Calendar No. 1777

81st Congress, 2d Session | SENATE | Report No. 1775

AMENDING AN ACT ENTITLED "AN ACT TO SUPPLEMENT EXISTING LAWS AGAINST UNLAWFUL RESTRAINTS AND MONOPOLIES, AND FOR OTHER PURPOSES," APPROVED OCTOBER 15, 1914 (38 STAT. 730), AS AMENDED

June 2 (legislative day, March 29), 1950.—Ordered to be printed

Mr. O'Conor, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 2734]

Together with the

MINORITY VIEWS OF MR. DONNELL

The Committee on the Judiciary, to whom was referred the bill (H. R. 2734) to amend an act entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (38 Stat. 730), as amended, having considered the same, report favorably thereon, with amendments, and recommend that the bill, as amended, do pass.

AMENDMENTS

1. On page 4, line 7, strike out the word "Authority" and insert in lieu thereof the word "Board".
2. On page 4, line 9, strike out the comma following the words "Exchange Commission" and insert the words "in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission,".
3. On page 4, line 11, strike out the word "Authority,".
4. On page 4, line 20, strike out the word "Authority" and insert in lieu thereof the word "Board".
5. On page 5, line 3, strike out the word "Authority,".
6. On page 5, line 13, strike out the word "Authority,".
7. On page 5, line 18, strike out the word "Authority,".
8. On page 5, line 22, strike out the word "Authority,".
9. On page 5, line 23, strike out the word "Authority,".
10. On page 6, line 12, strike out the word "Authority,".
11. On page 6, line 18, strike out the word "Authority,".
12. On page 6, line 19, strike out the word "Authority,".
13. On page 7, line 1, strike out the word "Authority,".
14. On page 7, line 8, strike out the word "Authority,".

15. On page 7, line 9, strike out the word "Authority,".
16. On page 7, line 16, strike out the word "Authority,".
17. On page 7, line 18, strike out the word "Authority,".
18. On page 7, line 21, strike out the word "Authority,".
19. On page 8, line 7, strike out the word "Authority,".
20. On page 8, line 11, strike out the word "Authority,".
21. On page 8, line 13 and 14, strike out the word "Authority,".
22. On page 8, line 18, strike out the word "Authority,".
23. On page 8, line 19, strike out the word "Authority,".
24. On page 8, line 21, strike out the word "Authority,".
25. On page 9, line 3, strike out the word "Authority,".
26. On page 9, line 7, strike out the word "Authority,".
27. On page 9, line 11, strike out the word "Authority,".
28. On page 9, line 13, strike out the word "Authority,".

PURPOSE OF THE AMENDMENTS

The purpose of the amendments is to include in the bill the recommendations of the United States Maritime Commission and the Securities and Exchange Commission, which the committee believe to be justified, and to change the Civil Aeronautics Authority to Civil Aeronautics Board which is the interested agency under this bill. The amendments striking out the wood "Authority" is because the change from Air Aeronautics Authority to Civil Aeronautics Board renders the word "Authority" unnecessary.

PURPOSE

The purpose of the proposed legislation is to prevent corporations from acquiring another corporation by means of the acquisition of its assets, whereunder the present law it is prohibited from acquiring the stock of said corporation. Since the acquisition of stock is significant chiefly because it is likely to result in control of the underlying assets, failure to prohibit direct purchase of the same assets has been inconsistent and paradoxical as to the over-all effect of existing law.

STATEMENT

H. R. 2734 proposes to amend sections 7 and 11 of the Clayton Act, which are sections 18 and 21 of the United States Code, Title 15. There is also a companion bill in the Senate which provides for the same amendment, said bill being S. 56, Eighty-first Congress.

Extensive hearings have been had on H. R. 2734 and the following statement is its findings and conclusions based upon a study of said hearings.

How H. R. 2734 amends

1. H. R. 2734 proposes to amend section 18, title 15 of the United States Code, so as to prohibit the acquisition of the whole or any part of the assets of another corporation when the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly.

2. The bill also contains a new section exempting transactions duly consummated pursuant to the authority of the Civil Aeronautics Authority, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Secretary of Agriculture, the Maritime Commission, or the Securities and Exchange

Commission operating under section 10 of the Public Utility Holding Company Act.

3. The proposed enactment, in its amendment of section 11 of the Clayton Act, which is section 21, title 15, United States Code, allows the Attorney General to intervene and appear in any proceeding brought by any Commission, Authority, or Board to enforce sections 2, 3, 7, or 8 of the Clayton Act. This does not affect the jurisdiction of the Department of Justice to enforce these sections in the courts.

The amendment modifies section 18, as it applies both to acquisitions of stock and acquisitions of assets, in that it does not make the lessening of competition between the acquiring and the acquired firms a test of violation. It also leaves out the word "community" and refers only to commerce in any section of the country.

THE LEVEL OF ECONOMIC CONCENTRATION

The purpose of the proposed bill, H. R. 2734, is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions. The bill would accomplish this purpose by enabling the Federal Trade Commission to prevent those acquisitions which substantially lessen competition or tend to create a monopoly. Since 1914 the Commission has had the power to prevent such acquisitions when they are effected through the purchase of stock. The objective of Congress in passing section 7 of the Clayton Act has been circumvented by the acquisition of assets rather than, or in addition to, the purchase of stock. The proposed bill would eliminate this practice by extending the application of the Clayton Act to acquisitions of assets.

While there exist many differences of opinion on other aspects of the monopoly problem, there is substantial agreement that the level of economic concentration is extremely high.

The extent to which the American economy has become concentrated and centralized in the hands of a few giant corporations was strikingly revealed before this Committee in figures presented by Dr. Wilfred I. King, professor emeritus of economics at New York University. The figures which he presented reveal an extraordinary level of concentration. Thus, his figures show that in 1946, the latest year for which such data are available, one-tenth of one percent of the total number of all American corporations—the giant firms with assets of $100,000,000 and over—owned 49 percent of the assets all American corporations; 2 percent of the number of corporations owned 78 percent; 8 percent of the number owned 89 percent of the assets; and 12 percent owned 92 percent of the assets. At the other end of the scale, 45 percent of the number of corporations—the small firms with assets of $50,000 or less—owned less than 1 percent of the assets.

The figures presented by Dr. King also show that in the field of manufacturing alone, the 25 largest corporations in 1948 owned 27 percent of the total assets of all manufacturing corporations, or a little more than an average of 1 percent of the assets for each of the 25 corporations.

