HOUSE CONSIDERATION

REPORT OF THE HOUSE COMMITTEE ON THE JUDICIARY
H.R. Rep. No. 1191
81st Cong., 1st Sess.
August 4, 1949

⊥1 ⊥ Mr. BYRNE of New York, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 2734]

The Committee on the Judiciary, to whom was referred the bill (H. R. 2734) 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, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Page 1, line 6, following the figures "1914", insert "as amended".

Page 1, line 6, strike out the word "Annotated".

Page 1, line 6, strike out the word "sec." and insert in lieu thereof "secs.".

Page 1, line 6, following the figure "18", insert "and 21".

Page 3, line 17, strike out the word "not" and insert in lieu thereof the word "nor".

Page 4, line 4, strike out the word "not" and insert in lieu thereof the word "nor".

Page 6, lines 11 and 12, strike out "circuit court of appeals of the United States" and insert in lieu thereof "United States Court of Appeals".

Page 6, line 20, strike out "circuit court of appeals of the United States" and insert in lieu thereof "United States Court of Appeals".

Page 7, line 1, strike out the word "testimoney" and insert in lieu thereof "testimony".

Page 8, line 6, strike out the figure "240" and insert in lieu thereof "1254".

⊥2 ⊥ Page 8, lines 6 and 7, strike out "the Judicial Code." and insert in lieu thereof "title 28, United States Code".

Page 8, lines 10 and 11, strike out "circuit court of appeals" and insert in lieu thereof "United States Court of Appeals".

Page 8, line 25, and page 9, line 1, strike out "circuit court of appeals of the United States" and insert in lieu thereof "United States Court of Appeals".

Page 9, line 3, strike out "circuit court of appeals" and insert in lieu thereof "United States Court of Appeals".

All of the above amendments are merely formal and correctional.

ECONOMIC BACKGROUND

Measured by practically any method and compared to practically any standard, the level of economic concentration in the American economy is high. The Temporary

National Economic Committee found that, if an individual product is picked at random, there is a one-to-one chance that the four largest producers of that product will account for 75 percent or more of its output.[1]

Moreover, the long-term trend of concentration has been steadily upward. Although comparable postwar data are not as yet available, the National Resources Committee found that while the 200 largest nonbanking corporations owned about one-third of all corporation assets in 1909, by 1928 they owned 48 percent of the total, and by the early thirties the proportion had increased to 54 percent.[2] This long-term trend is confirmed by another series prepared by an analyst of Moody's Investment Service, which shows that 316 large manufacturing corporations increased their proportion of the total working capital of all manufacturing corporations from 35 percent in 1926 to 47 percent in 1938.[3]

This long-term rise in concentration is due in considerable part to the external expansion of business through mergers, acquisitions, and consolidations. Thus, in the case of the steel industry, mergers and acquisitions of other companies accounted for one-third of the long-term growth (1915-45) of the Bethlehem Steel Corp., and two-thirds of the growth of Republic Steel.[4] And in the case of the industry's largest firm, the original formation of the United States Steel Corp. represented the greatest consolidation in history, with more that 170 formerly independent concerns having been brought together at one fell swoop. Much the same situation is true of the copper industry, in which no less than 70 percent of the long-term growth (1915-45) of the three largest companies, Anaconda, Kennecott, and Phelps-Dodge, has been due to external expansion through acquisitions and mergers.[5]

The importance of mergers and acquisitions as a cause of economic concentration has increased rapidly during recent years with the acceleration of the merger movement. During the period, 1940-47 some 2,500 formerly independent manufacturing and mining companies disappeared as a result of mergers and acquisitions. This is a minimum estimate, since it is based upon a sample drawn principally ⊥ from reports ⊥3
of acquisitions of the larger corporations as published in the leading financial manuals.

That the current merger movement has had a significant effect on the economy is clearly revealed by the fact that the asset value of the companies which have disappeared through mergers amounts to 5.2 billion dollars, or no less than 5.5 percent of the total assets of all manufacturing corporations—a significant segment of the economy to be swallowed up in such a short period of time.

