Cornell Law Review

Volume 14
Issue 1 *December 1928*

Article 2

Uncertainties of Section 7 of the Clayton Act

Ralstone R. Irvine

THE UNCERTAINTIES OF SECTION 7 OF THE CLAYTON ACT

RALSTONE R. IRVINE*

Does the Clayton Act forbid one corporation from acquiring and holding the assets of a competing corporation when those assets are acquired as a result of an illegal acquisition of stock or are paid for in the stock of the acquiring corporation?

In his annual report for the year ending June 30, 1927, Assistant to the Attorney General William J. Donovan, in discussing the enforcement of the antitrust laws, recognized that the recent series of cases entitled *Federal Trade Commission v. Western Meat Company, 272 U.S. 554, 47 Sup. Ct. 175 (1926)*, had left the answer in some doubt. He stated that "It is proposed to institute such proceedings as will result in determining the question as to the power of this Department."

Section 7 of the Clayton Act in part 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.
>
> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially 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 tend to create a monopoly of any line of commerce.[1]

The correct application of this section to the question involved in an acquisition of assets is in part dependent upon a knowledge of the history and purpose of the Clayton Act.

In 1911 the Supreme Court of the United States announced its decisions in the Standard Oil[2] and Tobacco Trust Cases.[3] These cases

*Washington, D. C.

[1]Act of October 15, 1914, 38 Stat. 730, U. S. Comp. Stat. (1916) § 8835, as amended May 15, 1916 and May 26, 1920.

[2]U. S. v Standard Oil Co., 221 U. S. 1, 31 Sup. Ct. 502 (1910).

[3]U. S. v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632 (1910).

adopted the "rule of reason" as the rule of interpretation under which the Sherman Act was to be administered. It is the effect of that rule "that only such contracts and combinations are within the Act as, by reason of their intent or the inherent natures of the contemplated acts, prejudice the public interest by *unduly restricting competition or unduly obstructing the course of trade.*"[4] But these decisions did not overrule prior cases. "Indeed, they declared that prior cases, aside from certain expressions in two of them[5] or asserted implications from them, were examples of the rule and show its thorough adequacy to prevent evasions of the policy of the law by resort to any disguise or subterfuge of form, or the escape of its provisions by any indirection."[6] Unfortunately, however, in the administrative process of dissolving these two trusts, the mandates of the Supreme Court were administered in such a way as to cause some disapproval. The belief developed that the Sherman Law had been emasculated.

The National Platform of the Democratic Party, adopted at the Baltimore Convention in 1912 voiced this feeling in its declaration that "we regret that the Sherman Antitrust Law has received a judicial construction depriving it of much of its efficiency, and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation."[7]

But of greater importance were the protests of the owners of moderate sized businesses.[8] These men declared that these decisions made it impossible to tell what could or could not be done under the Sherman Law. The "rule of reason" was said to be a rule of uncer-

[4]Thomsen v. Cayser, *et al.*, 243 U. S. 66, 84, 37 Sup. Ct. 353 (1916).

[5]U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup. Ct. 540 (1896). U. S. v. Joint Traffic Association, 171 U. S. 505, 19 Sup. Ct. 25 (1898).

[6]Thomsen v. Cayser, *et al.*, *supra* note 4, at 83.

[7]CAMPAIGN TEXT BOOK OF DEMOCRATIC PARTY (1912) 2–6.

[8]On January 20, 1914, the President of the United States delivered a message to Congress in which he recommended additional anti-trust legislation. "The business of the country awaits also, has long awaited and has suffered because it could not obtain, further, and more explicit legislative definition of the policy and meaning of the existing anti-trust law. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure what the law is. Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain." (PRESIDENT WILSON'S STATE PAPERS AND ADDRESSES, at 52.)

tainty resulting in business chaos. There was a growing desire for legislation which would definitely and clearly define those specific business practices which were considered harmful.[9]

The Clayton Act was the outgrowth of these two demands—the one a demand for a more effective antitrust law, and the other a demand for a definite statement of practices and combinations which were illegal.

