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REGULATION OF BUSINESS-ANTITRUST LAW AS AFFECTED BY STANDARD OIL COMPANY OF CALIFORNIA V. UNITED STATES

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REGULATION OF BUSINESS—ANTITRUST LAW AS AFFECTED BY STANDARD OIL COMPANY OF CALIFORNIA v. UNITED STATES—Contracts limiting the right of a purchaser to use or deal in the goods of a competitor of the seller are familiar both to the businessman and to the courts. As a general rule, they take one of two forms. The first is a "tying contract," where the one product of the seller is sold or leased only on condition that the buyer take a certain quantity of other products, or that no products of another seller be used in conjunction with it. The other is an exclusive dealing contract, in which the purchaser agrees not to use or deal in any goods except those furnished by the seller, the seller in return usually promising to furnish the buyer his requirements of the product for the term of the contract. The economic value of such contracts in obtaining and preserving a market for the manufacturer or wholesaler on the one hand, and providing the buyer an assured supply on the other, are apparent. But they are also peculiarly adapted to misuse for the restraining of competition. This adaptability, and the exploitation thereof, led to the enactment of section 3 of the Clayton Act, which provides:

> "It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, . . . or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[1]

It can easily be seen that the major problem of interpretation of this statute is found in the qualifying condition. In what circumstances will contracts be held to be such as "may substantially lessen competition"?

In *Standard Oil Company of California v. United States*,[2] the Supreme Court of the United States has given what appears to be a final and definitive answer to this question, although differing from what had formerly been thought to be the "final and definite answer." This comment will be centered on that case and its implications.

A. *The Standard Oil Case*

The Standard Oil Company of California is the leading California producer of gasoline, marketing all types of petroleum and petroleum products, together with automobile accessories, throughout a seven-state area. The greater part of this production is for sale for automotive use. During its business history, Standard has used three main types of marketing devices for these sales: agency contracts with independently operated service stations, company-owned stations,[3] and exclusive supply contracts with independently operated stations. The use of this last method was commenced in 1934, and by 1938 had completely supplanted the agency system. Standard now has 16% of the independent stations in the area under these contracts. Some contracts cover gasoline only, while others cover one or more of the other Standard products as well. In 1946, Standard's sales through the exclusive agreements totalled $57,646,233, this total being 6.7% of the total taxable

[1] 38 Stat. L. 731, §3 (1914), 15 U.S.C. (1940) §14.

[2] 337 U.S. 293, 69 S.Ct. 1051 (1949).

[3] These stations were owned through Standard Stations, Inc., a wholly-owned subsidiary of Standard of California, and co-defendant in this action.

gallonage sold in the area by all producers. Sales of gas, oil and accessories by this means have remained at a roughly constant proportion of the area's total sales for the period 1936-46. Its total sales by all methods for 1946 were 23% of the total taxable gallonage. Standard's six major competitors all use similar contracts, selling 42.5% of the total in 1946.

In 1948, the district court in California issued an injunction against the enforcement and entering into of these contracts, on the grounds that they were in violation of section 3 of the Clayton Act, in that they affected a substantial amount of commerce. The court refused to hear evidence as to the actual status of competitive activity or the probable result of these contracts as used in the industry, predicating its finding that they "may substantially lessen competition" solely on the size of the business involved.[4]

On appeal, the issue was phrased: "whether the requirement of showing that the effect of the agreements 'may be to substantially lessen competition' may be met simply by proof that a substantial portion of commerce is affected or whether it must also be demonstrated that competitive activity has actually diminished or probably will diminish."[5] The answer to this was based chiefly on grounds of difficulty of proof. The Court first pointed out that this "substantial market" test is the recognized rule in the cases involving tying agreements, and then goes on to recognize the difference in the economic benefits to the parties between the two types of agreements, saying: " . . . pertinent considerations support, certainly as a matter of economic reasoning, varying standards as to each for the proof necessary to fulfill the conditions of that clause. If this distinction were accepted, various tests of the economic usefulness or restrictive effect of requirements contracts would become relevant."[6] But in the last analysis, the Court concluded that the fact that the use of these contracts was widespread in the industry and that the relative shares of the market had not varied over the period of use, justified an inference that the maintenance of market position was due to a foreclosure of the late comers from the market. The Court continued: "Moreover, to demand that bare inference be supported by evidence as to what would have happened but for the adoption of the practice that was in fact adopted or to

[4] United States v. Standard Oil Company of California, (D.C. Cal. 1948) 78 F. Supp. 850.