Apart from this general effect, the current movement has had the result of raising the level of economic concentration in a number of very specific ways. In the first place, recent merger activity has been of outstanding importance in several of the traditionally "small business" industries. More acquisitions and mergers have taken place in textiles and apparel and food and kindred products-predominantly "small business" fields-than in any other industries. Furthermore, in certain other industries which have traditionally been considered as "small business" fields (such as steel drums, tight cooperage, and wines) nearly all of the industry has been taken over by very large corporations. Finally, the outstanding characteristic of the merger movement has been that of large corporations buying out small companies, rather than smaller companies combining together in order to compete more effectively with their larger rivals. More than 70 percent of the total number of firms acquired during 1940-47 have been absorbed by larger corporations with assets of over $5,000,000. In contrast, fully 93 percent of all the firms bought out held assets of less than $1,000,000. Some 33 of the Nation's 200 largest industrial corporations have bought out an average of 5 companies each, and 13 have purchased more than 10 concerns each.

Such in general outline is the broad economic problem of high and increasing concentration with which this legislation is concerned.

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[1] TNEC Monograph No. 27, The Structure of Industry, 1941, pp. 413-481.

[2] National Resources Committee, The Structure of the American Economy, 1939, p. 107.

[3] Cf. 70th Cong., 2d sess., Economic Concentration and World War II, S. Doc. 206, 1946, pp. 6-7.

[4] Federal Trade Commission, The Merger Movement: A Summary Report, 1948, p. 25.

[5] Federal Trade Commission, The Copper Industry, 1948.

HISTORY OF ANTIMONOPOLY LEGISLATION

Congress first came to grips with the problem in 1890 when, with only one dissenting vote, it passed the Sherman Act. In 1914 Congress again considered the subject and concluded that something more than the Sherman Act was needed to prevent monopolies and unwarranted mergers which would substantially lessen competition.

The usual practice at that time for the creation of a merger was for one corporation to buy the controlling stock of competing corporations. Section 7 of the Clayton Act, passed in 1914, was intended to prevent monopolies in their incipiency. So far as is material here, it prohibited a corporation from acquiring the capital stock of a competitor where the effect—

> may be to substantially lessen competition between the corporation whose stock is acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

That the Congress meant to deal effectively with this problem is shown by the following language of the report of the House Committee on the Judiciary, dated May 6, 1914, recommending passage of the Clayton Act:

> Section 8 (now sec. 7 of the Clayton Act) deals with what is commonly known as the
> ⊥4 holding company, which is a common and favorite method of promoting ⊥ monopoly. "Holding company" is a term generally understood to mean a company that holds the stock of another company or companies, but as we understand the term a holding company is a company whose primary object is to hold stocks of other companies. It has usually issued its own shares in exchange for these stocks and is a means of holding under one control the competing companies whose stocks are thus acquired. As thus defined a holding company is an abomination, and in our judgment is a mere incorporated form for the old-fashioned trust.[6]

Likewise, the Committee on the Judiciary of the Senate, in a report dated July 22, 1914, to accompany H. R. 15657 (the Clayton Act) stated as follows:

> * * * Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices, which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890, or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation * * *[7]

In view of these clear statements of intent, the present impotence of section 7 raises the question as to why Congress, in granting the Federal Trade Commission power to prevent purchases of stock, did not also give it the power to move against acquisitions of assets. Inasmuch as purchases of assets are more binding and lasting, and thus more destructive to competition, this omission seems particularly paradoxical. The answer lies in the fact that at the time when Congress enacted the Clayton Act, most acquisitions took the form of stock purchases. By comparison, acquisitions of assets were relatively unimportant.

The economic background behind the passage of the Clayton Act in 1914 was the great merger movement which began at the very end of the nineteenth century and extended through 1907. During this period, which witnessed the birth of such huge consolidations as the United States Steel Corp., most mergers were effected through the purchase of stock. There were solid reasons behind this predominance of stock acquisitions. It is much easier to purchase stock than assets. This is especially true in the case of holding companies which mushroomed during this early merger movement, since the holding company can readily exchange some of its shares for the stock of the company to be absorbed. Moreover, stock acquisitions are peculiarly suitable in any era which is characterized by the flotation of enormous amounts of watered stock. The prevailing method of promoters in bringing together these huge consolidations was to

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[6] House Committee on the Judiciary, Rept. No. 627, 63d Cong., 2d sess., to accompany H. R. 15657, p. 17.