These two forces are now manifesting themselves in two distinct views of the meaning of Section 7. One group takes the position that the section should be liberally construed in order to achieve the purpose of making the antitrust laws more rigorous and effective. Others insist that the technical form of the transaction is the essence of what was condemned in the seventh section of the Clayton Act. This conflict of construction goes to the heart of the statute and is the fundamental basis for the disagreement and uncertainties expressed in and resulting from the series of cases entitled *Federal Trade Commission v. Western Meat Company*, *supra*, at 560. There it appeared that the Thatcher Manufacturing Company had acquired the stock of four competing corporations. Thereafter a transfer of all the business and assets of three of these corporations was made to the Thatcher Company and the corporations acquired were dissolved. The Federal Trade Commission then issued its complaint. It found that the acquisition of stock had been in violation of Section 7 of the Clayton Act and ordered the company "to cease and desist from the ownership, operation, management and control of assets, properties, rights, etc., secured through such ownership." The Supreme Court

[9]Attorney General Wickersham counseled against such legislation. "I am strongly of the opinion that the advocacy of amendments of the law which shall particularize different acts as constituting unlawful restraints of trade or attempts at monopoly, has its origin, not so much with those who desire the enforcement of the law, as with those who are anxious to secure a safe means of its evasion. An enumeration by statute of the different practices which, in and of themselves, without regard to circumstances of particular cases, should be declared illegal, will either go too far or not far enough. Whether or not, for example, selling a commodity in one part of the country at a price lower than that charged in another part of the country should, or should not be enjoined, must depend entirely upon the nature of the case presented, the circumstances under which such sales are had, the effect upon competition produced thereby, and the extent and character of the control exercised by the vendor over the trade in which he is concerned. Experience in those states in which laws have been enacted particularizing as illegal practices employed in accomplishing a restraint on commerce does not tend to prove that they have strengthened the law or aided its enforcement." 11 ANNUAL REPORTS OF THE ATTORNEYS GENERAL 14.

of the United States held, however, that the power of the Federal Trade Commission is

> limited by Section 11 to an order requiring the guilty person to cease and desist from such violation, effectually to divest itself of the stock, and to make no further use of it. The Act has no application to ownership of a competitor's property and business obtained prior to any action by the Commission, even though this was brought about through stock unlawfully held. *The purpose of the Act was to prevent continued holding of stock and the peculiar evils incident thereto. If purchase of property has produced an unlawful status, a remedy is provided through the courts.* Sherman Act, c. 647, 26 Stat. 209; Act to Create a Federal Trade Commission, c. 311, Section 11, 38 Stat. 717, 724; *Clayton Act, c. 323, Sections 4, 15, 16*, 38 Stat. 730, 731, 736, 737; United States v. American Tobacco Co., 221 U. S. 106. The Commission is without authority under such circumstances.[10]

Mr. Justice Brandeis wrote the dissenting opinion. It was concurred in by the Chief Justice, Mr. Justice Holmes and Mr. Justice Stone.

It has been suggested that the limitation which this case places upon the power of the Federal Trade Commission does not bind the United States, acting through the Attorney General. There are those who urge that if the assets were acquired as an incident to or as the result of an illegal acquisition of stock the United States, under the authority of Section 7 of the Clayton Act, may successfully attack such acquisition even after the dissolution of the corporation whose assets were acquired. They make this argument: The Court in *Federal Trade Commission v. Western Meat Company, supra*, has suggested that there is a remedy under Sections 4, 15, and 16 of the Clayton Act. Sections 4[11] and 16[12] give private litigants legal and

---

[10]At 561. Italics supplied.

[11]That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the District in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Act of October 15, 1914, *supra* note 1.

[12]That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted, and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. *Supra* note 1, § 15.

equitable remedies for violations of the antitrust laws. Section 15[13], however, confers upon the district courts of the United States jurisdiction "to prevent and restrain violations of this act." Jurisdiction under Section 15 must be based upon a violation of the substantive law expressed in Section 7 of the Clayton Act, for clearly no other provision of that act applies. The decision therefore must be limited to the specific facts involved—must be restricted to a mere determination that Section 11[14] of the Clayton Act distinctly limits the power of the Federal Trade Commission to an order requiring the corporation "to cease and desist from such violations, and divest itself of the stock held . . ." whereas the United States is bound by no such limitation. It is therefore urged that the decision intentionally implies that the jurisdiction conferred upon the federal courts is

[13]That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. *Supra* note 1, § 15.

[14]. . . Whenever the commisson 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 two, three, seven, and eight of this Act, it shall issue and serve upon such person 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 or board requiring such persons to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission 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 or board. If upon such hearing the commission 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 held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. *Supra* note 1, § 11.

broad enough to empower them to prevent the retention of assets acquired as the result of the use of stock.

