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The Federal Trade Commission's Power with Reference to Stock Acquisitions

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confronted in two years' time. The discrepancy between this figure and 23,000 is apparent.

These statistics, of course, have no value in the study or solution of modern legislative or administrative problems. They throw no light upon the real character of legislation, because they do not differentiate statutes according to length or difficulty of enforcement. Obviously they have nothing to do with the drafting of statutes or with legislative procedure. In dealing with such questions, which are in no sense quantitative, statistics can give no aid. But the use of false statistics can create a great deal of confusion and misplaced emphasis. Clearly both lawyers and laymen have recently been guilty of much statistical misrepresentation.

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THE FEDERAL TRADE COMMISSION'S POWER WITH REFERENCE TO STOCK ACQUISITIONS

The trend of modern industry towards combination and monopoly and the persistent endeavor of Federal anti-trust legislation to prohibit restraints of competition, give rise to an increasingly confusing mass of laws. The confusion is increased rather than diminished by strict judicial construction limiting the final powers of the administrative bodies entrusted with enforcement of the statutes.

The Clayton Act[1] and the Federal Trade Commission Act were intended to supplement existing legislation by arresting monopolies in their incipiency.[2] With this objective, the acts created the Federal Trade Commission to secure the advantages of administrative action by a body of experts and specifically prohibited certain practices, many of which were within the general scope of existing legislation. Section 7 of the Clayton Act prohibits the acquisition by one corporation of the stock of another where the result is "to substantially lessen competition."[3] Section 11 of the act authorizes the Commission to proceed against violators of this provision, and to enforce its

[1] 38 Stat. 730 (1914), 15 U. S. C. secs. 12-27.

[2] Standard Fashion v. Magrane-Houston Co. (1921) 258 U. S. 346, 356.

[3] "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or 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 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." 38 Stat. 731 (1914), 15 U. S. C. sec. 18.

orders through the courts.[4] Each of these two sections raises a separate problem, section 7 necessitating an interpretation of the expression "substantial competition," and section 11 involving the finality of the Commission's findings. These questions are not clearly distinguishable, for in determining the extent to which the Commission's findings are conclusive the reviewing court must necessarily determine the nature of the findings required by section 7. However, a discussion of the cases arising under this section will be clarified by first considering the facts which have been held to constitute a substantial lessening of competition and later discussing the finality of the Commission's findings.

That the Federal Supreme Court adopts a rule of interpretation of section 7 at variance with that employed by the Commission is shown in the most recent case on this question, *International Shoe Company v. Federal Trade Commission.*[5] The International Company, the largest of the country's shoe manufacturers, acquired the stock of one of the largest eastern concerns, the W. H. McElwain Shoe Company. The McElwain Company's specialty had been men's dress shoes, which it sold in 35 states, the largest volume of its sales being in the northeastern states, and more particularly in the large cities. Its product was marketed through jobbers except for a few sales to large city retail stores. The International Company produced men's dress shoes at the same price as those sold by the McElwain Company and of slightly superior quality, though not so attractive in appearance. International's sales were largely in the western and southern states, but covered the entire country and were for the most part made directly to retail dealers, particularly in small cities and towns. The McElwain Company was in a poor financial condition at the time of the purchase,

[4] This section vests authority to enforce compliance with section 7 and other sections of the Clayton Act "in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, and in the Federal Trade Commission where applicable to all other character of commerce." Detailed provision is made for notice and hearing, and content of the transcript the Commission is required to keep. The Commission is empowered to issue an order "requiring such person to cease and desist from such violation, and divest itself of the stock held. . ." The Commission may apply to the Circuit Court of Appeals for enforcement of its order, or the party required by the order to cease and desist from a violation charged may obtain review by petitioning the Circuit Court of Appeals to set aside the order. For provisions of this section as to extent of judicial review see p. 58, below. 38 Stat. 734 (1914), 15 U. S. C. sec. 21.