[7] Senate Committee on the Judiciary, S. Rept. No. 698, 63d Cong., 2d sess., July 22, 1914, to accompany H. R. 15657, p. 1.

form a great holding company, which would then issue under its own name vast amounts of stock. Part of the stock so issued would be used to pay off the owners of the separate companies absorbed in the consolidation. The greater the amount of watered stock, the easier it was to absorb companies through the medium of stock transfers.

That acquisitions of stock were, indeed, the customary and prevailing method of absorbing competitiors was forcibly brought out by Justice Stone in his dissenting opinion in the Arrow-Hart and Hegeman case. He said that corporate mergers were "commonly" effected through stock acquisitions, that "only in rare instances" would a merger be successful without advance acquisition of working stock control, that such control was "the normal first step toward consolidation," that it was by that process most consolidations had been brought ⊥ about, that this was "the first and usual step" ⊥5 and that the statute therefore reached the evil of corporate mergers "in its most usual form by forbidding the first step."[8] Although industry, partly because of this very statute, no longer relies as heavily on stock acquisitions, Justice Stone's opinion was an accurate reflection of the business practices prevailing at that time.

In 1926 the Supreme Court, in a decision covering three section 7 cases, declared that if the acquiring corporation had so used its stock purchases as to secure title to physical assets of the corporation acquired before the Federal Trade Commission issued its complaint, an order by the Commission was improvident.[9] In 1934 the interpretation of the law respecting acquisitions of stock control, which were subsequently converted into outright purchase of assets, was extended by the Supreme Court, which held that if an acquiring corporation secured title to the physical assets of a corporation whose stock it had acquired before the Federal Trade Commission issues its final order, the Commission lacks power to direct divestiture of the physical assets, even though the acquisition of stock control may have fallen within the prohibitions of section 7 of the Clayton Act.[10]

From 1945 through 1948 companion bills designed to close the loophole in the law were regularly introduced in the Senate and the House by Senator O'Mahoney and Senator (then Representative) Kefauver. In both the Seventy-ninth and the Eightieth Congresses the House bill was approved by a subcommittee of the House Judiciary Committee, and twice was approved by the full Judiciary Committee, but twice failed to emerge from the House Rules Committee. On the Senate side the bill was approved in the Eightieth Congress on May 17, 1948, by a subcommittee of the Senate Judiciary Committee, consisting of Senators McCarran, Langer, and Ferguson. But, like the House bill, the Senate bill never reached the floor for debate.

EXPLANATION OF H. R. 2734

H. R. 2734 would amend section 7 so as to prohibit the acquisition of assets as well as stock of a competing corporation. In the first paragraph of the present section 7, after the word "capital", the following words are included:

> and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets * * *.

A similar addition is made in the second paragraph of section 7. Section 7 as it now stands provides that no corporation may acquire the capital stock of another corporation also engaged in commerce—

> where the effect of such acquisition may be to substantially 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 * * *.

In lieu of this language the present bill makes the provision less restrictive by substituting—

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[8] 291 U. S. 587, 600, 601.

[9] *Federal Trade Commission* v. *Western Meat Co., Thatcher Manufacturing Co.* v. *Federal Trade Commission*, and *Swift & Co.* v. *Federal Trade Commission* (272 U. S. 554–564 [*sic*] [47 S. Ct. 175, 179, 71 L. Ed. 405, 411 (1926)].

[10] *Arrow-Hart & Hegeman Electric Co.* v. *FTC* (291 U. S. 587–598).

> * * * 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 to substantially lessen competition * * *.

⊥6 ⊥ It will thus be seen that the language in H. R. 2734 is considerably less restrictive than the language in the present section 7. A strict interpretation of the present language related to whether the acquisition would lessen competition between the acquiring and acquired corporation, and it related to any "section or community." The language in the reported bill deals in "any line of commerce" and in lieu of "section or community" substitutes "in any section."

The last paragraph of section 7 is new. It simply provides that provisions of the bill should not apply to corporations coming under the jurisdiction of ICC, CAA, FCC, FPC, SEC, and the Secretary of Agriculture. These agencies already have jurisdiction over these corporations, and there is no disposition to change the present arrangement regarding them.