The enactment of the bill will limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy.

General History of H. R. 2734 and Tests of the Effect on Competition

The present wording of H. R. 2734 is intended to cover more than is prohibited by the Sherman Act and yet to stop short of the stated test of the present section 7 of the Clayton Act. Section 7 of the Clayton Act was originally written to reach effects beyond those prohibited by the Sherman Act, extending to the reduction of the competition which had previously existed between the acquiring and acquired companies. This latter feature, namely the effect on competition between the acquiring and acquired corporations, has been regarded as the distinctive "Clayton Act test," insofar as it relates to section 7 of the Act.

The purpose of H. R. 2734 was to make this legislation extend to acquisitions which are not forbidden by the Sherman Act. But here a problem presented itself. While on the one hand it was desired that the test be more inclusive and stricter than that of the Sherman Act, on the other hand it was not desired that the bill go to the extreme of prohibiting all acquisitions between competing companies. The present wording of H. R. 2734, but beginning with H. R. 515, introduced on April 24, 1947, represents an attempt to solve this problem. Several steps have been taken in order to achieve a solution.

Principal among them was the deletion of any reference to the effect on competition between the acquiring and acquired firms. The first versions of the bill to amend section 7 were S. 615, introduced on February 26, 1945, and its companion measure, H. R. 4519, introduced on October 29, 1945. These bills simply extended the present wording of the Clayton Act to cover acquisitions of assets. The test of competition between the acquiring and acquired firms was left in the bill and made applicable to assets, as well as to stock. However, in the course of hearings on this bill in the House Judiciary Committee, this wording was objected to on the grounds that it might be so construed as to prevent all acquisitions between competitors. Accordingly, subsequent versions of the bill, including the present H. R. 2734, deleted any reference to the effect on competition between the acquiring and acquired firms.

Another step which had the same general effect is also to be found in the legislative history of the present bill. As the bill originally stood, it was to be violated if, among other things, competition was substantially lessened "* * * in any community * * *" of the country. The use of this word raised a storm of controversy, centering around the possibility that the act, so worded, might go so far as to prevent any local enterprise in a small town from buying up another local enterprise in the same town. As a consequence, the word "community" was dropped from the subsequent versions of the bill.

The committee believe that the excessive sweep that has been given to section 7 of the present Clayton Act by these two features of that section has been largely responsible for the tendency of the courts in cases under that section to revert to the Sherman Act test. By eliminating the provisions of the existing section that appear to reach situations of little economic significance, it is the purpose of this legislation to assure a broader construction of the more fundamental provisions that are retained than has been given in the past. The committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.

The type of problem to which this bill is addressed was described by the Federal Trade Commission in these words:

> Under the Sherman Act, an acquisition is unlawful if it creates a monopoly or constitutes an attempt to monopolize. Imminent monopoly may appear when one large concern acquires another, but it is unlikely to be perceived in a small acquisition by a large enterprise. As a large concern grows through a series of such small acquisitions, its accretions of power are individually so minute as to make it difficult to use the Sherman Act test against them * * *
>
> Where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four large concerns produce the entire supply. This latter pattern (which economists call oligopoly) is likely to be characterized by avoidance of price competition and by respect on the part of each concern for the vested interest of its rival * * * (The Merger Movement, A Summary Report, pp. 6–7).

To make clearer the intent to give the bill broad application to acquisitions that are economically significant, its wording has been broadened in certain respects. Thus, the phrase "in any section of the country" was made applicable to both the lessening of competition and the tendency to create a monopoly. As the bill originally stood, it applied only to the former. Hence, an acquisition is not to be interpreted merely in terms of either its effect on competition or its tendency to create a monopoly "in the Nation as a whole." The act is to be violated if, as a result of an acquisition, there would be a substantial lessening of competition or a tendency to create a monopoly in any section of the country.

Similarly, the phrase "in any line of commerce," was also made applicable to both as above. As the bill originally stood, the phrase applied only to the tendency to create a monopoly. It is intended that acquisitions which substantially lessen competition, as well as those which tend to create a monopoly, will be unlawful if they have the specified effect in any line of commerce, whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition.

These various additions and deletions—some strengthening and others weakening the bill—are not conflicting in purpose and effect. They merely are different steps toward the same objective, namely, that of framing a bill which, though dropping portions of the so-called Clayton Act test that have no economic significance, reaches far beyond the Sherman Act.

The meaning of significant terms and phrases is discussed below:

"Section of the country"

Although it is, of course, impossible to define rigidly what constitutes a "section of the country," certain broad standards reflecting the general intent of Congress can be set forth to guide the Commission and the courts in their interpretation.

What constitutes a section will vary with the nature of the product. Owing to the differences in the size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section, whether such a definition were based upon miles, population, income, or any other unit of measurement. A section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product, such as milk.

As the Supreme Court stated in *Standard Oil Co.* v. *U. S.* (337 U. S. 293), "Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition."

In determining the area of effective competition for a given product, it will be necessary to decide what comprises an appreciable segment of the market. An appreciable segment of the market may not only be a segment which covers an appreciable segment of the trade, but it may also be a segment which is largely segregated from, independent of, or not affected by the trade in that product in other parts of the country.

It should be noted that although the section of the country in which there may be a lessening of competition will normally be one in which the acquired company or the acquiring company may do business, the bill is broad enough to cope with a substantial lessening of competition in any other section of the country as well.

The scope of the words "may be"

The words "may be" appear in the bill in defining the effect on competition of the forbidden acquisitions. Acquisitions are forbidden only where in any line of commerce in any section of the country the effect "may be" substantially to lessen competition or to tend to create a monopoly.

The use of these words means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed effect, as determined by the Commission in accord with the Administrative Procedure Act.

The words "may be" have been in section 7 of the Clayton Act since 1914. The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints.

The status of administrative agency findings of fact

The same theory should apply to the administrative agency findings of fact as that set forth above for the words "may be." The procedural wording of H. R. 2734 is the same as that contained in section 7 of the Clayton Act since 1914.

