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small group of the class to bring the action, practical difficulties can be minimized. There will be no necessity to canvass the group in advance of the action in an attempt to reach an agreement on attorneys, procedures of the action or control of the suit in general. However, this does not mean that a class suit should proceed without adequate representation, for it is a fundamental rule that those bringing such action must adequately represent the class.

The various rules formulated by the courts for regulating problems arising in control of class suits are, with very few exceptions, well settled and have been followed for many years in various jurisdictions throughout this country and in England. After a review of the above cases and the problems which they present, it seems safe to say that these rules have satisfactorily met the problems which will inevitably arise so long as the class suit itself is recognized.

HARRY L. HARRIS.

CLAYTON ACT AMENDMENT-LOOPHOLE CLOSED

This exposition is concerned mainly with the state of the law in regard to Section 7 of the Clayton Act[1] as it was formulated from 1914 to 1950 and the effect of the Amendment of 1950, passed in the closing days of the 81st Congress.[2]

Section 7 is a restraint on corporations; little doubt exists on that point.[3] It prohibits one corporation from eliminating another competitor corporation from the market by purchasing the stock of the latter where there may be a substantial lessening of competition.[4] The Supreme Court of the United States has planted several guideposts along the highway for use in construction of the statute. A strict construction should be given as the section is partly penal in nature and forced constructions will not be tolerated.[5] The section was designed for the protection of the public against the evils which are resultant from a substantial lessening of competition.[6] The basic issue is not merely stock acquisition but the effect of such acquisition upon commerce.[7]

1. 38 Stat. 731 (1914), 15 U.S.C., Sec. 18.
2. P. L. 899, Dec. 29, 1950.
3 Swift & Co. v. FTC, 8 F. (2d) 595 (C. C. A. 7th 1925), reversed on other grounds, 272 U.S. 554 (1926).
4. See note 1, supra.
5. Pennsylvania Railroad Co. v. I. C. C., 66 F. (2d) 37 (C. C. A. 3rd 1933), affirmed 291 U.S. 651.
6. International Shoe Co. v. FTC, 280 U.S. 291, 50 Sup. Ct. 89, 74 L. Ed. 431 (1930).
7. International Shoe Co. v. FTC, supra; V. Vivaudou, Inc. v. FTC, 54 F. (2d) 273 (C. C. A. 2nd 1931); Aluminum Co. v. FTC, 284 Fed. 401 (C. C. A. 3rd 1922), certiorari denied, 261 U.S. 616.

Section 7 prohibits one corporation from acquiring the stock of a competitor *only* where the effect *may be* to substantially lessen competition between the two, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.[8] This section does not prohibit a corporation engaged in commerce from purchasing stock of another corporation engaged in commerce, where the effect is merely a possibility that there will be a substantially lessened field of competition.[9] In *V. Vivaudou, Inc. v. Federal Trade Commission,* the finding was in accord with the aforementioned rules of law. It appeared that two corporations in the same cosmetic line were engaged in commerce, *X* was worth three million, while *Y* was worth four million and the former purchased the latter. The highest tribunal held that in the light of the fact that the total industry was valued at one hundred and twenty-five million there was no substantial lessening of competition.[10] Another interesting situation occurred in *International Shoe Co. v. Federal Trade Commission* where there was evidence of acquisition by the Shoe Manufacturing Company, which was distributing to small towns, of the stock of a corporation whose outlet was in the cities. The court therefore concluded that there was no substantial lessening of competition.[11] The amendment of 1950 does not in any way alter the existing law as aforementioned. However, the rules enunciated have been the subject of comment,[12] some holding that the interpretation given by the courts has rendered the section a nullity.[13]

There are three interesting devices, two of which operated before the recent amendment to advantage of the combining corporation, while one operated to the latter's detriment.

By purchasing the assets of a competitor corporation *rather* than the stock of the latter, jurisdiction was denied to the Federal Trade Commission. The theory behind the denial was that the situation was not prohibited by Section 7, hence the statement, mergers by transfer of assets are permissible.[14]

The second favorable situation occurred where the corporation had purchased the stock, conceding it to be unlawful, and in a race with the FTC had liquidated the competitor corporation by surrending the stock for *all*

8. See note 7, all cases, supra.
9. See note 7, all cases, supra.
10. V. Vivaudou, Inc. v. FTC, 54 F. (2d) 273 (C. C. A. 2nd 1931).
11. International Shoe Co. v. FTC, 280 U.S. 291, 50 Sup. Ct. 89, 74 L. Ed. 431 (1930).
12. Montague, G. H., The Commission's Jurisdiction over Practices in Restraint of Trade: A Large-Scale Method of Mass Enforcement of the Anti-Trust Laws, 8 Geo. Wash. L. Rev. 365 (1940); Irvine, R. P., The Uncertainties of Section 7 of the Clayton Act, 14 Cornell L. Q. 28 (1928); 27 Mich. L. Rev. 931 (1929); 38 Yale L. J. 830 (1929); 39 Yale L. J. 1042 (1930); 4 Tulane L. Rev. 638 (1930); 24 Ill. L. Rev. 908 (1930).
13. Montague, supra note 12, at 375-8; Irvine, supra note 12, at 30.
14. Arrow-Hart & Hegeman Electric Co. v. FTC, 291 U.S. 587, 54 Sup. Ct. 532, 78 L. Ed. 1007 (1934).