[5] (1929) 50 S. Ct. 89, 74 L. Ed. 173. Justices Stone, Holmes and Brandeis dissented. See note (1930) 24 ILL. L. REV. 908 and (1930) 39 YALE L. J. 1042.

having contracted for purchases of large quantities of hides just before a drop in the market price. The court held that since the companies did not meet in the same market in respect of 95 per cent of their sales and because the products varied in quality and appearance, there was no competition in fact prior to the acquisition, and hence no violation of section 7. The court also stressed the so-called "rule of reason"[6] in holding that the McElwain's financial condition prevented the transaction from being against the public interest, and thus negatived a violation of the statute. This reason was not necessary to the decision since the fact that no prior competition in fact existed was sufficient reason for reversing the Federal Trade Commission, which had found a violation of section 7 and had ordered the International Shoe Company to divest itself of the stock of the McElwain Company.[7]

The decision is not consistent with some of the prior cases on the question of the existence of competition in fact. In the case of *Aluminum Company v. Federal Trade Commission*[8] a claim somewhat analogous to that which the Supreme Court supported in the *International Shoe Company* case was made. Because of wartime conditions the demand for the product of both companies was larger than the supply. The companies maintained that since their products were not offered to the same buyers, no competition existed. The court dismissed this claim without other reason than that the Commission found that competition existed and that there was evidence to support this finding. In the cases involving the Swift Packing Company and the Western Meat Company it was held that the fact that one of the companies to a transaction is a small concern, competing with the other only in one locality, does not alone negative a violation of the statute.[9] And yet in *Thatcher v. Federal Trade*

[6] See *infra* note 22.

[7] In the Matter of International Shoe Company (1925) 9 F. T. C. 441.

[8] (1922) 284 F. 401, certiorari denied (1923) 261 U. S. 616. In this case one company acquired the stock of another through the guise of setting up a third company and dissolving the competitor. The transaction was held to be a stock acquisition within the meaning of section 7.

[9] Swift and Company v. Fed. Trade Com. (1925) 8 F. (2d) 595. One corporation acquired the stock of two small companies whose output amounted to only a fraction of one per cent of the total output of the nation. The Circuit Court of Appeals held a violation of section 7 occurred, stating, "Prior competition need not have been substantial nor the effect of the acquisition injurious to the public, in the face of clear and concise language of the statute condemning the acquisition unconditionally." This case was reversed in the Supreme Court on the grounds that the Commission acted too late in bringing its action, for the company had not only acquired the stock but had absorbed the assets of the other firm. Thus

Commission[10] it was held that no competition in fact existed where the two companies to the transaction were engaged primarily in the manufacture of different products, and the company whose stock was acquired devoted less than one per cent of its total output to the competing product.

The *Western Meat Company* and *Swift and Company* cases probably represent the broadest construction of "substantial lessening of competition," while the *International Shoe Company* case adopts the narrowest view. In none of the cases is there an attempt to define the term with the purpose of laying down a rule to be followed by the Commission, and since the statute itself gives no indication of what is meant to be included within the expression the Commission has no definite authority upon which to proceed in the future.

The question of the finality of the Commission's findings is dealt with at greater length in the statute. The reviewing court is given power "to make and enter, on the pleadings, testimony, and proceedings set forth in such transcript [of the Commission's record] a decree affirming, modifying, or setting aside the order of the Commission. The findings of the Commission as to the facts, if supported by testimony, shall be conclusive."[11] The apparent objective of definitely prescribing the scope of judicial review in the statute has been far from successful, for

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the stock of the company acquired was of no value and an order to divest itself of this stock would be of no avail. The Commission must render its order within a reasonable time after the transaction takes place. Western Meat Company v. Fed. Trade Com. (1926) 272 U. S. 554. A claim of lack of substantial competition prior to the acquisition was made. The corporation whose stock was acquired was a small concern whose business was largely confined to one state. The Supreme Court dismissed the claim holding that there was evidence to support the Commission's finding that a violation occurred.