This view is greatly fortified by *dicta* appearing in the subsequent case of *Federal Trade Commission v. Eastman Kodak Company.*[14a] In discussing the holding in the *Western Meat Company case, supra,* the opinion of the court, written by Mr. Justice Sanford, declares:

> The question here presented is in effect ruled by *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554, 561, 563, in which the decisions in *Federal Trade Commission* v. *Thatcher Mfg Co.* (C. C. A.), 5 F. (2d) 615, and *Swift & Co.* v. *Federal Trade Commission* (C. C. A.), 8 F. (2d) 595, that were relied upon by the Commission in its petition for the writ certiorari, were reversed by this Court. In that case it was held that—although the Commission, having been granted specific authority by Section 11 of the Clayton Act to require a corporation that had acquired the stock of a competitive corporation in violation of law "to cease and desist from such violations, and divest itself of the stock held", might require the corporation to divest itself of such stock in a manner preventing its use for the purpose of securing the competitor's property—it could not, after the corporation by the use of such stock had acquired the property of the competitor, require it to divest itself of the property thus acquired so as to restore the prior lawful condition. As to this we said, "The Act has no application to ownership of a competitor's property and business obtained prior to any action by the Commission, even though this was brought about through stock unlawfully held. The purpose of the Act was to prevent continued holding of stock and the peculiar evils incident thereto. *If purchase of property has produced an unlawful status a remedy is provided through the courts."* *And they "must administer whatever remedy there may be in such situation." Distinct reference was there made (p. 561) to Section 15 of the Clayton Act, where express provision is made for the invocation of judicial remedies as need therefor may arise.*[15]

Again the specific reference to Section 15 suggests that for a violation of Section 7 the United States might "after the corporation by the use of such stock had acquired the property of the competitor, require it to divest itself of the property thus acquired so as to restore the prior lawful condition."

In the previous *Western Meat Company case* Mr. Justice Stone had concurred in the dissenting opinion. The dissent rested upon a fundamental difference of opinion as to the meaning of Section 7 and

[14a] 274 U. S. 619, 47 Sup. Ct. 688 (1927).

[15] Federal Trade Commission v. Eastman Kodak Co., *supra* note 14a, at 624. Italics supplied.

was not limited to a mere disagreement as to the powers specifically conferred upon the Federal Trade Commission by Section 11. It was there declared that "the purpose of Section 7 of the Clayton Act was not, as stated by the Court, merely to 'prevent continued holding of the stock and the peculiar evils incident thereto.' It was also to prevent the peculiar evils resulting therefrom."[16] However, in the dissenting opinion in the *Eastman Case*, *supra*, Mr. Justice Stone discusses and perhaps limits the meaning of the decision of the majority in the prior case. In contrasting the broad powers conferred upon the Federal Trade Commission by Section 5 of the Federal Trade Commission Act[17] with those conferred by Section 11 of the Clayton Act he states:

> The powers thus broadly given sharply contrast with the specific enumeration of Sections 7 and 11 of the Clayton Act. As was pointed out in the *Western Meat Co. case*, the Clayton Act prohibits only the acquisition of stock and not the assets of the competing corporation, and in terms merely authorizes an order requiring the corporation "to cease and desist from such violations, and divest itself of the stock held. . . . For that reason alone the majority of the Court thought that the language of these provisions was not broad enough to enable the *Commission* to order the corporation to divest itself of the physical assets thus acquired, although their acquisition aggravated and brought to its final consummation the very evil aimed at by the statute.[18]

This language may indicate that the Court in the *Western Meat Company case* did not flatly decide that Section 7 was intended "to prevent continued holding of stock and the peculiar evils incident thereto." It may mean that the court was discussing not the purpose of Section 7 but the purpose of Section 7 as that purpose had been limited and circumscribed by Section 11. If, as stated, the acquisition of assets is the consummation of the very evil aimed at by Section 7 then it may well be that, under the broad jurisdictional powers conferred on the district courts by Section 15, such holding of assets can be enjoined.

Moreover, it may be pointed out that the Clayton Act was intended to enlarge and support the Sherman Law by reaching restraints of trade in their incipiency. From this premise one may conclude that Section 7 was intended to prevent mergers accomplished by the use of

---

[16]Federal Trade Commission v. Western Meat Co., 272 U. S. 554, 563, 47 Sup. Ct. 175 (1926).

[17]38 Stat. 717, U. S. Comp. Stat. (1916) § 8836-a.