[5] 337 U.S. 293 at 299, 69 S.Ct. 1051 (1949).

[6] Id. at 307-308.

require firm prediction of an increase in competition as a probable result of ordering the abandonment of the practice, would be a standard of proof, if not virtually impossible to meet, at least most ill-suited for ascertainment by courts."[7] Because of this dilemma, the final conclusion was that " . . . the qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected."[8] The majority is reinforced in its desire to avoid trial of such economic issues by the fact that the Clayton Act, enacted subsequent to the Sherman Act, was expressly designed to avoid the undesirable problems of proof posed by the "rule of reason." This doctrine had emphasized the reasonableness of a given course of action to attain a business end in itself legitimate, disregarding the more or less collateral results, with accompanying interest in the subjective intent of the men engaging in such action.[9] The difficulty of proof of such factors led Congress to single out, in this statute, certain specific practices—exclusive dealing, price discrimination, and intercorporate stock ownership—which it deemed most conducive to the establishment of restraints and monopoly, and subject them to more stringent surveillance than apparently could be had under the Sherman Act.[10] One of the reasons for the present holding is the expressed fear that otherwise the Clayton Act would cover no more than the Sherman Act.

In view of the small percentage of the total sales of the industry made through Standard's contracts, of the express admission by the Court that it cannot be said that Standard occupies a dominant position in the market, and of the highly competitive history of the industry, it seems clear that the finding of violation was predicated solely upon the quantitative volume of business.[11]

[7] Id. at 309-310.

[8] Id. at 314.

[9] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 at 58-66, 31 S.Ct. 502 (1911). Subjective intent to suppress competition is still regarded as an essential in Sherman Act prosecutions. United States v. Yellow Cab, 18 U.S. LAW WEEK 4040 (1949).

[10] S. Rep. 698, 63d Cong., 2d sess. (1914). See also Standard Fashion Company v. Magrane-Houston Company, 258 U.S. 346, 42 S.Ct. 360 (1922); United Shoe Machinery Corp. v. United States, 258 U.S. 451, 42 S.Ct. 363 (1922).

[11] Here the writer finds himself in the unfortunate position of contradicting Professor Louis B. Schwartz, of the University of Pennsylvania. Schwartz, "Potential Impairment of Competition—The Impact of *Standard Oil Company of California v. United States* on the Standard of Legality under The Clayton Act," 98 UNIV. PA. L. REV. 10 (1949). Professor Schwartz interprets the case as holding (1) that the inference of adverse effect on competition may be drawn from the sole circumstance of defendant's powerful, though not monopolistic, position in the trade, and (2) that such a defendant cannot justify the employment of prima facie restrictive devices by evidence purporting to show the non-monopolistic effects or the business advantages of the practice, and thus amply backed by the authority of Standard

Justice Douglas was one of the four dissenting justices, a fact superficially surprising when it is considered that the new test is predicated upon volume of business, and the potential clog on competition created by the volume. But the reason is to be found in exactly that theory from which the apparent contradiction arises. Here the Court was faced with conduct which could be declared illegal only because of its deleterious effect on competition. In such a situation, Justice Douglas felt that some consideration should be given to the probable effect of the decision before it is made. His whole dissent is based on this approach of weighing alternatives as to their effect on competition. It seems to predicate legality upon whether the revamped market structure resulting from a finding of illegality will not be more damaging to the public interest than maintenance of the status quo. In view of the recent judicial endorsement of bigness and corporate growth embodied in the *Columbia Steel* case,[12] Justice Douglas sees no alternative but that the certain result of the decision will be to drive the major oil companies into further expansion of their holdings in the retail field, seeking complete vertical integration to assure themselves the economic benefits resulting from single-brand stations. This will necessarily convert thousands of independent small businessmen into clerks subject to absentee owners, as well as completely terminating any possibility that the smaller refiners could, by offering concessions and building up consumer demand, break the hold of the majors upon the retail outlets. When this is the alternative to finding the contracts legal, a contrary finding is nothing more than a further judicial promotion of bigness.[13] His opinion here is predicated entirely upon the probable economic effect of the decision, and must stand or fall with

