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Antitrust Law--Application of the Sherman Act, Section One, to Bank Mergers

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since it indicated the clear intention of the board summarily to dismiss the claim, and held the action of the board to be erroneous. The court of appeals, on the other hand, has looked at the technical form of the board's action and has invalidated the action taken by the circuit court. The net effect is that the board must now go through the formality of issuing a final order which on appeal will be invalidated.

The interval between the initial assignment to the referee and the decision of the court of appeals was three years.[6] A similar time lapse presumably is now attending the review of the erroneous final order. Still another period of delay very likely will accompany the ultimate review on the merits. It is submitted that substantive treatment of the board's ruling could have reduced these detrimental delays by one, while the technical treatment given the ruling by the court of appeals unnecessarily postpones the possibility of recovery by the injured workman and clutters the court docket with repetitious review of what is essentially one issue.

T. R. Fitzgerald

ANTITRUST LAW—APPLICATION OF THE SHERMAN ACT, SECTION ONE, TO BANK MERGERS.—The First National Bank and Trust Company and the Security Trust Company, both of Lexington, Ky., after receiving authorization from the Comptroller of the Currency pursuant to the Bank Merger Act,[1] consolidated[2] to form the First Security National Bank and Trust Company. Suit based on sections one[3] and two[4] of

[6] Creech v. Roberts, *supra* note 4, at 734.

[1] 12 U.S.C. § 1828(c) (1960). It seems to be settled that Congress did not intend by its enactment of the Bank Merger Act to supersede the provisions of the Sherman Act in any respect. Approval by the Comptroller of the Currency does not immunize the plan from attack by the Justice Department. California v. Federal Power Commission, 369 U.S. 482 (1962); United States v. Philadelphia National Bank, 374 U.S. 321, 350 (1963); United States v. First National Bank & Trust Co., 208 F. Supp. 457, 458 (E.D. Ky. 1962).

[2] There is a recognized distinction between "merger" and "consolidation" as applied to corporations. In a "merger," one corporation absorbs the other but remains in existence, while the other is dissolved. In a "consolidation" a new corporation is created and the consolidating corporations are extinguished. Personal Credit Plan v. Kling, 20 A.2d 704, 706 (N.J. 1941). In the Philadelphia National Bank case, the "merger" was technically a "consolidation" and thus it is a moot question whether the rule of law of that case covers true mergers. In the *First National Bank* case, although the district court referred to the plan as a consolidation *or* merger, it is implicit that the plan was in fact a consolidation.

[3] 15 U.S.C. § 1 (1958). This section provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is declared to be illegal."

[4] 15 U.S.C. § 2 (1958).

the Sherman Act was filed against the plan of consolidation by the Justice Department; the district court found that no violation of the Act was shown.[5] Appeal was taken to the United States Supreme Court. *Held:* Reversed. The elimination of competition between two major competitors in the relevant commercial and geographical market[6] constitutes an unreasonable restraint of trade in violation of section one of the Sherman Act. *United States v. First National Bank and Trust Co.,* 84 Sup. Ct. 1033 (1964).

Justice Harlan wrote a strong dissenting opinion in which he labeled the decision of the majority as both "doomed to be a novelty in the reports" and "the vehicle for turning the clock back to antitrust days of long past."[7] These aphorisms are accurate criticism of the peculiar aspects of the majority opinion—the unique relationship to the *Philadelphia National Bank* case,[8] and the revival of an antiquated and discredited line of authority.

The *First National Bank* case must be considered a novelty in the reports as it is rendered, *ab initio,* of little value in bank-consolidation cases by the decision of *United States v. Philadelphia National Bank,* handed down by the Court during the period after the initiation of suit in the *First National Bank* case but before the final determination of that action. The *Philadelphia National Bank* case, on similar facts, held section seven of the Clayton Act, as amended in 1950,[9] applicable to bank consolidations. As the 1950 amendment to section seven excepted from coverage assets acquisitions by corporations not subject to the jurisdiction of the Federal Trade Commission, and as banks are not subject to the jurisdiction of the FTC, the *Philadelphia Na-*

[5] United States v. First National Bank and Trust Co., 208 F. Supp. 457 (E.D. Ky. 1962).

[6] The relevant commercial market was considered to be commercial banking; the relevant geographical market was considered to be Fayette County, Ky. United States v. First National Bank and Trust Co., 84 Sup. Ct. 1033, 1034 (1964). To ascertain the relevant market it is necessary to consider the actual competition to which the defendants are subject, and the reasonable interchangeability of the goods or services offered by the defendant with similar goods or services. United States v. E.I. DuPont Co., 351 U.S. 377, 404 (1956); Report of the Attorney General's National Committee to Study the Anti-Trust Laws 44-48 (1955).

[7] United States v. First National Bank and Trust Co., 84 Sup. Ct. 1033, 1038 (1964).