Section 21, title 15, of the United States Code provides that "the findings of the Commission or Board as to the facts, if supported by testimony, shall be conclusive," while H. R. 2734 provides that "the findings of the Commission, Authority, or Board as to the facts, if supported by substantial evidence, shall be conclusive." The courts have interpreted the language of section 21 as equivalent to the requirement of substantial evidence, and the Administrative Procedure Act requires that findings as to facts shall be supported by reliable, probative, and substantial evidence. The intent of the present bill is not to introduce new standards of proof, but to reaffirm existing standards.

Companies in a failing or bankrupt condition

The argument has been made that the proposed bill, if passed, would have the effect of preventing a company which is in a failing or bankrupt condition from selling out.

The committee are in full accord with the proposition that any firm in such a condition should be free to dispose of its stock or assets. The committee, however, do not believe that the proposed bill will prevent sales of this type.

The judicial interpretation on this point goes back many years and is abundantly clear. According to decisions of the Supreme Court, the Clayton Act does not apply in bankruptcy or receivership cases. Moreover, the Court has held, with respect to this specific section, that a company does not have to be actually in a state of bankruptcy to be exempt from its provisions; it is sufficient that it is heading in that direction with the probability that bankruptcy will ensue. On this specific point the Supreme Court, in the case of *International Shoe Co.* v. *Federal Trade Commission* (280 U. S. 281) said:

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

It is expected that, in the administration of the act, full consideration will be given to all matters bearing upon the maintenance of competition, including the circumstances giving rise to the acquisition.

Difference from H. R. 2734 as passed by the House of Representatives August 15, 1949

The proposed bill differs from the bill passed by the House of Representatives in three respects:

(1) The word "Authority" has been changed to "Board" so as to read "Civil Aeronautics Board" for the reason that under the Reorganization Plans III and IV of 1940, the functions of the Civil Aeronautics Authority were transferred to the Civil Aeronautics Board.

(2) The Maritime Commission, at its request has been included in the category of agencies to which the act does not apply when transactions are duly consummated pursuant to authority given to that Commission. In making this addition, however, it is not intended that the Maritime Commission, or, for that matter, any other agency included in this category, shall be granted any authority or powers which it does not already possess.

(3) At the request of the Securities and Exchange Commission the exemption relating to that Commission has been limited to the exercise of the jurisdiction of that Commission under section 10 of the Public Utilities Holding Company Act of 1935.

There are in the files of the Senate Judiciary Committee, in addition to the printed hearings on H. R. 2734, numerous communications and recommendations from interested departments, agencies, and individuals, but due to their great number, they are not attached as part of this report.

On the basis of the foregoing, it is the opinion of the committee that the bill, H. R. 2734, should be and is recommended for favorable consideration.

CHANGES IN EXISTING LAW

In compliance with rule XXIX of the Standing Rules of the Senate, as amended, there is printed below in roman existing law in which no change is proposed with matter proposed to be stricken out enclosed in black brackets, and new matter proposed to be added shown in italic.

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

SEC. 7. *That* no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital *and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets* of another corporation engaged also in commerce, where *in any line of commerce in any section of the country,* the effect of such acquisition may be [to] substantially *to* lessen competition, [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 *to* tend to create a monopoly [of any line of commerce].

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital *and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets* of *one* [two] or more corporations engaged in commerce, where *in any line of commerce in any section of the country,* the effect of such acquisition, *of such stocks or assets,* or *of* the use of such stock by the voting or granting of proxies or otherwise, may be [to] substantially *to* lessen competition, [between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community] or *to* tend to create a monopoly [of any line of commerce].

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other [such] common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under *section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.*

SEC. 11. That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics [Authority] *Board* where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

Whenever the Commission, [Authority,] or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person *and the Attorney General* a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission, [Authority,] or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. *The Attorney General shall have the right to intervene and appear in said proceeding and* any person may make application, and upon good cause shown may be allowed by the Commission, [Authority,] or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in such proceeding shall be reduced to writing and filed in the office of the Commission, [Authority,] or Board. If upon such hearing the Commission, [Authority,] or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, *or other share capital, or assets,* held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a [circuit court of appeals of the] United States *court of appeals* as hereinafter provided, the Commission, [Authority,] or Board may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the Commission, [Authority,] or Board while the same is in effect, the Commission, [Authority,] or Board may apply to the [circuit court of appeals of the] United States *court of appeals* within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission, [Authority,] or Board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, [Authority,] or Board. The findings of the Commission, [Authority,] or Board as to the facts, if supported by [testimony] *substantial evidence*, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, [Authority,] or Board, the court may order such additional evidence to be taken before the Commission, [Authority,] or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission, [Authority,] or Board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by [testimony] *substantial evidence*, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section [240 of the Judicial Code] *1254 of title 28, United States Code.*

Any party required by such order of the Commission, [Authority,] or Board to cease and desist from a violation charged may obtain a review of such order in said [circuit court of appeals] *United States court of appeals* by filing in the court a written petition praying that the order of the Commission, [Authority,] or Board be set aside. A copy of such petition shall be forthwith served upon the Commission, [Authority,] or Board, and thereupon the Commission, [Authority,] or Board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission, [Authority,] or Board as in the case of an application by the Commission, [Authority,] or Board for the enforcement of its order, and the findings of the Commission, [Authority,] or Board as to the facts, if supported by [testimony] *substantial evidence*, shall in like manner be conclusive.

The jurisdiction of the [circuit court of appeals of the] United States *court of appeals* to enforce, set aside, or modify orders of the commission, [authority,] or board shall be exclusive.

Such proceedings in the [circuit court of appeals] *United States court of appeals* shall be given precedence over [other] cases pending therein, and shall be in every way expedited. No order of the commission, [authority,] or board or the judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust Acts.

Complaints, orders, and other processes of the commission, [authority,] or board under this section may be served by anyone duly authorized by the commission, [authority,] or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

MINORITY VIEWS OF MR. DONNELL

The proposed act (H. R. 2734) to amend an act entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (38 Stat. 730), as amended, should, for reasons hereinafter set forth, not be enacted into law.

I. Purpose of the Bill

The majority report says:

> The purpose of the proposed legislation is to prevent corporations from acquiring another corporation by means of the acquisition of its assets, whereunder the present law it is prohibited from acquiring the stock of said corporation.

The purpose of the proposed bill, H. R. 2734, as further stated in the majority report, is—

> to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions.

II. There Is No Showing, in the Majority Report, of the Existence of Economic Need for H. R. 2734

The majority report states that—

> there is substantial agreement that the level of economic concentration is extremely high.