The language in the second paragraph of section 11, "and the Attorney General" and "the Attorney General shall have the right to intervene and appear in said proceeding and any" is new. This language was agreed to by the Federal Trade Commission and the Attorney General, and is intended to keep the Attorney General informed of proceedings by the Federal Trade Commission, and give him the right to intervene.

In the third and fourth paragraphs of section 11, the words "substantial evidence" are new. They are substituted for the word "testimony" in the present section. This is to make the bill conform with the Administrative Procedure Act.

QUESTIONS AND ANSWERS RELATING TO H. R. 2734

1. Would the bill prevent a corporation in failing or bankrupt condition from selling its assets to a competitor?

The argument that a corporation in bankrupt or failing condition might not be allowed to sell to a competitor has already been disposed of by the courts. It is well settled that the Clayton Act does not apply in bankruptcy or receivership cases. In the case of *International Shoe Co.* v. *The Federal Trade Commission* (280 U. S. 291) the Supreme Court went much further, as is shown by the following excerpt from the decision:

> * * * a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public, and does not substantially (303) lessen competition or restrain commerce within the intent of the Clayton Act. To regard such a transaction as a violation of law, as this court suggested in *United States* v. *U. S. Steel Corp.* (251 U. S. 417, 446–447), would "seem a distempered view of purchase and result." See also *Press Ass'n* v. *United States* (245 Fed. 91, 93–94) (Id. pp. 302–303).

2. Would the bill prohibit small corporations from merging in order to afford greater competition to large companies?

The objection that the suggested amendment would prohibit small companies from merging has strangely enough been put forward by representatives of big business. This would seem almost like "Greeks bearing gifts."

⊥7 ⊥ Incidentally, several small business associations interested in the welfare of small business and the maintenance of free enterprise testified very vigorously in support of this bill. No small business group appeared against it.

There is no real basis for this objection.

In the first place, the present language of section 7 as it relates to mergers by sale of stock is more restrictive than the language in the amended bill. Yet no case has been found where a small corporation had any difficulty or was criticized by the Federal Trade Commission for selling its business by selling its stock to another small corporation. The small corporations have not had to avoid the present language of section 7 by selling their assets in place of their stock, when they wanted to dispose of their business.

Furthermore, the Supreme Court and the Federal courts have not applied the present strict language of section 7, even in cases of stock acquisition, so as to prevent a small corporation from selling its business or of merging with another small business. The Supreme Court has only applied the present language of section 7, even in the case of stock acquisitions, to large transactions which would substantially lessen competition, or tend to create a monopoly. In the case of *International Shoe Company* v. *Federal Trade Commission, supra,* decided January 26 [*sic*], 1930, the International Shoe Co., having a Nation-wide business, purchased the stock of McElwain Co., a smaller shoe company also having a Nation-wide business. As to a part of the business of the two corporations, they were not in direct competition. The Federal Trade Commission sought to order a divestiture of the stock and prevent the merger. The Supreme Court held that the merger was not of sufficient size or importance, even though there was some competition between the two corporations to substantially lessen competition or to create a monopoly. The Court has this to say:[7.33]

> Mere acquisition by one corporation of the stock of a competitor even though it results in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree. *Standard Fashion Co.* v. *Magrane-Houston Co.* (258 U. S. 346, 357): that is to say, to such a degree as will injuriously affect the public.[11]

The language in the amendment it will be noted follows closely the purpose of the Clayton Act as defined by the Supreme Court in the International Shoe case.

In the second place the bill modifies the present law so as to remove any possibility of an interpretation that would prohibit inconsequential acquisitions of stock or assets. Section 7, as it now stands, prohibits a corporation engaged in commerce from acquiring the stock of another corporation engaged also in commerce—

> where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition * * *

Since acquisition of a controlling stock interest in a rival company necessarily eliminates effective competition between the acquiring and the acquired corporations, this language, but for limiting interpretations by the courts, might have prevented any use of stock purchases ⊥ to unite small corporations engaged in the same line of ⊥8
business even though these corporations were so small and their other competitors so numerous that the acquisition would have made no perceptible change in the intensity of competition in any line of commerce in which such corporations were engaged. The present bill eliminates this language and provides instead that an acquisition of stock or assets shall be prohibited—

> where in any line of commerce in any section of the country the effect of such acquisitions may be substantially to lessen competition.