[10] (1925) 5 F. (2d) 615. One company acquired the stock of four corporations engaged in the manufacture of bottles. The principal issue was whether the transaction was a stock acquisition or an acquisition of the assets of these companies. The Commission found that it was a stock acquisition which substantially lessened competition. The Circuit Court of Appeals sustained this decision as to three of the companies but held that as to the fourth there was no violation because there was no prior substantial competition. The Thatcher Company was engaged in the manufacture of milk bottles, while the other company was engaged primarily in the manufacture of whiskey bottles and produced only 8,000 gross of milk bottles out of a total production of 1,000,000 gross. The decree of the Circuit Court of Appeals was modified by the Supreme Court on the same grounds as in the Swift and Co. case, *supra* note 9. The case is reported along with the Swift and Co. and Western Meat Co. cases (1926) 272 U. S. 554.

[11] Clayton Act, section 11. 38 Stat. 734 (1914), 15 U. S. C. sec. 21.

the cases present a variety of conflicting interpretations. The first sentence of the above quotation seems to imply powers of minute review of the whole proceeding in order to decide the issues presented, without respect to the Commission's decision. The extent of the limitation on review imposed by the statement that the Commission's findings of facts are conclusive if supported by testimony depends naturally on the interpretation of the term "finding of fact." As in the interpretations of section 7, the court has not enunciated a rule of interpretation which has been followed with any degree of consistency.[12]

In the cases which have sustained the Commission the rule which gives the greatest degree of finality to the Commission's findings is laid down in *Federal Trade Commission v. Pacific Paper Association*,[13] "The weight to be given facts and circumstances admitted, as well as inferences reasonably to be drawn from them is for the Commission." The question of what constitutes a substantial lessening of competition is treated as a finding for the Commission and not as a conclusion of law, for the court holds that the Commission's finding that competition was substantially lessened "cannot be said to be without sufficient support and therefore is conclusive on the court."

In other cases, however, courts have reviewed the evidence and dismissed the case merely by stating that the facts found do not constitute a violation of the statute.[14] These cases proceed on the assumption that the ultimate question of what constitutes violation of section 7 of the Clayton Act is one of law for the court, not the Commission, in direct conflict with the rule announced in the *Pacific Paper Association* case.

In the *Curtis Publishing Company* case[15] the court did not hold that the facts found by the Commission failed to support the

[12] A good discussion of the difficulty of interpretation of the term "finding of fact" as differentiated from a "conclusion of law" is contained in an article by A. M. Tollefon, *Judicial Review of the Decisions of the Federal Trade Commission* (1927) 4 WIS. L. REV. 257.

[13] (1927) 273 U. S. 52. The Commission's order in this case was made under section 5 of the Federal Trade Commission Act, which prohibits "unfair methods of competition." On the question of judicial review of the Commission's orders, actions under this section present the same problem as in section 7 of the Clayton Act.

[14] Fed. Trade Com. v. Kinney-Rome Co. (1921) 275 F. 665; Mennen Co. v. Fed. Trade Com. (1923) 288 F. 774; Fed. Trade Com. v. Gratz (1920) 253 U. S. 421; Fed. Trade Com. v. Raymond Bros. Clark Co. (1922) 280 F. 529.

[15] Fed. Trade Com. v. Curtis Publishing Company (1923) 260 U. S. 568. This case involved an alleged violation of section 3 of the Clayton Act which renders unlawful a sale, or contract of sale, or a lease on the condition that the purchaser or lessee shall not use the commodity of a competitor where the effect of such lease or contract may be to substantially