Fashion Company v. Magrane-Houston Company, 258 U.S. 346, 42 S.Ct. 360 (1922). While the facts of the case certainly open the way for this holding, the majority opinion of Justice Frankfurter pays much more attention to the magnitude of the business done through these contracts than to Standard's position as price leader in the market, and at least *seems* to stress the tying agreement cases more than the Standard Fashion case as supplying authority for the holding. Justice Jackson's dissent certainly is predicated upon an interpretation contrary to that of Professor Schwartz, as he goes so far as to state that the substance of the holding is that "the requirements contract is *per se* an illegal one" (at 323 of the principal case).

[12] United States v. Columbia Steel Co., 334 U.S. 495, 68 S.Ct. 1107 (1948), with Justice Douglas dissenting. The present dissent is based in large part upon his feeling that the Columbia decision precludes any effective action on the part of the Government to prevent vertical integration.

[13] ". . . elimination of these requirements contracts sets the stage for Standard and the other oil companies to build service-station empires of their own. . . . [The majority opinion] is an advisory opinion as well, stating to the oil companies how they can with impunity build their empires." 337 U.S. 293 at 320, 69 S.Ct. 1051 (1949).

the accuracy of his prediction. This accuracy is to some extent debatable, as there are alternative courses which the majors may follow. Such expansion would require the acquisition and staffing of some thousands of service stations over a very large geographical area, by each company, at the cost of a very considerable amount of capital and for an unpredictable return. Faced with this prospect, the major oil companies may instead elect to permit the deterioration of their retail markets and make up any resulting deficit by expansion of their crude oil market, since that is a field of proportionately larger returns and the present source of the greater part of their profits.[14] Another possibility would be the development of a new marketing device such as a "superstation" carrying many brands, de-emphasizing the product differentiation which has been the keynote to retail gas marketing in the past, and compensating for the decline in revenue by savings in distribution and advertising costs. However, the best argument against the approach of Justice Douglas probably remains the essential indefiniteness of the test. It might well be questioned whether the probable economic result of a change in the existing situation is a proper subject for judicial inquiry, in view of the wide conflicts of opinion and many factors of causation possible.[15]

Justice Jackson wrote the other dissenting opinion, joined by Chief Justice Vinson and Justice Burton. This dissent was based chiefly upon the refusal of the trial court to permit the defendant to show that the contracts involved did not in fact lessen competition, and the substitution, by the majority, of inference for evidence. " . . . this arrangement operated on enough commerce to violate the Act, provided its effects were substantially to lessen competition or tend to create a monopoly. But proof of their quantity does not prove that they had this forbidden quality; and the assumption that they did, without proof, seems to me unwarranted."[16] The inference drawn by the majority is further criticized as based on a misunderstanding of the use of these contracts and the competition sought to be safeguarded by the statute. Competition in the sale of gasoline for consumption in automobiles, though immediately by the dealers, is still essentially waged by the producers.

[14] BAIN, ECONOMICS OF THE PACIFIC COAST PETROLEUM INDUSTRY, Part III, pp. 4-8 (1947).

[15] But it would seem to be a factor worthy of consideration by the enforcement agencies. Cf. Mason, "The Current Status of the Monopoly Problem in the United States," 62 HARV. L. REV. 1265, esp. at pp. 1284-85 (1949).

[16] 337 U.S. 293 at 322, 69 S.Ct. 1051 (1949).