Small companies which cannot produce the specified effect upon competition are not thereby forbidden to acquire either stock or assets.

3. Would the bill merely duplicate the Sherman Act?

Acquisitions of stock or assets by which any part of commerce is monopolized or by which a combination in restraint of trade is created are forbidden by the Sherman Act. The present bill is not intended as a mere reenactment of this prohibition. It is not the purpose of this committee to recommend duplication of existing legislation.

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[11] See also *Federal Trade Commission* v. *Sinclair Co.* (261 U. S. 463) [43 S. Ct. 450, 67 L. Ed. 746 (1923)]. The Second Circuit Court of Appeals in the case of *Temple Anthracite Coal Co.* v. *Federal Trade Commission* (51 Fed. (2) 656) [3d Cir. 1931], in a case where one coal company had purchased several others in Kentucky held that section 7 of the Clayton Act was not involved, and cited in addition to the International Shoe Co. case a decision of the Supreme Court in the case of *Standard Fashion Co.* v. *Magrane-Houston Co.* (258 U. S. 346).

[7.33] See notes 7.27 & 7.28 *supra*.

Acquisitions of stock or assets have a cumulative effect, and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize. Such an effect may arise in various ways: such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.

Under H. R. 2734 a merger or acquisition will be unlawful if it may have the effect of either (*a*) substantially lessening competition or (*b*) tending to create a monopoly. These two tests of illegality are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act. Thus, it would be unnecessary for the Government to speculate as to what is in the "back of the minds" of those who promote a merger; or to prove that the acquiring firm had engaged in actions which are considered to be unethical or predatory; or to show that as a result of a merger the acquiring firm had already obtained such a degree of control that it possessed the power to destroy or exclude competitiors or fix prices.

The test of substantial lessening of competition or tending to create a monopoly is not intended to be applicable only where the specified effect may appear on a Nation-wide or industry-wide scale. The purpose of the bill is to protect competition in each line of commerce in each section of the country.

The bill retains language of the present statute which is broad enough to prevent evasion of the central purpose. It covers not only purchase of assets or stock but also
19 any other method of acquisition, such as, for example, lease of assets. It forbids not only direct acquisitions but also indirect acquisitions, whether through a subsidiary or affiliate or otherwise.

4. Have recent decisions of the Supreme Court made this proposed amendment unnecessary?

It has been contended that, owing to recent Court decisions, specifically in the Aluminum case[7.34] decided in 1945 and the Tobacco case in 1946, the Sherman Act is now adequate to meet the economic problem to which this bill is addressed and that therefore the amendment of section 7 of the Clayton Act is not necessary.

Before analyzing this contention, it should be pointed out that if the argument were correct—which does not appear to be the case—Congress, instead of amending the Clayton Act to cover the acquisitions of assets, should logically repeal that part of the law relating to stock, since, according to this point of view, both are equally unnecessary.

What are the facts in the Tobacco case? They are briefly that three separate corporations, each representing between 20 and 25 percent of the cigarette business, had conspired to monopolize that business, to exclude competitors therefrom and to fix prices. The case went up on the correctness of instructions given by the trial court to the jury to the effect that actual exclusion of competitors was not necessary where the members of the conspiracy were—

> able, as a group, to exclude actual or potential competitors from the field, accompanied with the intention and purpose to exercise such power.

The jury was also instructed that—

> *an essential element* of the illegal monopoly or monopolization charged *in this case is the existence of a combination or conspiracy to acquire and maintain the power to exclude*

[7.34] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). The Tobacco case is cited at note 7.31 *supra*.

competitors to a substantial extent—

and that—

an indispensable ingredient of each of the offenses charged in the information is a combination or conspiracy.[12] [Italics added.]

The Supreme Court therefore said that it included that element in deciding the correctness of the instructions (p. 786) and that—

it is therefore only in conjunction with such a combination or conspiracy that these cases will constitute a precedent (p. 798).

The Court held that the jury had been correctly instructed and that it was unlawful under section 2 of the Sherman Act—

for parties, as in these cases, to combine or conspire to acquire or maintain the power to exclude competitors—

when they are—

able, as a group, to exclude actual or potential competition from the field—

and when they have—

the intent and purpose to exercise that power (p. 809).