order, but refused to sustain the findings themselves. The reasonable basis for this holding is that the findings which are not sustained are in reality conclusions of law and that, under the statute, the court is bound by the Commission's findings only where they are findings of fact. Though the decision in the *Curtis Company* case was probably based on this distinction, the broad language of the majority opinion does not limit the court's power to overrule findings to questions of law alone. The principal issue in this case was whether certain contracts between the Curtis Company and its distributors were contracts of sale and hence void as containing a condition restraining the buyer from dealing in goods of a competitor, or whether they were contracts of agency and not within the statute. The Commission found that they were contracts of sale and a violation of section 3 of the Clayton Act.[16] The Court of Appeals inquired into the evidence and, disregarding the Commission's finding, held that the contracts in issue were contracts of agency.[17] The Supreme Court sustained the Court of Appeals, justifying that court's policy of making its own findings by stating, "Manifestly the court must inquire whether the Commission's findings are supported by the evidence. If so supported they are conclusive. But as the statute grants jurisdiction to make and enter on the pleadings, testimony, and proceedings a decree affirming, modifying or setting aside an order, the court must also have power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission. If there be substantial evidence relating to such facts from which different conclusions may be drawn, the matter may be and ordinarily, we think, should be remanded to the Commission—the primary fact-finding body—with directions to make additional findings; but if from all the circumstances it clearly appears that in the interests of justice the contest should be decided without further delay the court has full power under the statute so to do."[18] The late Chief Justice Taft rendered a doubting opinion in which he pointed out that the above quotation was not entirely clear, saying: ". . . if this means that where it clearly appears that there is no substantial evidence to support additional findings necessary to

lessen competition or tend to create a monopoly in any line of commerce. This section is enforceable by the Commission in the same manner as section 7, so that the question of judicial review is the same in both sections.

[16] Fed. Trade Com. v. Curtis Publishing Co. (1919) 2 F. T. C. 20. For the provisions of section 3 of the Clayton Act see *supra* note 15.

[17] Curtis Publishing Co. v. Fed. Trade Com. (1921) 270 F. 881.

[18] Fed. Trade Com. v. Curtis Publishing Co. (1923) 260 U. S. 568, 580.

justify the order of the Commission complained of, the court need not remand the case for further proceedings, I fully concur in it. It is because it may bear the construction that the court has discretion to sum up the evidence pro and con on issues undecided by the Commission and make itself the fact finding body, that I venture with deference to question its wisdom and correctness."[19]

This statement from the majority opinion in the *Curtis Company* case is cited with approval in the *International Shoe Company* case. In the *Curtis Company* case there is some reason to believe that the court meant to limit its power of making findings not reported on by the Commission to matters which were open to only one conclusion from the evidence, and the Chief Justice limited his approval to the statement so construed. In the *International Shoe Company* case, it appears that the court assumes the power which former Chief Justice Taft questioned, for the court reviews the evidence and not only makes findings on matters unreported by the Commission, but makes findings directly opposed to those of the Commission. The court decided that the facts did not constitute a violation of the Clayton Act because: (1) there was no lessening of competition to such a degree as injuriously to affect the public; (2) pre-existing competition is necessary to constitute a violation and there is no pre-existing competition where (a) the bulk of the trade of the two companies is in different sections of the country, (b) there is a difference in appearance and quality of the two products and a consequent appeal to different classes of people, (c) in respect of 95 per cent of the business there is no competition in fact—no observed tendency to contest in the same market for the trade of the same persons, (d) uncontradicted testimony is given by officers of the companies to the effect that competition was incidental and imperceptible; and (3) the purchase by a corporation in need of additional facilities of the stock of another corporation in failing circumstances, the rehabilitation of which is doubtful, is not prejudicial to the public.

The Commission made findings on practically all of these matters.[20] The court's first finding is merely a conclusion from the other findings, even granting the proposition that the transaction must be such as injuriously to affect the public. On the question of pre-existing competition the Commission found in paragraph 5 of its report that the products "were similar in style, comparable in price, and equal or superior in quality (to the shoes produced by the McElwain Company)." Paragraph 2 states that the International Company sold to purchasers in

[19] *Ibid.* 583.