[8] United States v. Philadelphia National Bank, 374 U.S. 321 (1963).

[9] 15 U.S.C. § 18 (1958). This section provides in relevant part: "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, or to tend to create a monopoly."

tional Bank case is most startling on its face, and perhaps the tortuous reasoning[10] of that case may explain why the Justice Department instigated an action based on the Sherman Act during the pendency of its Clayton Act case. Now that it has been determined that the Clayton Act is applicable to bank consolidations, the Sherman Act should be of receding importance. Under the Clayton Act, the Government satisfies the burden of proof when it shows that the consolidating corporations are both thriving, are in *inter se* competition, and that the consolidated corporation will have an unduly large share of the relevant market.[11] The Clayton Act is used as a prophylactic measure to stop anti-competitive tendencies in their incipiency; the test is one of per se illegality, without reference to motive or the strength of remaining competition.[12]

On the other hand, where a consolidation, either vertical or horizontal, is challenged under the Sherman Act, the Government is compelled to prove a real threat to the remaining competition by showing that the consolidation will have the effect of restraining trade. The case of *United States v. Columbia Steel Co.*[13] is the modern keystone of this aspect of section one of the Sherman Act. In that case, the Court rejected per se illegality as applied to vertical and horizontal integration and outlined a factor approach to require an inquiry into the economic realities of every individual case.

> We look [the Court said] rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command varies with the setting in which that factor is placed.[14]

The *Columbia Steel* case received mixed comment[15] and served in

[10] Justice Brennan, writing for the Court, was forced to argue that the stock-acquisition and assets-acquisition provisions read together reach mergers; and that, since banks are exempt only from the assets-acquisition provision and since immunity from the antitrust laws is not to be lightly implied, bank mergers are subject to section seven. See *The Supreme Court, 1962 Term,* 77 Harv. L. Rev. 62, 160 (1963).

[11] Brown Shoe Co. v. United States, 370 U.S. 294, 311-23 (1962); United States v. Philadelphia National Bank, *supra* note 8, at 363.

[12] *Ibid.*

[13] 334 U.S. 495 (1948).

[14] United States v. Columbia Steel Co., 334 U.S. 495, 527-8 (1948).

[15] See generally: Zlinkoff and Barnard, *Mergers and the Anti-Trust Law,* 97 U. Pa. L. Rev. 151, 175 (1948); *The Columbia Steel Case: New Light on Old Antitrust Problems,* 58 Yale L.L. 764, 773 (1949).

part to instigate the 1950 amendment to the Clayton Act,[16] by which it was sought to extend the preventative justice of the newer law to assets-acquisitions situations. Nevertheless, in Sherman Act cases involving horizontal or vertical integration, the *Columbia Steel* decision has been and continues to be the principal authority.

In the *First National Bank* case, Justice Douglas, although his majority opinion went much farther, quoted the *Columbia Steel* factors (set out *supra* in this comment) and said that the factors, as applied to the case at bar, compelled the conclusion that the consolidation was illegal.[17] Justices Brennan and White specially concurred in the result but would have rested the reversal *solely* on the conclusion that the *Columbia Steel* factors compelled reversal. Justice Harlan, joined by Justice Stewart, dissented, arguing that the Court ignored the factors which failed to show a real economic threat to competition and based a decision solely on one factor—the large proportionate share, or fifty-two percent[18] of the relevant market to be held by the consolidated bank.

Whether the Government did in fact prove its case under the economic factors approach is a moot question, for it seems clear that the majority (Douglas and the four concurring without opinion), in discussing the *Columbia Steel* case, was throwing a sop to the four man minority who would rely on that case. The majority cited as controlling authority the case of *Northern Securities Company v. United States,*[19] "and its progeny"[20]—*United States v. Union Pacific Company,*[21] *United States v. Reading Company,*[22] and *United States v. Southern Pacific Company.*[23] The Court relied on these four old railroad cases, all decided before 1925, for a proposition of per se illegality —that "where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger, itself constitutes a violation of § 1 of the Sherman Act."[24] Both banks being major competitive factors whose consolidation would eliminate *inter se* competition, this fact, without more,

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[16] See United States v. Philadelphia National Bank, *supra* note 8, at 342, n. 20. "*Columbia Steel* was repeatedly cited by Congressmen considering the amendment of § 7 as an example of what they conceived to be the inability of the Sherman Act, as then construed, to deal with the problems of corporate concentration."

[17] United States v. First National Bank and Trust Co., *supra* note 7, at 1037.

[18] *Id.* at 1035. This figure appears in the majority opinion.

[19] 193 U.S. 197 (1904).

[20] United States v. First National Bank and Trust Co., *supra* note 7, at 1036.

[21] 226 U.S. 61 (1912).

[22] 253 U.S. 26 (1920).

[23] 259 U.S. 214 (1922).