Figures presented by Dr. Willford I. King, professor emeritus of economics at New York University, are set forth in the majority report as revealing "an extraordinary level of concentration." It is significant, however, that, notwithstanding the emphasis which is thus laid by the majority report on the height of the economic concentration level, said report does not assert that acquisitions, by one corporation, of assets of another corporation or of other corporations have caused any great increase in such level.

In considering whether the present level of concentration demonstrates the existence of a need for enactment of H. R. 2734, attention is called to an instructive article (Senate subcommittee hearings p. 371 ff.), prepared to appear in the February 1950 issue of the Review of Economics and Statistics, by Doctors John Lintner and J. Keith Butters on "Effect of Mergers on Industrial Concentrations, 1940–47." The material in that article was originally prepared as part of the background for a monograph which is one part of the study of the effects of taxation on business decisions, which has been conducted at the Harvard Graduate School of Business Administration under a grant from the Merrill Foundation for the Advancement of Financial Knowledge.

The authors of said article point out the general recognition of the fact—

> that the high degree of industrial concentration which characterizes our economy today *stems largely* from the two waves of merger activity *in the late nineteenth*

century which were typified by the formation of the Standard Oil trust in 1879 and, later, of the billion dollar United States Steel Corp. *at the turn of the century.* [Our emphasis.]

The article further points out that—

The major merger movement of *the 1920's* still further increased prevailing levels of concentration. [Our emphasis.]

It is true that (*a*) since 1940 there has occurred what Doctors Lintner and Butters term "the resurgence of large-scale merger activity in the United States," (*b*) according to them in "manufacturing and mining alone the financial manuals list approximately 2,000 formerly independent companies which disappeared as a result of mergers and acquisitions by other companies in the 8-year period, 1940–47." and (*c*) to quote further from the above-mentioned article:

The companies so absorbed held assets, at the date of sale or merger, estimated by the Federal Trade Commission to amount to approximately $5 billion.

Indeed, the Federal Trade Commission, in its 1948 report on the merger movement, says:

The importance of external expansion in promoting concentration has never been more clearly revealed than in the acquisition movement that is taking place at the present time—a movement which is strengthening the position of big business in several ways.

Messrs. Lintner and Butters developed points, however, which seem to them "to essentially reverse the major conclusion on the contribution of mergers to increasing general concentration." The apparent contradiction between many of the findings of Messrs. Lintner and Butters and those of the Federal Trade Commission is explained, so Messrs. Lintner and Butters inform us, for the most part "by the fact that the Commission analyzed primarily data on the *numbers of mergers* whereas our" [i. e., Messrs. Lintner and Butters'] "analysis also takes full account of *the size of the merged companies.*" [Our emphasis.]

The Lintner and Butters article points out that—

for all manufacturing and mining companies during the 8-year period, 1940–47, mergers were a much less important source of growth for large companies than for smaller companies.

Moreover the authors of the article further state:

Technical measures of concentration in the asset holdings of manufacturing and mining companies show only a slight increase in concentration as a result of merger activity during 1940–47.

The writers of the article point out that—

(*a*) The total assets acquired through merger or purchase during the 1940–47 period by all manufacturing firms with assets of over $100,000,000 at the time of acquisition amount to $780,000,000, or only 2.1 percent of the total assets of all firms with assets of over $100,000,000 at the end of 1946.

(*b*) The corresponding figure for all firms with assets of over $50,000,000 at the end of 1946 is 2.8 percent.

(*c*) The ratio generally used to measure relative concentration or inequality—when computed for the asset distribution of all companies—increased, on account of mergers, by less than 1 percent during the 1940–47 period.

(*d*) When computed separately for both the 500 and the 1,000 largest manufacturing companies, however, the index was actually reduced by the merger activity of these firms.

Messrs. Lintner and Butters further state:

Since particular importance attaches to the distribution of assets among the largest companies, we also computed the index of concentration for the 500 and the 1,000 largest manufacturing companies as of the end of 1946. In both instances relative concentration was reduced as a result of all the acquisitions of these companies over the 8-year period. The index for the 1,000 largest was reduced from 0.639 to 0.632. For the 500 largest the decrease was substantially greater, from 0.550 to 0.534, or by about 3 percent as compared to the increases of about 1 percent for all manufacturing and mining as a whole.

Moreover mergers are not the only factors which have entered into concentration since 1940. Messrs. Lintner and Butters say:

In general, our findings indicate that, because of their large absolute size, other factors such as retained earnings and the relative availability of outside capital have potentially much greater effects on concentration than mergers have had since 1940.

The concluding two paragraphs of the article of Messrs. Lintner and Butters read:

In conclusion, the *Federal Trade Commission correctly appraised the recent merger movement in describing its outstanding characteristic* insofar as its impact on concentration is concerned as "* * * the absorption of smaller, independent enterprises by larger concerns." But it *drew an erroneous inference* as to the significance of this characteristic. Rather than promoting concentration this very characteristic explains why *the recent merger movement has had such slight effect on over-all levels of concentration.*

This same characteristic also distinguishes the recent merger movement from its major predecessors which were characterized by conbinations in which very large-corporations acquired other very large corporations. In fact, the combination of very large companies was the dominant characteristic of the great waves of mergers of from 50 to 75 years ago which gave "American industry its characteristic twentieth century concentration of control." Such combinations also played an important role in the extraordinarily active merger movement of the 1920's. In striking contrast, *in the recent merger movement combinations between very large companies have been negligible in number.* [Our emphasis.]

It would be reasonable to expect that, if the level of economic concentration has in recent years been materially raised through the medium of acquisition by one corporation of the assets of another or of others, the majority report would have contained a finding to that effect. No such finding appears in that report. Not only is such finding absent from the report, but Doctors Lintner and Butters say:

To sum up, mergers have been responsible for such a small percentage of the total growth of large firms since 1940 that their effect on over-all levels of industrial concentration has been very small. (Senate subcommittee hearings on H. R. 2734, p. 374). [Our emphasis.]

In the absence of a finding, in the majority report, either that in recent years there has occurred a material increase in the height of the level of economic concentration through the means of acquisition by a corporation of assets of another corporation or other corporations, or that likelihood of such material increase through such means is threatened, the majority fail, in their report, to bring to the attention of the Senate the existence of such facts as make it important that legislation to prevent such acquisition be enacted.