[20] In the Matter of International Shoe Co. (1925) 9 F. T. C. 441.

substantially all the states, and paragraph 3 qualifies this with the statement that the sales were principally to dealers in small towns. Paragraph 4 states that the McElwain Company sold throughout the country.

The Supreme Court found that the McElwain Company was in financial difficulties, its rehabilitation doubtful, and that the purchase possibly saved it from bankruptcy or receivership. Paragraph 9 of the Commission's report states that the McElwain Company had suffered through a temporary drop in prices in 1920 at a time when it had large supplies of hides ordered and other contractual obligations to meet, and that it owed large sums of money to the banks at the time of the acquisition, but that the concern was not insolvent and did not fail. It is pointed out in the dissenting opinion in the Supreme Court that there was testimony to sustain the Commission's finding that the company had value as a going concern in competition.[21]

Thus the Supreme Court in effect weighed the evidence and made its own findings. These findings were not all on matter unreported by the Commission, but as shown above, some of them were in direct conflict with the Commission's findings. In making its own findings and in going into the evidence minutely, weighing it, and deciding, for example, that the Commission should have given more weight to the testimony of officers of the companies to the effect that competition was imperceptible and to the testimony in regard to the financial condition of the McElwain Company, the court not only overruled findings of fact made by the Commission, but summed up the evidence pro and con and assumed the position of the fact-finding body.

The court's conclusion that no competition in fact existed is subject to criticism in that it is arrived at through an assumption of fact-finding powers which the statute vests solely in the Commission. This conclusion is reached by the application of a subjective test much similar to that employed by the Commission. Elementary findings are made from the evidence such as the court's finding that the products varied in quality and appearance and that the bulk of the sales of the two companies was to different classes of people. From such findings inferences are drawn, such as the court's inference that there was no observed tendency to contest. As the final step the court draws its conclusion that no competition in fact existed. This conclusion was sufficient basis for overruling the Commission but the court makes the additional "finding" that there was no lessening of competition to such a degree as injuriously to affect the public. The unnecessary injection of the "rule of reason" not only

[21] (1929) 50 S. Ct. 89, 94.

complicates the issue of this case but adds to the confusion prevalent under the Clayton Act generally. The rule was first employed by the court under the Sherman Act.[22] One of the objectives of the Clayton Act was to supplement this act with prohibitions of practices not specifically condemned under prior anti-trust legislation. Thus the application of the rule of reason defeats the legislative attempt unconditionally to prohibit these practices.[23] If the lessening of competition must be such as injuriously to affect the public, then the interpretation of the expression is entirely different from that employed by the Commission. The Commission is equipped to apply interpretation based on statistics of sales and business practice. There can be no efficient action by the Commission on the vague and perplexing question of public interest, for this question cannot be answered solely on a consideration of all the facts, but must include a consideration of circumstances not within the provisions of the statute. The statute declares the public interest so far as the Commission is concerned and it is empowered to determine only the fact of a violation and to base its order on such fact. If the court adopts a construction which the Commission cannot follow, the benefits of administrative action are lost. For judicial review in this event amounts to a rehearing of the case before the court.

The *International Shoe Company* case, through its application of the doctrine that the transaction must be prejudicial to the public to constitute a violation of the statute, and through its exercise of unlimited power of review, not only usurps the Commission's fact-finding power, but practically negatives the effect of section 7. The case may be considered as expressing the judicial view that sound policy requires the recognition of the industrial trend. So regarded it is a doubtful policy in the face of the declared legislative view to the contrary.

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THE JUVENILE COURT AS A POSSIBLE ADMINISTRATIVE BODY

The possibility of dealing with juvenile delinquency and dependency by administrative action may seem a far cry, but it is

[22] Standard Oil Co. v. United States (1911) 221 U. S. 1, 60, ". . . it was intended that the standard of reason which had applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

[23] See Swift and Co. v. Fed. Trade Com., *supra* note 9.