorists were shackled by a paucity of pertinent facts. The market structure theorists insisted that only by eliminating
oligopolies would competition be revived. The "effective" or "workable" competition school of thought rejected the concepts of the market structure theorists and insisted that the evolved market structure must be accepted as a natural growth, which must be tested case by case to determine whether such "workable" competition as might be had, did exist. The third school of economic thought is a hybrid, incorporating many concepts of the second school. It makes its own special contribution in that the competitive concept is only one of many factors to be considered in judging either of the desirability of corporate mergers or of great corporate size. Other factors, such as industrial efficiency, national defense and resources conservation should be given weight. That the precepts of the third school of thought represent a radical departure from classic antitrust theory is clear.

The next level of the structure reflects the vicissitudes of legislative activity in revising or attempting to revise Section 7. The most active proponents of revision were the Federal Trade Commission, Senators O'Mehoney and Kefauver, and Representative Celler. The range of legislative proposals ran from limitations on the size of merged companies to a simple amendment of Section 11 of the Clayton Act to permit the Federal Trade Commission to
proceed against proscribed asset acquisitions. The theories of the first school of economic thought prevailed, after exhaustive consideration, and H.R. 2734 (amended Section 7) became law in December, 1950. That new objectives had been framed by Congress was clearly apparent in the Committee Reports. In particular the Senate Report on H.R. 2734 emphasized that the intent of the Committee was that amended Section 7 would avoid the consequences of such cases as the Columbia Steel decision, go beyond the apparent authority of the Sherman Act, bring all merger types within the purview of the law and include mergers through asset acquisitions. The intent, at least of the Committee, was clear. This intent was explained to the Senate by Senator O'Conor. It is also significant that this amendment had bi-partisan support, stemming, in part, so it is believed, from a common pro-small business sentiment in Congress.

The Judicial History of the Fourth Merger Movement is heavily weighted with litigation arising under the

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396 Congressional Record, pp. 16433-57.
4Ibid., p. 16508.
Sherman Act. This litigation was included, in brief form, because it considered concepts directly bearing on the operation of both original and amended Section 7. In particular the Aluminum decision of 1945 and the Tobacco decision of 1946 seemed to indicate a strict attitude toward oligopolistic and monopolistic industries. The requirements of proof in such cases and the remedies involved were clearly transferrable to Section 7 cases. These two cases, however, were not merger cases, and as has been common with the courts, their reluctance to interfere with mergers was shown in the Columbia Steel decision of 1948. There is no evidence, to date, that the Supreme Court has changed its historical attitude towards mergers, unless they clearly approach a monopoly status or have become involved in a conspiracy.

The few cases which have arisen under amended Section 7 are not indicative of the judicial attitude, as they have arisen either on the pleadings or have been defective in their presentation of the facts. It, therefore, is still too early to predict what the judicial attitude will be on the interpretation of amended Section 7.

The most important element in the structure is that of administrative and executive policy. This policy is based upon political considerations and, as such, can either
put amended Section 7 to sleep or make it an active part of our antitrust laws. Both the Federal Trade Commission and the Department of Justice have consistently manifested an interest in the active enforcement of amended Section 7.

The outlook for the effective enforcement of amended Section 7 is not bright. In spite of the logic and the expressed intentions of Congress or even of the judiciary there are forces which do not see or refuse to see any economic evil in the concentration of economic power, by merger or otherwise. Dominant among these forces are the general public, who connect their high standard of living with big business entities; labor, which sees better wages, pension funds and the like with giant corporations; and capital interests, who serve and are mostly paid by the industrial giants. The counter-pulling forces resolve their differences in the political policy of the period. Amended Section 7 means no more nor less than this constantly variable political policy.

It is believed that the structure, as described above, presents a comprehensive outline of Federal trust policy as it relates to the administrative and executive control of mergers through the medium of Section 7 of the Clayton Act.
AN ACT

To amend an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, (38 Stat. 730), as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 7 and 11 of an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," approved October 15, 1914, as amended (U.S.C., title 15, sec. 18 and 21), are hereby amended to read as follows:1

Sec. 11. That authority to enforce compliance with sections 2, 3, 6, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Authority Board where applicable to air carriers and foreign air carriers subject to the Civil aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade

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1The language of the original law is shown in roman type, while the language struck by the amended statutes is enclosed in black brackets. New matter is shown in italics. Only Section 7 is given in the text. Section 11 appears in the appendix of this dissertation.
Commission where applicable to all other character of commerce to be exercised as follows:

Whenever the Commission, [Authority] or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission, [Authority] or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission, [Authority] or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in such proceeding shall be reduced to writing and filed in the office of the Commission, [Authority] or Board. If upon such hearing the Commission, [Authority] or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a [circuit court of appeals of the United States court of appeals as hereinafter provided, the Commission, [Authority] or Board may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the Commission, [Authority] or Board while the same is in effect, the Commission, [Authority] or Board may
apply to the United States court of appeals within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission, or Board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, or Board. The findings of the Commission, or Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, or Board, the court may order the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission, or Board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 240 of the Judicial Code of title 28, United States Code.

Any party required by such order of the Commission, or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission, or Board
be set aside. A copy of such petition shall be forthwith served upon the Commission, Authority, or Board, and thereupon the Commission, Authority, or Board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission, Authority, or Board as in the case of an application by the Commission, Authority, or Board for the enforcement of its order, and the findings of the Commission, Authority, or Board as to the facts if supported by testimony substantial evidence, shall in like manner be conclusive.

The jurisdiction of the Circuit court of appeals United States court of appeals to enforce, set aside, or modify orders of the commission, Authority, or board shall be exclusive.

Such proceedings in the Circuit court of appeals United States court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission, Authority, or board or the judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust Acts.

Complaints, orders, and other processes of the commission, Authority, or board under this section may be served by anyone duly authorized by the commission, Authority, or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

Approved December 29, 1950, 12:50 P.M.


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AUTOBIOGRAPHY

I, Robert Demming Myers, was born in Covington, Ohio, November 5, 1906. I received my primary and secondary school education in the public schools of the city of Dayton, Ohio. All collegiate training was had at The Ohio State University. I received the degree Bachelor of Arts in 1929 and the degree Master of Arts in 1932. In 1933 I was admitted to the bar of Ohio. During the years 1930-32 I was Professor of Business Administration at West Virginia Wesleyan College. Thereafter, until 1946, I practiced law in various capacities. Since 1946 I have been Associate Professor of Business Law at the University of Toledo.