[18]*Supra* note 14a, at 626, 627.

stock, that Section 7 extends to the very situation discussed by the court in the *Western Meat Company Case, supra.*

It is submitted, however, that the better view denies to the United States the power under the Clayton Act to compel a divestiture of assets after the corporation whose assets are acquired has been dissolved, even though the assets are acquired as the result of an illegal acquisition of stock.

The legislative history of Section 7 supports this conclusion.

That Section 7 was intended to apply only to acquisitions of stock is indicated by the fact that several amendments were introduced in Congress which would have made the section specifically applicable to other methods of control and all of these suggestions were rejected by Congress.[19]

Perhaps the chief evil at which the Section was aimed was the "bogus independent." "Bogus independents" had been employed by a large number of organizations which prior to the passage of the Clayton Act had fallen under the condemnation of the Sherman Law. In these cases the controlled corporation was nominally independent, but was in fact effectively managed by the trust which held the stock of the "bogus independent." When the trust could not recover lost business in a particular section of the country the "bogus independent" would be called into service. The trust would refuse to recognize it and would inform the trade that its goods were poor and of a low grade. The price of trust brands would not be lowered but the "bogus independent" by cutting prices would get the business of the independent and thus destroy the real competitor of the trust. In some cases the "bogus independent" might be instructed to make no calls except upon the customers of the true independent competitors, in others it might be prohibited from selling to customers of the trust at less than the regular market prices. It is needless to say that the trust supplied the "bogus independent" with goods and capital.[20]

---

[19]For example Senator Cummins introduced an amendment which provided in part: "That it shall be unlawful for any corporation to acquire, own, hold or control either directly or indirectly the whole or any other part of the capital stock or the share capital or any other means of control or participation in the control of any other corporation also engaged in commerce . . ." 51 CONG. REC. 14315 (1914).

[20]Senator Cummins, one of the conferees on the bill, indicates the limits of the section.

. . . I cannot quite agree with the Senator from Montana. Suppose there were a hundred corporations engaged in a certain kind of business scattered all over the United States. I do not believe it would be a violation of the anti-trust

But the enactment of Section 7 was probably intended to do more than condemn the secret acquisition of stock for the purpose of maintaining a "bogus independent." Indeed, the language used condemns the holding of stock, regardless of the existence or threat of bogus competition. There are three conditions named in the 7th section of the Clayton Act which render illegal the acquisition of stock. They are: (1) substantial lessening of competition between the corporations involved, (2) restraining of trade in any community or section, and (3) tendency to create a monopoly. In the first instance the test of illegality is the tendency of the acquisition to lessen competition between the corporation acquiring the stock and the corporation or corporations whose stock is acquired. This test is clearly too severe and unfair, if its sole and only purpose is to prevent and eliminate the "bogus independent." For a "bogus independent" is used to restrict competition between the parent company and its true competitors, and not between the parent company and the "bogus independent." The existence of competition between the acquired and acquiring companies throws no light on whether it is intended to create a "bogus independent." The section seems to have been aimed at something more than the "bogus independent."

The report submitted by the Committee on the Judiciary indicates the intention of Congress to supplement the Sherman Antitrust Law. It stated that:

---

law for one corporation of the hundred to sell out to another. There would still remain in all probability, that full and substantial competition which the anti-trust law requires. I do not think that the anti-trust law condemns every lessening of competition; otherwise it would have to be construed to mean that one concern could not under any circumstances buy or absorb another. I think it depends on circumstances whether such a transaction can lawfully occur or not.

Mr. Walsh: That, of course, is qualified by the clause where the effect is to substantially lessen competition.

Mr. Cummins: It would lessen competition as between the two, but, of course, if one had a right under the law to buy out the other it could not be any offense against the law, as it is now, for one to acquire control of the other. It is just that case that we want, as I think, to prohibit, so that if a consolidation can lawfully occur under the anti-trust laws, it shall be an open, public consolidation, so that everybody can know what is transpiring. . . . I do not believe that is the proper construction of the anti-trust law; otherwise there could be no sale of business. I think there can be, but *wherever the law permits the sale of the business, then it ought to be open and public, and a corporation ought not to acquire control of a business simply through the purchase of the stock of a company which continues under its own name, and, so far as the public knows, is independent in its management. That is what I* think this section is intended in the main to prevent. (Italics the writer's) 51 CONG. REC. 14315–6 (1914). For a discussion of the use of the "bogus independent" see STEVENS, UNFAIR COMPETITION (1917) 28.

