Marquette Law Review

Volume 14
Issue 3 *April 1930*

Article 6

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Repository Citation
John A. Walsh, *Clayton Acts Combinations: Substantial Reduction in Competition*, 14 Marq. L. Rev. 175 (1930).
Available at: http://scholarship.law.marquette.edu/mulr/vol14/iss3/6

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Clayton Acts Combinations: Substantial Reduction in Competition.

International Shoe Co., Petitioner, v. *Federal Trade Commission* (Jan. 6, 1930) 74 L. Ed. 173 (U.S.)

The International Shoe Company, with headquarters in St. Louis, is the largest shoe manufacturer in the United States. In 1921 it owned 32 factories and its capacity was 70,000 pairs of shoes per day. The W. H. McElwain Company was then a Massachusetts Corporation, the largest shoe manufacturers in New England and the fifth or sixth largest in the United States. On or about May 11, 1921, the International Shoe Company obtained all or practically all of the stock or other share capital of the W. H. McElwain Company. This merger was investigated by the Federal Trade Commission and they directed the petitioner to divest itself of the stock of the McElwain Company because it was acquired in violation of Section 7 of the *Clayton Act* (38 Stat. 730; 15 U.S.C.A. § 18. Section 7 of the *Clayton Act* provides: "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital 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, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." Sec. 11 (15 U.S.C.A. § 21) provides that the commission after hearing shall state its findings of fact and order that such violation of the Act cease. It also provides for review by the court but says," the findings of the Commission as to the *facts if supported by testimony* shall be conclusive."

The International Shoe Company appealed to the Circuit Court of Appeals (First Circuit) and that court unanimously upheld the findings of the commission, that the combine was in violation of the Clayton Act (29 F. (2d) 518). The International Company then appealed to the United States Supreme Court and there with Justice Holmes, Brandeis and Stone dissenting, both the Federal Trade Commission and the Circuit Court of Appeals were reversed.

The reasons given by the Supreme Court for this reversal were: (1) that the McElwain Company was not an actual competitor of the International Shoe Company because "the markets reached by the two companies within these states, with slight exceptions hereafter mentioned, were *not the same.*"[1] (2) The McElwain Company was upon the verge of bankruptcy and therefore was no longer a competitor of the International Shoe Company.

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[1] Advance Sheets 74 L. Ed. 175.

Both of these questions were considered by the Federal Trade Commission and by the Circuit Court of Appeals. In reference to the former the commission found, "Both companies made and sold medium priced dress shoes and sold such shoes to retail dealers in the same states and in many of the same cities and towns, and in some instances, to the same dealers."[2] On the second point the Commission found the McElwain Company solvent and the Circuit Court approved that finding in the words, "While the McElwain Company had suffered substantial losses in the tremendous slump in prices in 1920-21, there is no foundation whatever for the petitioners contention that (except for this purchase) the concern would have gone out of existence, and therefore out of competition with the petitioner."[3]

Of these findings Justice Stone in his dissenting opinion says, "Without stating it in detail, there appears to me to be abundant evidence that the competitive products made by two of the largest shoe manufacturers in the world reached the same local communities through different agencies of distribution."[4]

And in regard to the second point, "Nor am I able to say that the McElwain Company, for the stock of which petitioner gave its own stock, having a market value of $9,460,000, was then in such financial straits as to preclude the reasonable inference—that its business—would probably continue to compete with that of petitioner.[4] (See *Standard Fashion Company* v. *Magrane-Houston Co.*, 288 U.S. 346, 66 L. Ed. 653.) It plainly had large value as a going concern—there was no evidence that it would have been worth more or as much if dismantled, and there was evidence that the depression in the shoe trade in 1920-21 was then a passing phase of the business."[5]

These are the main reasons opposing the decision of the court. The court itself justifies its decision that there was no substantial competition between the two companies because "An analysis of the sales of the International for the twelve months preceding the acquisition of the McElwain capital stock discloses that in forty-two states, no men's dress shoes were sold to customers of the McElwain Company; and that in the remaining six states, during the same period, a total of only 52 5/12 dozen pairs of such shoes had been sold to sixteen retailers and three wholesalers, who were also customers of the McElwain Company. This amounted to less than one fourth of the production of dress

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[2-3] 29F. (2d). 518, 521.

[4] 74 L. Ed. 179, 180.