> "[T]he retailer in this industry is only a conduit from the oil fields to the driver's tank, a means by which the oil companies compete to get the business of the ultimate consumer—the man in whose automobile the gas is used. . . . It does not seem to me inherently to lessen this real competition when an oil company tries to establish superior service by providing the consumer with a responsible dealer from which the public can purchase adequate and timely supplies of oil, gasoline and car accessories of some known and reliable standard of quality."[17]

This approach would seem more economically justifiable, involving an analysis of the market to determine its actual characteristics before determining what the effects of a given course of action may be. On such an analysis, the only way contracts of this type could lead to lessened competition in this field would be by the absorption of an unreasonable number of retail outlets, thus restricting the practical availability of the consumer market. This, of course, would restore the necessity of evidence on economic issues, with the resulting uncertainty feared by the majority. An additional drawback is that the act was set up to stop menacing activities in their inception. A test giving too much weight to past history may overlook the actual present influence or trend of a given practice until after it has manifested itself by irreparable injury to the competitive situation.

B. *Effect on Section 3*

The effect of this statute has largely been concentrated on two types of contracts—"tying" agreements and exclusive dealing contracts. They are similar in that both are "devices by which a seller reaches forward in the productive or distributive process to control business policies at subsequent stages for its own benefit,"[18] and to some extent operate to limit the access of competitors to the market. However, there are vast differences in the economic utility of the two "devices." The one purpose of tying contracts is to expand legitimately acquired market control in one field to another, and the effect is to enable one product to ride on the economic desirability of another, the seller acquiring by his superiority in one line an unfair competitive advantage in others.[19]

[17] Id. at 323.

[18] MILLER, UNFAIR COMPETITION 194 (1941).

[19] "In the final analysis any attempt to tie one commodity to another in selling either of them is fundamentally unfair. It makes the sale of the subsidiary article depend upon the tying clause instead of its own merits. . . . The very existence of such restrictions suggests that in its absence a competing article of equal or better quality would be offered at the same or at a lower price; necessarily so, for otherwise there would be no occasion for the restriction." VAUGHAN, ECONOMICS OF OUR PATENT SYSTEM 127 (1925).

The argument that they are necessary to assure proper working aids for the basic machine, and thereby protect the seller's good will, has met with scant approval from either economists or judges, the observation being made that the same effect can be obtained by a stipulation for minimum standards of quality.[20] Exclusive dealing contracts, on the other hand, have considerable value to the businessman beyond the possibilities of suppression of competition.[21] The advantages from the seller's viewpoint, such as closer control of distribution, are numerous. This control enables the producer to prevent the use of sales methods damaging to product reputation, and also to predict future demand with greater accuracy. Among other benefits are active sales efforts by the retailer directed specifically at his product and carried on in close collaboration with area-wide promotions, and lower unit selling expense resulting from the smaller number of customers and ease of selection of good credit risks. From the buyer's viewpoint there are similar advantages. One of his principal objectives is the obtaining of an assured, reliable source of supply, with an accompanying freedom from the necessity of large inventories. Others include advantages in buying stemming from concentrated purchasing power and improved credit terms, potential financial assistance from the seller if needed; and the ability to engage in local advertising without the danger that his competitors will gain from his efforts. This method of marketing is effective only when the product is differentiated from others of a similar type and is most valuable when used by a new producer to break into an established industry. In such a situation, it is recognized as a means of encouraging competition.[22]

The difference between the two types of contracts has hitherto been recognized by the courts. Tying agreements have been uniformly

[20] International Business Machines Corp. v. United States, 298 U.S. 131, 56 S.Ct. 701 (1936); International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12 (1947); VAUGHAN, ECONOMICS OF OUR PATENT SYSTEM 127 et seq. (1925). The fact that one or both machines are patented does not affect the legality of the arrangement. United Shoe Machinery Corp. v. United States, 258 U.S. 451, 42 S.Ct. 363 (1922); Radio Corp. of America v. Lord, (C.C.A. 3d, 1928) 28 F. (2d) 257, cert. den. 278 U.S. 648, 49 S.Ct. 83 (1928).

[21] N.Y. UNIV. BUR. OF BUSINESS RESEARCH, THE EXCLUSIVE AGENCY (1923); PHILLIPS AND DUNCAN, MARKETING 638-40 (1948); Stockhausen, "The Commercial and Anti-Trust Aspects of Term Requirements Contracts," 23 N.Y. UNIV. L. Q. REV. 412 (1948).