the assets. This operated to deprive the FTC of jurisdiction, on the theory that the merger had been consummated and the remedy must be had through the courts.[15] The detrimental situation (for the corporation) occurred where the corporation was not fast enough for the FTC or the FTC found out too soon, for then there was jurisdiction. This factual situation is very similar to the preceding second favorable situation, except that the assets had not completely changed hands. Hence as part of the divestiture of stock order, and to effectuate legislative policy, divestiture of the assets so held was proper.[16] The conclusion then is that the corporation had to have title and possession of *all* the assets for the purposes of thwarting the FTC.[17]

Two other situations have occurred which should be mentioned. One dilemma a corporation found itself in was where the FTC had ordered it to divest itself of stock illegally held in a competitor corporation and this same corporation found itself subsequently a creditor of the to be divested corporation. The Supreme Court permitted the creditor to bid in at the sale for the same properties, inasmuch as the debt was bona fide and no fraud had been alleged.[18]

The second situation occurred where one corporation invested in a competitor corporation claiming the transaction was solely for purposes of making a return. The court held that the corporation was attempting to do indirectly what it could not do directly, to wit, eliminate a competitor corporation.[19] Of course the burden of proof is on the FTC here[20] as in all these cases.[21] Investment is permitted under the original Section 7 and as amended,[22] however it must be a bona fide investment. The transaction will certainly be looked upon with suspicion if the transaction is with an active competitor.[23]

For years the FTC has been advocating an amendment to the Clayton Act in order to close up these loopholes.[24] In 1950, in the closing days of the 81st Congress, the amendment was passed.[25] An analysis of the amendment reveals that the loopholes are indeed plugged and very tightly so. No longer may a corporation effectuate a merger by purchasing the

15. FTC v. Western Meat Co., 272 U.S. 554, 47 Sup. Ct. 175, 71 L. Ed. 405 (1926).
16. Thatcher Mfg. Co. v. FTC, 272 U.S. 554, 47 Sup. Ct. 175, 71 L. Ed. 405 (1926).
17. Compare FTC v. Western Meat Co. in note 15, supra, with Thatcher Mfg. Co. v. FTC in note 16, supra.
18. Western Meat Co. v. FTC, 33 F. (2d) 824 (C. C. A. 9th 1929), certiorari dismissed, 281 U.S. 771.
19. Swift & Co. v. FTC, 8 F. (2d) 595 (C. C. A. 7th 1925), reversed on other grounds, 272 U.S. 554 (1926).
20. Swift & Co. v. FTC, supra.
21. See notes 5, 6, 7, 14, 15, 16, 18, supra; U. S. Republic Steel Corporation, 11 F. Supp. 117 (N. D. Ohio 1935).
22. See notes 1 and 2 supra.
23. Swift & Co. v. FTC, 8 F. (2d) 595 (C. C. A. 7th 1925), reversed on other grounds, 272 U.S. 554 (1926).
24. Twenty-Five Annual Report of the Federal Trade Commission, released December 29, 1939. Same recommendation made in fiscal report for 1940-1.
25. See note 2, supra.

assets of a competitor *rather* than the stock.[26] Both types of merger are now expressly made illegal providing the requisite effect on competition exists.[27] Aware of the previous strict construction the Supreme Court of the United States has given, mergers to be consummated by seeking the assets first as aforementioned are specifically forbidden.[28] A result of making acquisition of assets illegal is to bring down the other notable exception that of purchasing the stock, conceded to be unlawful, and acquiring the assets by surrender of the stock before the FTC held a hearing.[29]

The comment to Congress by the FTC can be, better late than never, because for years corporations with the able assistance of the U.S. Supreme Court were rendering Section 7 of a nullity doing indirectly what they could not do directly.

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CORPORATE KNOWLEDGE REQUIRED FOR RATIFICATION BY ACQUIESCENCE

A principal is liable for the act of his agent when the agent has authority to do the act or when after the act is done the principal ratifies it. When the authority is not given in the first instance the principal is required, after knowledge of the action taken, to affirmatively adopt or ratify the action as his own or he must fail to act affirmatively when the circumstances require such action if he is to be held liable for the unauthorized act. The latter is ratification by acquiescence. No act or ratification by the agent is sufficient. The ratification must be by the principal as he is the only one who had authority to authorize the act originally. It is the situation in which ratification by acquiescence is being proved that the knowledge of the principal becomes most important. These principles of ratification would seem to apply equally to a corporation.

The problems of the requirement of knowledge become more acute in the corporate situation where all action is by agents. There authority is delegated by the board of directors, and so it would seem that before there could be ratification by asquiescence of an unauthorized act the board of directors would have to be apprised of the act.

There may be ratification by acquiescence in case affirmative action is taken pursuant to the unauthorized contract, or there may be ratifica-

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26. See note 2 for citation of amendment, supra.
27. See note 2 for citation of amendment, supra.
28. See note 2 for citation of amendment, supra.
29. Compare Section 7 (see note 1 for citation), amendment (see note 2 for citation) and cases in notes 15 and 16, supra, with each other.