[24] United States v. First National Bank and Trust Co., *supra* note 7, at 1037.

brings this case within the above proposition, and the proposition was reiterated by Douglas as the rule of law of the case.[25]

Harlan's dissent emphasized that the four railroad cases relied on by the majority had been considered in the *Columbia Steel* case and had been rejected as so factually dissimilar as to offer little guidance. The cases had not been expressly overruled, the Court saying, "We do not stop to examine those cases to determine whether we would now approve either their language or their holdings."[26] Harlan maintained that the cases were overruled sub silentio by the portion of the *Columbia Steel* opinion set out *supra.* The consideration of all the economic factors surrounding a consolidation *is* inconsistent with per se illegality, where a court holds a combination illegal because of the elimination of the *inter se* competition between the merging companies, without reference to the strength or weakness of the remaining competition.[27]

To explain the majority's use of a discredited line of authority is to deal in supposition. Nevertheless, the similarity of the burden of proof under the rule of law in the *First National Bank* case to that under section seven of the Clayton Act is strikingly obvious. Harlan commented that the case was a "Clayton Act case masquerading in the garb of the Sherman Act" and that the Government had been allowed "to change horses in midstream in fact if not quite in form."[28] The Sherman Act has been said to be a "charter of freedom" with "a generality and adaptability comparable to that found to be desirable in constitutional provisions."[29] Moreover, in the *Columbia Steel* case, Justice Reed, writing for the Court, indicated that in determining whether a violation of the Sherman Act had occurred, the public policy behind section seven of the Clayton Act should be taken into account.[30] Whether the Sherman Act is, or should be, able to expand to meet any loophole left by newer antitrust legislation is beyond the scope of this comment. Suffice it to say in this instance that the

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[25] Douglas did discuss testimony in the record which indicated the possible debilatory effect of the consolidation on the remaining competitors. As pointed out in the dissent, however, the district court had found that this particular testimony was based on surmise and lacking in factual support (208 F. Supp. at 460), and this finding must stand unless clearly erroneous. Douglas' tentative consideration of the effect of the consolidation on remaining competitors appears to be part of the attempt to show the minority that illegality is compelled by the *Columbia Steel* factors. The consideration of this factor is not essential to the rule of law of the case.

[26] United States v. Columbia Steel Co., *supra* note 14, at 531.

[27] United States v. First National Bank and Trust Co., *supra* note 7, at 1036.

[28] *Id.* at 1041.

[29] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

[30] United States v. Columbia Steel Co., *supra* note 14, at 507, n. 7. See also, *The Columbia Steel Case: New Light on Old Anti-Trust Problems,* 58 Yale L.J. 764, 770-1 (1949).

majority appears to have read this elastic element into the Act. This was done almost as if for the particular circumstance, because the *Columbia Steel* case was not overruled as consistency would dictate. Rather it was cited and quoted approvingly by the Court.

The precedental value of the *First National Bank* case is for situations involving assets acquisitions, not accompanied by merger, by corporations not subject to the jurisdiction of the FTC. These acquisitions were not brought within the realm of the Clayton Act by the *Philadelphia National Bank* case. The Government must rely on the Sherman Act. It is almost a certainty that both prosecutor and prosecuted will argue that the *First National Bank* case compels a decision in their favor, that the Justice Department will rely on the rule of per se illegality, and that the defendants will rely on the *Columbia Steel* factors test.

William H. Fortune

EMINENT DOMAIN—QUALIFYING THE NON-EXPERT WITNESS.—In a condemnation action, the property owner was permitted to testify as to the fair market value of the property in question. The Commonwealth moved to strike the testimony as incompetent. The motion was denied and the jury found for the property owner in the amount of 44,000 dollars. *Held:* Reversed and remanded. The testimony given by the property owner revealed no familiarity with property values in the neighborhood and was clearly incompetent. The court went on to say prospectively that the property owner will not be *presumed* competent simply because he is the owner of the property in question; that the owner must be qualified as competent before he gives an estimate of value. *Commonwealth v. Fister*, 373 S.W.2d 720 (Ky. 1963).

The court in the *Fister* case was careful to say that it was making only a procedural change; that under prior Kentucky law[1] the property owner was *presumed* competent to testify as to market value, but if it were shown on cross examination that he was not, the testimony was subject to motion to strike. This case has the immediate effect of certifying the law. The prior law seemingly was in conflict as to the status of the property owner as a witness on market value.[2] Decisions in which it was held error not to strike the owner's testimony may

[1] Hipp-Green Lumber Corp. v. Potter, 271 S.W.2d 892 (Ky. 1954).

[2] See generally 32 C.J.S. *Evidence* § 545(3): "Although there is some authority to the contrary it is generally held that the owner of realty is competent to testify as to its value; and his estimate is received although his knowledge on the subject is not such as would qualify him to testify if he were not the owner."