Hence, it appears that in the Tobacco case the charge of conspiracy is so interwoven as to be indistinguishable from that of monopoly power, and thus the case fails to provide any clear-cut basis for proceedings against the particular problem with which this bill is concerned.

⊥ In the Aluminum case the Supreme Court withdrew itself on the grounds that ⊥10
several of its members had been officials of the Department of Justice while the case was in process, and the decision was accordingly handed down by a special court of last resort. This court held that 90-percent control of an industry by one company was, per se, in violation of the Sherman Act. The existence of unlawful practices was not considered necessary to prove a violation of the law in the face of such control.

But this ruling is subject to a number of important qualifications, the most significant of which was the dictum that while 90-percent control of an industry by a single company was sufficient to constitute a monopoly, it was "doubtful" that 64 percent would be sufficient to constitute an unlawful monopoly, and that 33 percent was "certainly" not sufficient.[7.35]

If the 90-percent rule were adopted, it would not affect more than a mere handful of American industries. In 1937 there were only 21 important products (those with an annual value of over $10,000,000) in which the largest 4 companies accounted for more than 90 percent of the total output. Consequently, there are probably fewer than half a dozen important products in which the largest single firm accounts for more than 90 percent of the output. Even if the 64 percent "doubtful" point were to be adopted, only a very small proportion of the American industrial economy would be affected. Thus the TNEC in 1937 found that of 1,807 census products there were only 152 in which the leading producer accounted for over 60 percent of the Nation's output (and they represented only 8.1 per cent of the total number and 3.3 percent of the total value of all the products surveyed).[13]

It is true that the Supreme Court said in the Tobacco case that it welcomed the opportunity to endorse certain statements in the Aluminum case opinion. But the statements that were endorsed were to the effect that a monopoly cannot be disassociated from its power, that its power cannot be disassociated from its exercise, and that if 90 percent of the ingot producers had combined it would have constituted

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[12] 328 U. S. 781, 795, 786.

[13] TNEC Monograph No. 27, The Structure of Industry, p. 292.

[7.35] 148 F.2d at 424.

an unlawful monopoly.[14] It is important to note that the Supreme Court did not affirmatively endorse the statement of the special court that 90 percent control by one corporation is enough to make it an unlawful monopoly, per se, or the statement that it was doubtful whether 60 to 64 percent would be enough and that 33 percent is certainly not enough.[15]

On top of these considerations, which in themselves would seem to dissipate the contention that the Sherman Act, as recently interpreted, is clearly sufficient to deal with the problem of acquisitions and mergers, there are the further considerations that *(a)* the Department of Justice, which administers the Sherman Act, has maintained that in addition to the Sherman Act there is need for the amendment of the Clayton Act in order to deal adequately with the merger problem and (*b*) the Supreme Court, in a decision subsequent to the Aluminum and Tobacco decisions, held that the acquisition of the largest steel fabricator on the west coast by the largest steel producer on the west
⊥11 ⊥ coast (which itself is a subsidiary of the largest steel producer in the Nation) did not violate the Sherman Act.[16]

5. 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[*?*]

Mergers and acquisitions have traditionally been designated as horizontal, vertical, and conglomerate. Horizontal acquisitions are those in which the firms involved are engaged in roughly similar lines of endeavor; vertical acquisitions are those in which the purchase represents a movement either backward from or forward toward the ultimate consumer; and conglomerate acquisitions are those in which there is no discernible relationship in the nature of business between the acquiring and acquired firms.

These three different types of mergers are illustrated in the accompanying charts.* Chart I, which shows the recent acquisitions of the Borden Co., illustrates the horizontal type of merger; chart II, which represents the recent mergers by United States Steel Corporation, provides an example of vertical acquisitions–in this case, forward vertical acquisitions; and chart III, which shows those of American Home Products Corp., illustrates the conglomerate type of acquisition.