[5] 74 L. Ed. 173, 180.

shoes by the International for a single day, the daily production being about 250 dozen pair."[6]

And in the second place, the court felt that the McElwain Co. was virtually insolvent. Mr. Justice Sutherland says, "Shortly stated, the evidence established the case of a corporation in failing circumstances, the recovery of which to a normal condition was, to say, the least in gravest doubt, selling its capital to the only available purchaser in order to avoid what its officers fairly concluded was a more disastrous fate."[7]

Thus we see that the United States Supreme Court reviewing the evidence which was presented before the Federal Trade Commission and the Circuit Court of Appeals came to the conclusion that the facts found by the commission were not supported by testimony. The commission and the judges of the Circuit Court of Appeals, who unanimously affirmed the commission's order, must have found some testimony to support it. The Congress of the United States said, "the findings of the commission as to the facts if supported by testimony shall be conclusive." *(15 U.S.C.A.* § *21.)* It is also worthy of note that the court says in *Federal Trade Commission* v. *Pacific States Paper Trade Association,* 273 U.S. 52, 71 L. Ed. 534, 47 Sup. Ct. Rep. 255, "The weight to be given to the facts and circumstances admitted, so well as the inferences reasonably drawn from them is for the commission."

In spite of the direct legislative enactment that the findings of fact of the commission should be final and in opposition to their own views on this subject, as expressed in a very recent case, the court reversed the commission and the Circuit Court of Appeals on a question of fact. The sole question was the McElwain Company in substantial competition and likely to remain as such competitor with the International Shoe Company, seems to me to be a question of fact. It is often extremely difficult to distinguish questions of law from questions of fact, but I feel that the great mass of mankind and probably most of the members of the bar would call this a question of fact.

Moreover, it is worthy of note that in this case Justices Stone, Brandeis and Holmes dissented. In both *Thatcher Manufacturing Co.* v. *Federal Trade Commission* and in *Swift & Company* v. *Same,* 272 U.S. 554, 47 Sup. Ct. 175, 71 L. Ed. 405, the Court held, "we are of the opinion that under Sections 7 and 11 of the Clayton Act the commission is without authority to require one who has secured actual title and possession of physical property before proceedings were begun

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[6] 74 L. Ed. 173, 178.
[7] 74 L. Ed. 173, 178.

against it to dispose of the same, although secured through an unlawful purchase of stock." Again, in this case, Justices Brandeis, Holmes & Stone dissented and here they were joined by Chief Justice Taft.

The Clayton Act (passed Oct. 15, 1914), attempted to effect in a narrow field what the Sherman Anti Trust Act (July 2, 1890) was unable to do. Is this act more effective than its predecessor? It seems that it is not. We are living in an age of big business, of consolidation, of merger. It seems useless for the Congress or the Courts to attempt to stem the tide. It seems that we can only hope that these consolidations and mergers are for the common good and general welfare, for today they carry on.

JOHN A. WALSH

Infants: Misrepresentation: Liability for Torts.

The case of the *Wisconsin Loan & Finance Corp.* v. *Goodnough,* 228 N.W. 484, was an action on a note signed by defendant. The defendant set up in his answer that he was at that time a minor and could not be held on an action for payment of the note. The plaintiff demanded recovery on the grounds that the defendant misrepresented his age, maintaining that he was legally capable of executing a note.

The Wisconsin Supreme Court enforced the minor's transaction with the plaintiff, holding that a minor can be held on a tort liability for misrepresentation and deceit.

The question which seems to divide courts in consideration of this matter is whether or not the fraudulent representations enter into the contract. In *Fitts* v. *Hall,* 9 N.H. 411, after referring to the leading English case of *Johnson* v. *Pie,* 1st Keb. 913, it was held: "The representation in *Johnson* v. *Pie,* and in the present case, that the defendant was of full age, was not part of the contract, nor did it grow out of the contract, or in any way result from it. It is not any part of its terms, nor was it the consideration upon which the contract was founded. No contract was made about the defendant's age. The sale of the goods was not a consideration for this affirmation or representation. The representation was not a foundation for an action of assumpsit. The matter arises purely *ex delicto.* The fraud was intended to induce, and did induce, the plaintiff to make a contract for the sale of the hats, but that by no means makes it part and parcel of the contract. It was antecedent to the contract; and if an infant is liable for a positive wrong connected with a contract, but arising after the contract has been made, he may well be answerable for one committed before the contract was entered into, although it may have led to the contract.

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[8] 71 Cd. 405 at 411.