[22] Stockhausen, "The Commercial and Anti-Trust Aspects of Term Requirements Contracts," 23 N.Y. UNIV. L. Q. REV. 412, 424-28 (1948). See also Excelsior Motor Mfg. & Supply Co. v. Sound Equipment, Inc., (C.C.A. 7th, 1934) 73 F. (2d) 725, cert. den. 294 U.S. 706, 55 S.Ct. 352 (1935); B.S. Pearsall Butter Co. v. F.T.C., (C.C.A. 7th, 1923) 292 F. 720.

denounced as illegal. While most of the cases involving such contracts have also involved some degree of market dominance, the latest cases have not stressed this as too important a factor. The origin of the rule adopted in the Standard Oil case is found in *International Salt Co. v. United States.*[23] The defendant in that action held patents on two machines designed for the utilization of salt products, and inserted in its leases of such machines a proviso binding the lessee to use only defendant's salt therein. The Salt Company sold $500,000 worth of salt for use in these machines in 1944. Without discussing percentiles, the Court held the contracts violative of the Clayton Act, saying "Not only is price-fixing unreasonable, *per se,* . . . but also it is unreasonable, *per se,* to foreclose competitors from any substantial market. . . . The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious."[24] This case marked the acceptance by the Supreme Court of the doctrine previously advanced in several decisions handed down by the Circuit Courts of Appeals, the first of which was *Oxford Varnish Corp. v. Ault & Wiborg Corp.*[25] In that case, the offending patentee had licensed its patents to customers under four different types of agreements, three of which contained covenants that the licensee would not use any products but those of the patentee in conjunction with the patented processes. The fourth contained no such proviso, but called for triple royalties if materials used were purchased from others. The practice was held to violate section 3, despite the fact that the patentee controlled only 1% of the market.

On the other hand, cases involving exclusive dealing contracts have uniformly shown signs of careful market analysis and scrutiny of the circumstances peculiar to the industry before making a decision as to the predictable effect of the practice. The final prediction has consistently been phrased in terms of probability. Among the various factors which have been considered pertinent as tests of legality are the market position of the seller,[26] the difficulty of operation without

[23] 332 U.S. 392, 68 S.Ct. 12 (1947).

[24] Id. at 396.

[25] (C.C.A. 6th, 1936) 83 F. (2d) 764; see Signode Steel Strapping Co. v. F.T.C., (C.C.A. 4th, 1942) 132 F. (2d) 48; Judson L. Thomson Mfg. Co. v. F.T.C., (C.C.A. 1st, 1945) 150 F. (2d) 952, cert. den. 326 U.S. 776, 66 S.Ct. 267 (1945).

[26] Standard Fashion Company v. Magrane-Houston Company, 258 U.S. 346, 42 S.Ct. 360 (1922); Fashion Originators' Guild of America v. F.T.C., 312 U.S. 457, 61 S.Ct. 703 (1941); Butterick Co. v. F.T.C., (C.C.A. 2d, 1925) 4 F. (2d) 910, cert. den. 267 U.S. 602, 45 S.Ct. 462 (1925).

the seller's products,[27] the past effect on competition,[28] and the purpose behind the utilization of such a marketing device.[29] Thus, in *Standard Fashion Company v. Magrane-Houston Company*,[30] the Court emphasized the fact that the seller controlled 40% of the retail outlets for patterns in the country, and laid down a test of probability, saying:

> "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 the 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. That it was not intended to reach every remote lessening of competition is shown in the requirements that such lessening must be substantial."[31]

The Court then found that such probability existed, reasoning that the control of outlets plus the circumstances of the industry facilitated the development of local monopolies.[32] In contrast with this decision is *B. S. Pearsall Butter Co. v. Federal Trade Commission*,[33] where the main factors in deciding that the contracts were not violative of the Clayton Act were that the seller produced only 1% of the total margarine production of the country and that the past history of the industry revealed that such contracts were not in fact damaging to competition. In other cases the decisive factor has been that the seller

[27] Carter Carburetor Corp. v. F.T.C., (C.C.A. 8th, 1940) 112 F. (2d) 722; F.T.C. v. Sinclair Refining Co., 261 U.S. 463, 43 S.Ct. 450 (1923); B.S. Pearsall Butter Co. v. F.T.C., (C.C.A. 7th, 1923) 292 F. 720.