III. The Sherman Act Already Makes Illegal Such Assets Acquisitions as Shall Tend To Create a Monopoly in Any Section of the Country or as Shall Have the Effect of Substantially Lessening Competition in Any Such Section

Such acquisition of assets as shall tend to create a monopoly or as shall have the effect of substantially lessening competition is already illegal under the Sherman Act (Act of July 2, 1890, 26 Stat. 209).

MONOPOLY

Monopolization, or attempted monopolization, of any part of the trade or commerce among the several States, or with foreign nations, is made punishable by section 2 of the Sherman Act. Said section 2 reads, in part, as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *.

Actual exclusion of competitors is not necessary to the crime of monopolization under said section 2. In its opinion in *American Tobacco Co. et al.* v. *United States* (328 U. S. 781, at pp. 808 and 809) the court states:

> The question squarely presented here by the order of this Court in allowing the writs of certiorari is whether actual exclusion of competitors is necessary to the crime of monopolization in these cases under § 2 of the Sherman Act. We agree with the lower courts that such actual exclusion of competitors is not necessary to that crime in these cases and that the instructions given to the jury, and hereinbefore quoted, correctly defined the crime. A correct interpretation of the statute and of the authorities makes it the crime of monopolizing, under § 2 of the Sherman Act, for parties, as in these cases, to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent and purpose to exercise that power. See *United States* v. *Socony-Vacuum Oil Co.* (310 U. S. 150, 226, n. 59), and authorities cited.

At page 810 the court states:

> Neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization under the Sherman Act.

In *Fashion Originators' Guild, etc.*, v. *Federal Trade Commission* (312 U. S. 457, l. c. 466) the court says:

> Nor is it determinative in considering the policy of the Sherman Act that petitioners may not yet have achieved a complete monopoly. For "it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition" (citing cases).

SUBSTANTIAL LESSENING OF COMPETITION

Not only is there in the Sherman Act adequate provision making conduct tending to a complete monopoly illegal, but it is also true that an assets acquisition, the effect of which shall be substantially to lessen competition, is violative of that portion of the Sherman Act which declares every contract in restraint of trade or commerce among the several States, or with foreign nations, to be illegal. Reference is made to section 1 of the Sherman Act which reads, in part, as follows:

> 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 * * *.

The Supreme Court, in *United States* v. *Socony-Vacuum Oil Co., Inc.*, et al. (310 U. S. 150 at p. 226) said:

> But the crime under § 1 is legally distinct from that under § 2 (cases cited) though the two sections overlap in the sense that a monopoly under § 2 is a species of restraint of trade under § 1.

Acquisition of assets is attained by a sale. 55 Corpus Juris, 48, Note 69 (a) reads in part: --

A "sale," in the legal import of the word, implies the transferring of property from the seller to the buyer for a price, and includes, not only the idea of divesting the seller of title, but that of vesting it in the buyer. *State* v. *Wentworth* (35 N. H. 442, 443).

A sale of assets is a "contract." Section 1 of the Sherman Act makes every "contract" of the type therein mentioned illegal. In 55 Corpus Juris, 36 is the following:

"Sale," in legal nomenclature, is a term of precise legal import, both at law and in equity, and has a well-defined legal signification, and has been said to mean, at all times, a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold.

In *White* v. *Trent* (100 Fed. 290, 291) the court says:

Inasmuch as a sale is a contract or agreement, it is frequently spoken of as a "contract of sale" or "an agreement of sale," two phrases which, in law, mean no more and no less than the word "sale."

Clearly a sale of assets comes within the term "contract" as used in section 1 of the Sherman Act. *United States* v. *Steel Co. et al.* (334 U. S. 495) is a suit brought by the United States to enjoin the United States Steel Corp. and its subsidiaries from purchasing the assets of the largest independent steel fabricator on the west coast on the ground that such acquisition would violate sections 1 and 2 of the Sherman Act (l. c. 498). Although the proof adduced by the Government failed in that suit to prove its contention that the acquisition of Consolidated (i. e. of such assets) would unreasonably lessen competition in the respects charged, and consequently the court held (l. c. 508) the proposed contract was not forbidden by section 1 of the Sherman Act, it is nevertheless obvious that *the court accepted the proposition that the sale of assets, if an unreasonable lessening of competition were proved, would be illegal under section 1 of the Sherman Act.* In this connection attention is called to the language of the court at pages 507 and 508 that—

On the record before us and in agreement with the trial court we conclude that the Government has failed to prove its contention that the acquisition of Consolidated would unreasonably lessen competition in the three respects charged, *and therefore the proposed contract is not forbidden by § 1 of the Sherman Act.* [Emphasis ours.]

In said case of *United States* v. *Steel Co. et al.* (334 U. S., 1. c. 527) the court says, with respect to the acquisition of competitors in identical or simliar lines of merchandise (the case being, as above indicated, one in which the purchase of assets was involved):

If such acquisition results in or is aimed at unreasonable restraint, then the purchase is forbidden by the Sherman Act.

By reason of the use by the court of the term "unreasonable restraint" it is obvious that the provision of the Sherman Act by which the court considered that said purchase would be forbidden is section 1 which declares to be illegal every contract, etc., "in restraint of trade."

In our opinion the provision of said section 1 declaring illegal every contract, etc., "in restraint of trade or commerce among the several States, or with foreign nations" includes, within its scope, any tendency of an assets acquisition to substantial lessening, hindering, or suppression of competition. In *Shotkin* v. *General Electric Co. et al.*

(171 Fed. 2d, 236 (U. S. C. A., Tenth Circuit) decided December 2, 1948), the defendants were charged under sections 1, 2, 3, 4, 7, and 15 of the Sherman Antitrust Act. The court in that case said (l. c. 238):

> But regardless of the intent of the parties, if the inherent tendency of the combination, agreement, or concert is substantially to lessen, hinder, or suppress competition in the channels of the trade or commerce, it comes within the sweep of the act. *Fashion Originators' Guild* v. *Federal Trade Commission* (312 U. S. 457, 668 [468], 61 S. Ct. 703, 85 L. Ed. 949).