> Broadly stated, the bill, in its treatment of unlawful restraints and monopoly, 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, before consummation. Among others of these *trade practices* which are denounced and made unlawful may be mentioned discrimination in prices for the purpose of wrongfully injuring or destroying the business of competitors; exclusive and tying contracts; *holding companies;* and interlocking directorates. (Italics supplied).

And this report conclusively establishes that Section 7, formerly Section 8, was aimed at the holding company and at all the evils incident to such a practice, including the evil of the bogus independent.

> Section 8 deals with what is commonly known as the "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 understood the term a "holding company" is a company whose *primary* purpose is to hold stock of other companies. It has usually issued its own shares in exchange for those stocks, and is a means of holding under one control the competing companies whose stocks it has thus acquired. As thus defined a "holding company" is an abomination and in our judgment is a mere incorporated form of the old-fashioned trust. Most of the corporations engaged in interstate commerce are organized under the laws of one or the other of the states. It is right that this should be so, and it is right that the various states, each of which has the right to exclude corporations of any other state from its borders, should exhibit comity to these other states, and that the Federal Government, which perhaps has the right to exclude corporations of any state from interstate commerce, should exhibit comity to all the states.
>
> At common law a corporation had no right to own stock in another corporation, but from time to time the various states have by special statutes, permitted it, until now certainly more than a majority of all the states permit corporate stockholding either generally or of certain kinds and under certain conditions. This legislation in its early operation may have served a useful, economic purpose. Trade and commerce could do as well without steam and electricity as without the idea of the commercial unit which is embodied in the word "corporation." Hence there are certain corporations which may properly be interested with individuals other than its own stockholders, but experience has taught us that *the "holding company" as above described* no longer serves any purpose that is helpful to either business or the community at large *when it is operated purely as a "holding company."* Section 8 is intended to elim-

> inate this evil so far as it is possible to do so, making such exceptions from the law as seem to be wise, which exceptions have been found necessary by business experience and conditions, and the exceptions herein made are those which are not deemed monopolistic and do not tend to restrain trade.[21]

But however interesting an examination of the history of the Act may be, it is probable that the statute will be interpreted without resort to the debates and the committee reports. The Supreme Court of the United States has already indicated its belief that "the words of the Act are plain and the meaning is apparent without resort to the extraneous statement and often unsatisfactory aid of such reports."[22]

Section 7 in terms condemns the acquisition of stock. It does not mention assets. And the history of the Act indicates plainly enough that Congress did not fail to choose apt language to express its purpose. Moreover, the Supreme Court has said in the *Western Meat Company Case, supra*, that "The purpose of the Act was to prevent *continued holding of stock and the peculiar evils incident thereto*." And the four members of the Court who dissented had no doubt that this was the specific holding of the Court.

But what of the reference to a remedy under Section 15 of the Clayton Act?

The argument that this citation of Section 15 means that the United States may compel the return of assets after the corporation whose stock is acquired has been dissolved and therefore after all ownership of stock has ceased comes to this: The district courts have been given jurisdiction under Section 15 of the Clayton Act to require the return of assets although the holding of these assets does not violate the purpose of the Act. Of course no court will enforce an act contrary to its purpose and beyond its wording. No court may properly retain jurisdiction unless that jurisdiction is founded on some violation of law. The only alternative argument is that the Supreme Court used the above language, descriptive of the purpose of Section 7, loosely, that the Court did not mean what it plainly said, and that the Justices who dissented were in error when they ascribed the meaning to the opinion which its words had clearly expressed.

While it is therefore believed that Section 7 does not condemn such a holding of assets it is nevertheless felt that the language of the Supreme Court and particularly the reference to Scetion 15, leaves the answer in substantial doubt.

Less troublesome is the question presented when corporation A acquires the assets of its competitor, corporation B, and pays for those assets with its own stock.

---

[21]SEN. REP. No. 698, 63d Cong. 2d Sess., July 22, 1914. Italics supplied.

[22]Standard Co. v. Magrane & Houston, 258 U. S. 346, 356, 42 Sup. Ct. 360 (1922).