[28] Pick Mfg. Co. v. General Motors Corp., (C.C.A. 7th, 1935) 80 F. (2d) 641, affd. 299 U.S. 3, 57 S.Ct. 1 (1936); Butterick Co. v. F.T.C., (C.C.A. 2d, 1925) 4 F. (2d) 910, cert. den. 267 U.S. 602, 45 S.Ct. 462 (1925); B.S. Pearsall Butter Co. v. F.T.C., (C.C.A. 7th, 1923) 292 F. 720; Lipson v. Socony-Vacuum Corp., (C.C.A. 1st, 1937) 87 F. (2d) 265, cert. granted 300 U.S. 651, 57 S.Ct. 612 (1937), dismissed by stipulation of counsel 301 U.S. 711, 57 S.Ct. 788 (1937).

[29] Carter Carburetor Corp. v. F.T.C., (C.C.A. 8th, 1940) 112 F. (2d) 722; Pick Mfg. Co. v. General Motors Corp., (C.C.A. 7th, 1935) 80 F. (2d) 641, affd. 299 U.S. 3, 57 S.Ct. 1 (1936).

[30] 258 U.S. 346, 42 S.Ct. 360 (1922).

[31] Id. at 356-57. Italics added.

[32] The Court stressed the following quotation from the opinion of the circuit court of appeals: "The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business in the community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business." Standard Fashion Company v. Magrane-Houston Company, (C.C.A. 1st, 1919) 259 F. 793 at 798.

[33] (C.C.A. 7th, 1923) 292 F. 720.

imposing the conditions was in such a position as to make it imperative that the buyer purchase some of his products[34] on the theory that, with such leverage, an unscrupulous seller could drive his competitors in the sale of other goods out of the market. A distinction has been made in the past between contracts of purchase for consumption and those contemplating resale,[35] on Justice Jackson's theory that in such cases the essential competition is for the business of the ultimate consumer, and that the only serious danger in the latter situation is that one producer may control so many retail outlets as to prevent the other producers from competing effectively for the consumer's favor. The effect of such practices on the industry has consistently been held to be of great importance.[36] However, the maintenance of the status quo as to market share certainly should not be deemed controlling in view of the possible use for consolidation of a market once obtained and the weakening of potential competition by increasing the risks of entry into the industry.[37] The possibilities of abuse have made the motive of the user of such contracts an important test,[38] though certainly not as much so as under the Sherman Act. On this issue, one good criterion in determining the dominant motive (as well as the principal effect) between marketing utility and efficacy as a monopolistic device, is whether the term conforms to the reasonable requirements of the industry. "As a competition killer the long term contract is an effective weapon. One could hardly have a more favored service contract than an agreement for exclusive dealing . . . and a quarter century of time to elapse before one need to be concerned with new terms. . . . The security . . . has been buttressed further by staggered expiration dates."[39] However, the relative market position of the seller has been the most important single factor, since a dominant firm has the power to use these contracts to stamp out competition.[40]

[34] Carter Carburetor Corp. v. F.T.C., (C.C.A. 8th, 1940) 112 F. (2d) 722; Fashion Originators' Guild of America v. F.T.C., 312 U.S. 457, 61 S.Ct. 703 (1941).

[35] Pick Mfg. Co. v. General Motors Corp., (C.C.A. 7th, 1935) 80 F. (2d) 641, affd. 299 U.S. 3, 57 S.Ct. 1 (1936). F.T.C. v. Sinclair Refining Co., 261 U.S. 463, 43 S.Ct. 450 (1923).

[36] Pick Mfg. Co. v. General Motors Corp., (C.C.A. 7th, 1935) 80 F. (2d) 641, affd. 299 U.S. 3, 57 S.Ct. 1 (1936); B.S. Pearsall Butter Co. v. F.T.C., (C.C.A. 7th, 1923) 292 F. 720; Butterick Co. v. F.T.C., (C.C.A. 2d, 1925) 4 F. (2d) 910, cert. den. 267 U.S. 602, 45 S.Ct. 462 (1925): United States v. Pullman Co., (D.C. Pa. 1943) 50 F. Supp. 123.