It is our opinion that the court, in the language so quoted, is referring not to section 2 of the Sherman Act (which is the section relative to monopolization) but to section 1, which is the section which relates to contracts, combinations, or conspiracies in restraint of trade. The reason for this opinion is that the language so quoted is the concluding part of a paragraph the earlier portion of which reads:

> In determining whether a contract, combination, or concert constitutes restraint of trade or commerce in violation of the act, the intention of the parties may or may not be material, depending on whether the necessary effect of the agreement or concert or acts done is to directly restrain such trade or to create a monopoly. A specific intent to restrain such trade or commerce or to build up a monopoly in order for an agreement or concert to come within the scope of the act is not always necessary (*Swift & Co.* v. *United States*, 196 U. S. 375, 25 S. Ct. 276, 49 L. Ed. 518; *United States* v. *Griffith*, 334 U. S. 100, 68 S. Ct. 941).

No legislation other than the Sherman Act is necessary to make illegal any such restraints of interstate commerce the effects of which do not cover the entire United States. In *United States* v. *Steel Co.* (334 U. S. l. c. 519) the court says:

> The Sherman Act is not limited to eliminating restraints whose effects cover the entire United States; we have consistently held that where the relevant competitive market covers only a small area the Sherman Act may be invoked to prevent unreasonable restraints within that area.

Under the Sherman Act the Attorney General may not only institute and maintain criminal proceedings against corporations which he deems to have violated that act, but, in addition, at his instance there may be granted injunctive relief or divestiture decree to prevent the exercise of power to raise prices or exclude competition even though such power has not been exercised. Mr. Gilbert Montague, attorney at law, in memorandum filed (subcommittee hearings, p. 198) with the subcommittee said:

> For many years the Supreme Court has been expanding its interpretation of the Sherman Act. Today that act empowers the Attorney General to apply to the court for an injunction ab initio, or criminal sentence, or divestiture decree in respect of any economic concentration, be it existing or incipient, whether a person, firm, or corporation, or group of them, which has power to raise prices, or to exclude competition, in any section of the country, even though it is only incipient, and never exercises such power.
>
> This was the unanimous decision of the Supreme Court in *American Tobacco Co.* v. *U. S.* (328 U. S. 781 (1946)), which reiterated the rule that was unanimously stated in the final decision of *U. S.* v. *Aluminum Co. of America* (148 F. 2d 416 (1945)).

Clearly, under the Supreme Court's interpretation of the Sherman Act, that law already makes illegal such assets acquisitions as shall produce the power, whether exercised or not, to create a monopoly in any section of the country or as shall inherently tend to lessen substantially competition in any such section. Consequently there does not exist a need for H. R. 2734 in order to make such assets acquisitions illegal.

IV. The Fact That the Clayton Act Covers Stock Acquisitions Is No Reason for so Amending the Clayton Act as to Cause It to Cover Assets Acquisitions

As stated earlier in this report the majority report says:

The purpose of the proposed legislation is to prevent corporations from acquiring another corporation by means of the acquisition of its assets, where under the present law it is prohibited from acquiring the stock of said corporation.

The majority report then continues:

Since the acquisition of stock is significant chiefly because it is likely to result in control of the underlying assets, failure to prohibit direct purchase of the same assets has been inconsistent and paradoxical as to the over-all effect of existing law.

These two quoted statements present the view that, inasmuch as stock acquisitions are prohibited by the Clayton Act, and inasmuch as assets acquisitions may produce an effect identical with the effect of such stock acquisitions, assets acquisitions should also be prohibited by the Clayton Act.

The answer to this argument follows:

(1) The Sherman Act (as has been demonstrated in III of this report) already makes illegal such assets acquisitions as shall produce the power, whether exercised or not, to create a monopoly in any section of the country or as shall inherently tend to lessen substantially competition in any such section; and not only may the Attorney General, under the Sherman Act, institute and maintain criminal proceedings against corporations which he deems to have violated that act but, in addition, at his instance there may be granted injunctive relief or divestiture decree to prevent the exercise of power to raise prices or exclude competition even though such power has not been exercised; consequently there is no necessity of now adding, in the Clayton Act, legislation concerning assets acquisitions.

It may be argued that, if the last above sentence is true, the Congress (because the Sherman Act, just as it applies to assets acquisitions, applies also to stock acquisitions and consequently there was no need to enact that part of the Clayton Act which refers to stock acquisitions) would not have legislated, in the Clayton Act, with respect to stock acquisitions. It is to be noted, however, that (*a*) subsequent to the enactment of the Clayton Act, the Sherman Act has been very broadly interpreted by the Supreme Court, as is pointed out by Mr. Gilbert Montague in the above-mentioned memorandum filed with the subcommittee in his statement reading:

This bill (referring to H. R. 2734) is wholly unnecessary, for the Supreme Court has recently expanded its interpretation of the Sherman Act, so that it now curbs every evil in big business. (subcommittee hearings, p. 198)

and (*b*) Congress may not have anticipated, at the time the Clayton Act was passed, that the scope of the Sherman Act would be interpreted by the courts to be as broad as it has since been by them interpreted to be.

Moreover, Congress may have been influenced to enact the provisions of the Clayton Act which refer to stock acquisitions by reason of the fact that a secret acquisition of control of a business could be effected through the purchase of the stock of such business and it might therefore be desirable, in ferreting out the existence of such secret acquisition of control of a business, that an administrative body, such as the Federal Trade Commission, equipped with investigators, rather than a court be invested with power to ferret out and issue an order to cease and desist. In this connection attention is called to the following excerpt from the senatorial debate on the Clayton Act, namely:

> Mr. CUMMINS. 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 (Congressional Record, vol. 51, pt. 14, p. 14316).

Secret stock acquisitions might readily deceive the public into believing that two corporations were competing with each other when actually one was owned by the other. Congress may, therefore, have thought, at the time the Clayton Act was passed, that a summary, quick type of procedure by an administrative agency, which also has the power and authority to investigate, was necessary to deal properly with such secret stock acquisitions, and that, because assets acquisitions are generally known by the public, the courts could, under the Sherman Act, adequately deal with assets acquisitions.

In *Federal Trade Commission* v. *Western Meat Company, Thatcher Manufacturing Company* v. *Federal Trade Commission* (272 U. S. 554, 560 (1926)), the Supreme Court said (561):

> The purpose of the Act (the Clayton 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 he courts. Sherman Act, c. 647, 26 Stat. 209; Act to Create a Federal Trade Commission, c. 311, § 11, § 38 Stat. 717, 724; Clayton Act, c. 323, §§ 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

Assets acquisitions were obviously not likely to be secret.