The committee reports submitted to Congress contain no suggestion that this situation was contemplated by Section 7. There was at least one specific statement made during the Senate debates to the effect that this state of facts did not come within the condemnation of the law.[23] And yet an Attorney General of the United States recognized the situation presented as a doubtful and a difficult one.[24]

If, as stated by the Supreme Court, the purpose of Section 7 was "to prevent continued holding of stock and the peculiar evils incident

---

[23]Senator Colt stated: "Now I should like to ask the Senator from Missouri if the same effect, so far as the elimination of competition is concerned would not be accomplished if Corporation B was wound up and Corporation A bought the property and paid for it in stock of the company? I cannot quite understand the reasons upon which this provision is founded if its purpose is to prevent the suppression of competition."

Senator Reed replied:

"It is no answer either to say that the corporation might sell all of its assets to another corporation, or that a corporation might go out of business and its property might be acquired by another corporation. When that is done, it means an increase of capital stock. It means that there is given to the world knowledge of the fact that the property of the business are thus controlled; whereas, under the method of stock ownership that has been exercised in this country for years a secret control and frequently monopoly is almost completelyworked outthrough it."

These remarks were made relative to an amendment proposed by Senator Reed which provided:

"That no corporation engaged in commerce shall acquire directly or indirectly the whole or any part of the stock or other shared capital of other corporations engaged also in commerce in the same line or lines of business." 51 CONG. REC. 14456–14457 (1914).

[24]In considering certain steel mergers Attorney General Daugherty found that the mergers would not substantially lessen competition.

"This conclusion renders it unnecessary for me to consider another question, the solution of which is attended with no little difficulty, and that is whether the proposed merger would fall within this Act if its effect were to substantially lessen competition. As we have just seen, that Act does not in express terms prohibit the acquisition of physical assets. What it prohibits is the acquisition of "the stock or other share capital." What the Bethlehem Co. in this instance proposes to do is to acquire, not the capital stock of the Lackawanna, but an outright conveyance of its physical assets. The Federal Trade Commission, by a ruling made in 1916, announced that in its opinion the Act did not prohibit the acquisition of the physical assets of one corporation by another. As that body, no less than myself, is charged with the duty of enforcing certain provisions of this Act, its administrative construction of the section in question is entitled, under a long and well-recognized line of authorities, to great weight. In this instance, however, the plan of purchase contemplates that the Lackawanna shall convey its property to the Bethlchem in return for shares of stock of the latter company, to be followed by an early winding up and dissolution of the Lackawanna and the distribution of these shares among the Lackawanna stock-thereto" it is clear that an acquisition of assets is not condemned even though the assets are paid for in stock. The evil, which is the elimination of competition, may be incident to the acquisition of assets, but it is only indirectly the result of the holding of stock.

Also, even if the purpose of the Section be as stated by a minority of the Court to "prevent the peculiar evils resulting" from the holding of stock such an acquisition of assets would seem not to be condemned. The loss of competition could be only remotely charged to any holding of stock and it therefore seems that this situation should on principle be judged as any other acquisition of assets would be and that the answer should not be influenced by the fact that the acquiring corporation chose to pay for the assets in stock and not in cash. But here also there is the fundamental conflict of opinion as to the purpose of Section 7.

These uncertainties suggested by the *Western Meat Company Case supra*, raise important questions of public policy. Is there need for an interpretation of Section 7 which will make that Section applicable to certain acquisitions of assets? Is there need for additional legislation?

It is true that under existing law, particularly the law announced in *United States v. United States Steel Corporation*,[25] the dominance obtained by a corporation in any line of commerce must be very great before a court will infer an intent to monopolize from a mere acquisition of assets. But if a more strenuous law be needed, if certain mergers not now reached by the Clayton Act or the Sherman Law must be prevented in their incipiency, it is submitted that the solution does not lie in condemning acquisitions of assets which result merely in lessening competition between the corporations involved. The opinion is hazarded that the public welfare does not call for the prevention of all mergers of two or more corporations, more or less competing, where the effect is limited to the elimination of competition existing among them and where the resulting effect is not substantially to lessen competition in the country at large or in any given section or does not tend to create a monopoly in the commerce involved. If supplemental legislation is needed to reach consolidations in their incipiency, it might better be confined to condemning acquisitions of assets and stocks resulting in the substantial lessening of competition or which tend to create monopoly in any line of commerce *in the country at large or in any section thereof.*

---

holders. I need not, however, stop to consider whether, under other circumstances, this would be a violation of the Act, for the conclusion I have just announced makes it unnecessary to do so." 33 Opinions of Attorneys General 241–242(1922).

[25] 251 U. S. 417, 40 Sup. Ct. 293 (1920).