[37] See MILLER, UNFAIR COMPETITION 211 (1941).

[38] Carter Carburetor Corp. v. F.T.C., (C.C.A. 8th, 1940) 112 F. (2d) 722.

[39] United States v. Pullman Co., (D.C. Pa. 1943) 50 F. Supp. 123 at 129.

[40] See Stockhausen, "The Commercial and Anti-Trust Aspects of Term Requirements Contracts," 23 N.Y. UNIV. L. Q. REV. 412 at 428 (1948); comment, 49 COL. L. REV. 241 at 246 (1949).

Coming against such a background of previous decisions, the far-reaching effect of the principal case must be immediately apparent. *Pick Mfg. Co. v. General Motors Corp.*,[41] must now be regarded as overruled in both its express holding that an increase in competition throughout the period during which the contracts were in force precludes a finding that the contracts "may substantially lessen competition," and the implied holding that sales for resale were entitled to more lenient treatment when the real competition was for the patronage of the ultimate consumer. With it must fall the cases holding that a necessary part of any prosecution under this section is a showing of actual effects as demonstrated by the experience of competitors. The double standard that had been set up, testing the legality of tying contracts by whether any quantitatively substantial amount of business was involved and exclusive dealing contracts by the factors outlined in the preceding paragraph, is now a thing of the past. The new test of legality for all types of contracts covered by section 3 is whether they affect a substantial volume of business.

It has been suggested that this holding amounts to a declaration that a contract to handle the goods of only one supplier is illegal per se.[42] It is submitted that this does not necessarily follow. The substantial volume test would seem to permit the use of these contracts in the promotional stage of a business and compel abandonment only after a sizable market had been developed. Thus the contracts would still be available to businessmen at the time when they are most desirable and least restraining, that is, when they are being used to create competition, and at the same time a trade practice would not be developed which might later put newcomers at a disadvantage through compelling the immediate establishment of an extensive chain of rival distributive outlets in order to compete effectively.[43]

C. *Effect on Other Fields of Antitrust Law*

The same test as in section 3 reappears in section 1(a) of the Robinson-Patman Act, amending section 2 of the Clayton Act.[44] This section makes it unlawful for any person to discriminate in price between purchasers "where the effect . . . may be substantially to lessen

41 (C.C.A. 7th, 1935) 80 F. (2d) 641, affd. 299 U.S. 3, 57 S.Ct. 1 (1936).

42 Justice Jackson's dissent, 337 U.S. 293 at 323, 69 S.Ct. 1051.

43 See MILLER, UNFAIR COMPETITION 212 (1941). Another factor is the waste resulting from the allocation of resources to such means of competing.

44 49 Stat. L. 1526, §1 (1936), 15 U.S.C. (1940) §13.

competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." This section also has recently undergone a judicial revamping expanding its scope and easing the requirements of proof of a predictable deleterious effect on competition. It is established that a showing of an actual lessening of competition will bring the conduct within the proscribed class.[45] As under section 3, the chief problem of interpretation is the meaning of "may substantially tend to lessen." In *Corn Products Refining Co. v. Federal Trade Commission,*[46] the Court adopted the test as applied in the *Standard Fashion* case interpreting section 3, saying: " . . . 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." Three years later the Court reinterpreted the provision as meaning, instead, that the discrimination was illegal if there was a reasonable *possibility* that it may injure competition.[47] It is doubtful that the *Standard Oil* decision will have any further liberalizing effect on the interpretation of this section. It is submitted that the chief significance in this particular is that it is a reaffirmance of the theory of the *Morton* case, both opinions seeming to come from the same expansionist approach to the antitrust laws.

Section 7 of the Clayton Act[48] employs the same test as to intercorporate stock holdings, providing that it shall be unlawful for one corporation engaged in interstate commerce to acquire stock in another corporation similarly engaged "where the effect of such acquisition may be to substantially lessen competition between such corporations. . . ." It is in this field of antitrust activity that the *Standard Oil* decision may be of the most significant collateral effect. What decisions there are under this section indicate a rather strict interpretation of the clause, applying the 'probability' test, and looking more for pres-

[45] Porto Rican American Tobacco Co. v. American Tobacco Co., (C.C.A. 2d, 1929) 30 F. (2d) 234, cert. den. 279 U.S. 858, 49 S.Ct. 353 (1929).