In light of the interpretation given by the Supreme Court in recent years to the Sherman Act, sections 7 and 11 of the Clayton Act are not necessary to make illegal either a stock acquisition or an assets acquisition by a corporation where, in any line of commerce [1] (see footnote) such acquisition produces the power, whether exercised or not, to create a monopoly in any section of the country or as shall inherently tend to lessen substantially competition in any such section.

(2) In any case in which a court can function adequately, Congress should not now grant to the Federal Trade Commission any admixture of prosecuting and quasi-judicial powers. If H. R. 2734 shall be enacted, the Federal Trade Commission will with respect to assets acquisitions have (just as it now has with respect to stock acquisitions) extensive power, both prosecuting and quasi-judicial (see sec. 11 of H. R. 2734). Moreover the findings of the Commission as to facts, if supported by substantial evidence, will with respect to assets acquisitions (just as now with respect to stock acquisitions) be conclusive both in subsequent court review of the orders of the Com-

[1] "Commerce," as used in the Clayton Act, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing contained in the Clayton Act shall apply to the Philippine Islands.

mission and in cases where application is made by the Commission to a court for enforcement of its order.

The National Association of Manufacturers, in a statement printed in the subcommittee hearings (p. 113), said:

> In considering the proposed changes in section 7 of the Clayton Act, it must be understood that the discretionary administrative powers of the Federal Trade Commission are vastly broader today than at the time the Clayton Act and the Federal Trade Commission Act were enacted. This has resulted from the tendency of the courts to uphold the Commission's conclusions of law, as well as its findings of fact, almost solely upon the basis of the agency's presumed "expertness coming from experience."

We make no point against a provision making conclusive, if supported by substantial evidence, the findings of an administrative body, as to facts, in instances in which it is advisable to grant such body the right to perform quasi-judicial functions. We do not, however, think it usually advisable to give such power to an administrative body in cases where courts can adequately handle the situation.

In the case of assets acquisitions, which are usually characterized by absence of secrecy, a court can function adequately—and the service of the Federal Trade Commission equipped to ferret out and uncover secret conduct is not needed—to prevent such of those acquisitions as shall produce the power, whether exercised or not, to create a monopoly in any section of the country or as shall inherently tend to lessen substantially competition in any such section. The enactment of H. R. 2734 would largely increase the scope of subject matter over which the Federal Trade Commission would exercise an admixture of prosecuting and quasi-judicial functions. The additional subject matter, namely assets acquisitions, is one over which a court can function adequately. It is therefore unwise to create the increase, which H. R. 2734 would create, in the area over which the Federal Trade Commission may exercise said admixture of functions.

V. H. R. 2734 Would Produce Harmful Effects

If this bill (which would amend the Clayton Act) shall be enacted into law:

(1) 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 in commerce (as defined in previous footnote), where in any line of commerce, as so defined, in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

(2) The Federal Trade Commission, whenever it shall have reason to believe that any person is violating or has violated the foregoing prohibition, shall issue a complaint stating its charges in that respect.

(3) If, upon the hearing provided by the law, the Commission shall be of the opinion that the foregoing prohibition has been or is being violated, it shall issue an order requiring the person complained of to cease and desist from such violation and divest itself of the assets held contrary to the foregoing prohibition.

One result of the foregoing is that if the bill shall become law no corporation acquiring the whole or any part of the assets of another corporation which is engaged in commerce, as so defined, can be certain that the acquisition of such assets is valid until the validity of the transaction shall have been adjudicated by the procedure specified in the act.

Among reasons why the uncertainty of the outcome of such adjudication is especially great is that not only would the effect of such acquisition "in any line of commerce" (as commerce is so defined) have to be determined before the validity or invalidity of the transaction would be established, but in addition there would have to be also first determined the effect, in such line of commerce, *in any section of the country* of such acquisition. [Our emphasis.]

The term "any section of the country" is not defined in the bill but would have to be determined by the Federal Trade Commission or the court. A similar phrase in an amendment to S. 1008 was criticized by Congressman Celler (who introduced H. R. 2734) in House debate as follows:

The phrase "to restrain commerce in any section of the country" is new phraseology. I have not heard that before in any antitrust legislation or in any Federal Trade Commission legislation. It would give rise to all manner of questions, of controversies, and of disputes; there would be nothing but confusion. It would mean a field day for the lawyers. I am a lawyer and I would like to have a field day, but I do not think we should on the floor of the House, willy-nilly pass legislation without mature reflection and deliberation, that we should not accept words that would make for confusion, words which have not been passed upon by the courts. (Congressional Record, July 7, 1949, pp. 9248 and 9249.)

A further reason why the uncertainty of the outcome of the adjudication above mentioned is especially great is that the effect of such acquisition which is determinative of the validity or invalidity of the transaction is whether or not it "may be" substantially to lessen competition, or to tend to create a monopoly.

The bill does not specify, as a ground of invalidity, an actual existence of power to lessen competition or a tendency to create a monopoly, but specifies merely that there "may be" a substantial lessening of competition or a tendency to create a monopoly. The Supreme Court of the United States in the case of *Federal Trade Commission* v. *Morton Salt Co.* (334 U. S. 37, at p. 46) stated:

The statute requires no more than that the effect of the prohibited price discriminations "may be substantially to lessen competition * * * or to injure, destroy, or prevent competition." After a careful consideration of this provision of the Robinson-Patman Act, we have said that "the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect." *Corn Products Co.* v. *Federal Trade Commission* (324 U. S. 726, 742).

The court, however, in footnote 14 on page 46, stated:

This language is to be read also in the light of the following statement in the same case, discussing the meaning of § 2 (a), as contained in the Robinson-Patman Act, in relation to § 3 of the Clayton Act:

"It is to be observed that § 2 (a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect. Cf. *Standard Fashion Co.* v. *Magrane-Houston Co.* (258 U. S. 346, 356–357). But as was held in the Standard Fashion case, supra, with respect to the like provisions of § 3 of the Clayton Act, prohibiting tying clause agreements, the effect of which 'may be to substantially lessen competition,' the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition." 324 U. S. at 738; see also *United States* v. *Lexington Mill Co.* (232 U. S. 399, 411).

The court, however, subsequent to said quoted footnote says, in the Morton Salt Co. case (l c. 47):

> As we have pointed out, however, the Commission is authorized by the act to bar discriminatory prices upon the "reasonable possibility" that different prices for like goods to competing purchasers may have the defined effect on competition.