Because section 7, as passed in 1914, prohibited, among other things, acquisitions which substantially lessened competition between the acquiring and the acquired firms, it has been thought by some that this legislation applies only to the so-called horizontal mergers. But in the proposed bill, as has been pointed out above, the test of the effect on competition between the acquiring and the acquired firm has been eliminated. One reason for this action was to make it clear that this bill is not intended to prohibit all acquisitions among competitors. But there is a second reason, which is to make it clear that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition * * * or tending to create a monopoly.

If, for example, one or a number of raw-material producers purchases firms in a fabricating field (i. e., a "forward vertical" acquisition), and if as a result thereof competition in that fabricating field is substantially lessened in any section of the country, the law would be violated, even though there did not exist any competition between the acquiring (raw material) and the acquired (fabricating) firms.

The same principles would, of course, apply to backward vertical and conglomerate acquisitions and mergers.

6. Can the loophole in section 7 be closed through judicial interpretation?

It has been contended by some that there is no necessity for congressional action on this matter since, according to this view, the Commission could seek and obtain a

[14] 328 U. S. 813, 814.

[15] 148 F. 2d. 416, 424.

[16] *U. S.* v. *Columbia Steel et al.* (334 U. S. 495. [68 S. Ct. 1107, 92 L. Ed. 1533 (1948)]).

* Not reprinted herein.

reversal of the Supreme Court decisions which have hindered it in its enforcement of the law. To this point of view there are two answers.

In the first place the Commission has taken the position, and the committee believes rightly so, that any defect in the law, as interpreted by the Supreme Court, should be remedied through legislative rather than judicial action.

⊥ In the second place, even if those decisions were reversed, the legislation would ⊥12
remain ineffective. Since the Commission could take action only against those asset acquisitions which were preceded by stock acquisitions, the possible reversal of decisions would in no way give the Commission the power to prevent those acquisitions of assets which do not involve the transfer of stock. No one has ever contended that the Commission, under any possible construction of section 7, has the power to prevent this latter type of acquisition. Yet today asset acquisitions are more important than stock acquisitions, constituting nearly 60 percent of all industrial acquisitions.[17] Moreover, with any reversal of the old decisions, this proportion would undoubtedly rise to 90 percent or thereabouts, since business could be expected to cease making stock acquisitions—some of which might be held illegal—and rely almost entirely upon asset acquisitions not involving stock—none of which could be attacked under any interpretation of section 7. Only in a relatively small number of acquisitions, amounting to less than 10 percent of the total, is it absolutely essential, because of the size and complexity of the merger, to buy up the stock before the assets are acquired.[18]

In short, to rely on the Court in this matter is merely to substitute what might be termed the "completely by assets" loophole for the "stock first, assets later" loophole. Such a substitution of loopholes can hardly be regarded as an effective remedy for this outstanding defect in the law.

ENDORSEMENT

The committee on trade regulation and trade-marks of the Association of the Bar of the City of New York adopted a report from which the following conclusion is taken:

> Your subcommittee unanimously approves the pending bills (excluding H. R. 1240 which is not further commented upon because it is felt that its provisions have already been considered and rejected by the House Judiciary Committee). We can see no reasonable basis for excluding assets from section 7 of the Clayton Act but we feel that Congress, when it originally passed the Clayton Act, intended to prohibit all acquisitions and that it was through oversight that asset acquisitions were not included probably because the popular way of merging corporations at that time was through stock acquisition. We see no reasonable basis for distinguishing between stock and assets if the effect may be to substantially lessen competition or to create a monopoly.
>
> We believe that the substitution of substantial evidence for testimony in section 11 will do much to correct the criticism now leveled at findings of the Federal Trade Commission and that the service of the complaint on the Attorney General and his right to intervene will bring about a closer coordination between the Federal Trade Commission and the Department of Justice. While it is true that even should the amendments be enacted the Federal Trade Commission and the Department of Justice will still have concurrent jurisdiction, the fact that the Attorney General will have notice of any proceeding brought under section 7 by the Federal Trade Commission and that he may intervene should, in your committee's opinion, eliminate actions by both the Commission and the Department of Justice for the same offense.

CONCLUSION

In adopting the Sherman Act and later the Clayton Act, the Congress, without partisan division, gave expression to a virtually unanimous demand that our competitive economic system be protected ⊥ against those forces of monopoly which ⊥13
would destroy it. The platforms of both major political parties have consistently carried planks approving the course thus charted. Both President Hoover and the late President

[17] During the period 1939–44, the Federal Trade Commission found that asset acquisitions represented 58 percent of the total number of all industrial acquisitions (FTC, The Merger Movement: A Summary Report, 1948, p. 6).