In *Standard Oil Company of California et al.* v. *United States* (337 U. S. l. c. 300) the court said:

> The Standard Fashion case, the first of the five holding that the act had been violated, settled one question of interpretation of § 3. The Court said:
>
> "Section 3 condemns sales or agreements where the effect of such sale or contract of sale 'may' be to substantially lessen competition or tend to create monopoly * * *. But we do not think that the purpose in using the word 'may' was to prohibit mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly." 258 U. S. at 356–57. See also *Federal Trade Comm'n* v. *Morton Salt Co.* (334 U. S. 37, 46, n. 14).

From the foregoing there will be observed the difficulty which the Supreme Court has had in determining the meaning of the word "may." The word "may" probably does not mean the "mere possibility" but may mean either the "reasonable possibility" or, at most, the "probability" under "the circumstances disclosed."

Obviously it will, prior to final adjudication, be in many specific cases difficult if not impossible to be certain whether or not the effect of a specific acquisition of assets may be substantially to lessen competition or to tend to create a monopoly.

The extent by which a lessening of competition may constitute a substantial lessening thereof is also indeterminate in advance of final adjudication. The Supreme Court of the United States has held that in a case in which 6.7 percent of the total sales in a particular area are controlled by a company such control is such that its effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce," as used in section 3 of the Clayton Act (*Standard Oil Company of California et al.* v. *United States* (337 U. S. 293 (1949)).

It has been asserted that one of the major purposes of the bill is the protection of small business. In view of the foregoing, it would appear that there is great danger that the bill would injure, rather than aid, small business. In every sale to another corporation, engaged in commerce (as defined in above-mentioned footnote), of the assets of a corporation there would be uncertainty as to the legality of the transaction and danger that an order would be issued to divest the acquiring company of the assets so sold. Such uncertainty would act as a serious deterrent to corporations which might otherwise be willing customers for such assets.

Small-business enterprises would feel the heaviest harmful effects of such uncertainty. If those interested in a small- or medium-sized business, because of bad business conditions, death, age, or ill health of the owners, internal difficulties or tax problems, desire that its assets, including its good will, be sold, its best market, perhaps its only one, is among other enterprises in the same line of business, perhaps competitors. Obviously if one buys out a competitor, competition is lessened. In view of the foregoing it would appear that there would be grave uncertainty of the legality of selling the assets of even a very small business to a competitor, engaged in commerce (as so defined), in the same section of the country. If H. R. 2734 becomes law there is great danger that a large part of the market for the assets of many small businesses will be destroyed. Certainly the owners of many small businesses would find available to them, for sale by their corporation of its assets, a much more restricted market than that which would otherwise exist.

Mrs. Katherine Parsons, associate director of the employers' advisory division, Pennsylvania Manufacturers' Association, when testifying before the subcommittee, stated (hearings, p. 93):

As the venture capital of individuals become scarcer small- and medium-sized corporations faced with the necessity of selling found that the market for their businesses was restricted to some larger corporation, usually a competitor.

It is an indisputable fact that this legislation will now remove this principal remaining market for small- and medium-size businesses in the event that sale becomes necessary. The physical properties would have to be disposed of piecemeal at salvage prices. The good will and reputation that the company may have built up over the years would bring in nothing to the stockholders.

Mr. James L. Donnelly, executive vice president of the Illinois Manufacturers' Association, Chicago, Ill., when testifying before the subcommittee, stated (hearings p. 295):

The second reason why we oppose this legislation is that the measure would injure small business. This measure represents, in substance, a renewal of the effort that has been made for years to induce Congress to so amend the antitrust laws that the opportunities of small companies to sell their businesses would, in effect, be restricted.

This measure, in effect, is based upon the premise that business development results only from the building of new plants, facilities, etc. and that such development should never follow the lawful acquisition of the assets of a competitive company.

This philosophy is particularly unfortunate in its application to thousands of smaller business firms.

Frequently a small business, on account of Government taxation policies, internal difficulties, business conditions, death, ill health, age, and many other sound considerations, is required to sell its assets, and in many cases, the only market for such sale is among competitors. This measure would, in effect, prevent the sale of said assets to a competitor.

The measure would, in effect, freeze the assets of many small business firms and prevent their expansion or further development. This result, of course, would be directly contrary to the expressed intention of the advocates of the measure, i. e., to protect small business against larger concerns.

The Commerce and Industry Association of New York, Inc., in a memorandum printed in the hearings (p. 55), stated:

The small corporate business is usually a family enterprise, or a so-called closed corporation; in either case the stock is closely held by relatively few individuals. Personal incentive and ability are the principal ingredients for its success; and in the absence of extreme, pressing circumstances the small business is not bought or sold. The factors motivating such sales are quickly enumerated; death or illness or the retirement of a principal shareholder, bad business conditions in the face of small operating capital, personal or immediate tax problems. are the ones most frequently responsible.

When small business runs afoul of such circumstances, the only market usually available is among competitors in the same field. This bill would forbid competitors to purchase, and a small business would find it was unable to offer itself as a going concern to the highest bidder; virtually, it would of necessity be disposed of as at a forced sale; good will and the repute it may have earned as a going business would be lost to its stockholders.

It has been argued that the Federal Trade Commission would not apply the strict language of section 7 so as to prevent a small corporation from selling its business or merging with another small business. There is nothing in the bill or in the law to insure that the Federal Trade Commission would so construe the bill. In fact there does not appear to be anything in the bill which would even permit the Federal Trade Commission so to construe it.

It is reasonable to expect that the bill (H. R. 2734) would also have the effect of protecting and solidifying the now-existing position of the big companies in that small companies which must compete with the larger corporations might be precluded from merging in order that they could successfully compete with their larger competitors.

Mrs. Katherine Parsons, associate director of the employers' advisory division, Pennsylvania Manufacturers' Association, when testifying before the subcommittee, stated (p. 95):

> The proponents of the bill in their anxiety to frustrate the alleged monopolistic tendencies of a few giant corporations would freeze at their present size all corporate enterprise. The bald language of the bill prevents mergers and acquisitions between small- and medium-size corporations, destroys the hope of these corporations ever to expand so as to meet the very competition of the big fellows about which the bill's supporters complain.

VI. Conclusion

For the foregoing reasons it is herein recommended that H. R. 2734 be not favorably considered.

FORREST C. DONNELL.

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