[18] Ibid., p. 6.

Roosevelt recommended tightening up of the Sherman and Clayton Acts. President Truman has specifically recommended this amendment to the Clayton Act.

This proposal is in no sense antagonistic to so-called big business. Its contribution to the national welfare, both in peace and war, is recognized by all. Nevertheless, big business too has a tremendous stake in the maintenance of competition—without which capitalism cannot survive. The only alternative to capitalism is some form of statism—destructive alike to both big and small business. The concentration of great economic power in a few corporations necessarily leads to the formation of large Nation wide labor unions. The development of the two necessarily leads to big bureaus in the Government to deal with them.

CHANGES IN EXISTING LAW

In compliance with clause 2a of rule XIII of the House of Representatives, there is printed below in roman existing law in which no change is proposed, with matter proposed to be stricken out enclosed in black brackets, and new matter proposed to be added shown in italic (this includes the committee amendments which are perfecting amendments only):

SECTIONS 7 AND 11 OF AN ACT APPROVED OCTOBER 15, 1914 (38 STAT. 730)

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 [to] substantially *to* lessen competition, 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* [two] 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 [to] 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 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 construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition
⊥14 between the company owning the branch line so constructed ⊥ and the company owning the main line acquiring the property of an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other [such] common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything 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 Authority, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission, or the Secretary of Agriculture under any statutory provision resting such power in such commission, authority, Secretary, or board.

SEC. 11. That authority to enforce compliance with sections 2, 3, 7, 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 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 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 any 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 [circuit court of appeals of 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, Authority, 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, Authority, or ⊥15
Board. The findings of the Commission, Authority, or Board as to the facts, if supported by [testimony] *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, Authority, or Board the court may order such additional evidence to be taken before the Commission, Authority, or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission, Authority, 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 [testimony] *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] 1254 *of title 28, United States Code.*

Any party required by such order of the Commission, Authority, or Board to cease and desist from a violation charged may obtain a review of such order in said [circuit court of appeals] *United States court of appeals* by filing in the court a written petition praying that the order of the Commission, Authority, 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 of the] 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.

HOUSE DEBATE
81st Cong., 1st Sess.
August 15, 1949

95 Cong. Rec. 11484

The SPEAKER. The gentleman from New York is recognized.

Mr. [EMANUEL] CELLER [D., N.Y.]. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 2734) 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.

The Clerk read the title of the bill.

The Clerk read the bill as follows: . . .

⊥11485 ⊥The SPEAKER. Is a second demanded?

Mr. [ANGIER L.] GOODWIN [R. Mass.]. Mr. Speaker, I demand a second.

Mr. CELLER. Mr. Speaker, I ask unanimous consent that a second be considered as ordered.

The SPEAKER. Is there objection to the request of the gentleman from New York?

There was no objection.

The SPEAKER. Under the rules the gentleman from New York [Mr. Celler] is recognized for 20 minutes and the gentleman from Massachusetts [Mr. Goodwin] will be recognized for 20 minutes.

Mr. CELLER. Mr. Speaker, I yield myself 5 minutes.

Mr. SPEAKER. The gentleman from New York is recognized.

Mr. CELLER. Mr. Speaker, this bill seeks to plug a loophole in the present antitrust laws. It seeks to amend section 7 and section 11 of the Clayton Act. Those sections invoke the sanction of the law only when there is a merger that substantially lessens competition or creates a monopoly by the purchase of corporate stock. Astute lawyers for years have learned how to evade violations by their clients of section 7 and section 11. Instead of purchasing corporate stock and thereby merging, the larger corporation swallowing the smaller corporation does it by acquiring the assets; by acquiring the accounts receivable, by acquiring the raw material and finished products, by acquiring the real estate, and by acquiring the good will, thereby leaving only an empty husk, a mere shell. They do not have to take over the corporate stock. Sometimes they do, but when the assets are thus acquired and all the properties of the smaller corporation are thus acquired by the larger corporation there is no violation of the law, according to the