[46] 324 U.S. 726 at 738, 65 S.Ct. 961 (1945). See also Samuel H. Moss, Inc. v. F.T.C., (C.C.A. 2d, 1945) 148 F. (2d) 378, cert. den. 326 U.S. 735, reh. den. 326 U.S. 809 (1945), where it was held that the clause was satisfied if the lower price tended to prevent competitors from taking business away from the merchant which they might have gotten but for the special price offered. Italics added.

[47] Fed. Trade Comm. v. Morton Salt Co., 334 U.S. 37, 68 S.Ct. 822 (1948). Justice Jackson dissented in that case also, joined by Justice Frankfurter (author of the majority opinion in the principal case).

[48] 38 Stat. L. 731, §7 (1914), 15 U.S.C. (1940) §18.

ently demonstrable results than for dangerous potentialities.[49] Thus, in *International Shoe Co. v. Federal Trade Commission*,[50] the Court held the acquisition by one shoe manufacturer of all the stock in another shoe company marketing its product throughout the same area as did the purchaser, not violative of section 7. The grounds for the decision were that one product was designed primarily for appearance and the other for service, and that the one company was in financial difficulty at the time of acquisition, the Court saying: "Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree . . . that is to say, to such a degree as will injuriously affect the public."[51] It seems quite plausible that a relaxation of this test will be next in line, in view of the *Standard Oil* and *Morton* decisions. When to these cases is added the fact that many of the recent decisions of the federal courts demonstrate an increased sensitivity to all types of restraint and a determination to outlaw these restraints despite their legality by previous standards,[52] the combination of opportunity and inclination is sufficient to warrant an expectation of an early alteration of the law in the field of intercorporate stock acquisition. If this comes about, the way may be open for the Justice Department to reach the integrated corporate enterprises which the Sherman Act has proved impotent to bridle, at least when expansion is carried on by merger rather than by sale of assets. This seems all the more probable in light of the definite trend of the antitrust decisions of the present Court to the theory that the public interest is

[49] Pennsylvania R. Co. v. Interstate Commerce Commission, (C.C.A. 3d, 1933) 66 F. (2d) 37, affd. without opinion by an equally divided Court, 291 U.S. 651, 54 S.Ct. 559 (1934), (*held*, the acquisition by one road of 49% of the stock of two competing roads not a violation); United States v. Republic Steel Corp., (D.C. Ohio 1935) 11 F. Supp. 117 (no violation because still-existing competition within the industry was held to remove danger of injury to the public). See also United States v. New England Fish Exchange, (D.C., Mass. 1919) 258 F. 732; and Aluminum Co. of America v. F.T.C., (C.C.A. 3d, 1922) 284 F. 401, cert. den. 261 U.S. 616, 43 S.Ct. 362 (1923). Both latter cases found violation in actual cessation.

[50] 280 U.S. 291, 50 S.Ct. 89 (1930).

[51] Id. at 298.

[52] Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 62 S.Ct. 402 (1942); Eastern Wine Corp. v. Winslow-Warren, Ltd., (C.C.A. 2d, 1943) 137 F. (2d) 955; United States v. Aluminum Co. of America, (C.C.A. 2d, 1945) 148 F. (2d) 416. See Zlinkoff, "Monopoly Versus Competition: Significant Trends in Patent, Anti-trust, Trade-mark, and Unfair Competition Suits," 53 YALE L. J. 514 (1944), for a discussion of the decade-long drive in the federal courts for restriction of patent and trademark monopolies, and the trend to a more expanded interpretation of the anti-trust laws.

the one controlling factor in all these cases, and that this interest can best be served by the establishment of as freely competitive an economic system as possible, unhampered by statutory or contractual grants of special dispensation.[53]

William R. Worth, S.Ed.

[53] Zlinkoff, "Monopoly Versus Competition: Significant Trends in Patent, Anti-trust, Trade-mark, and Unfair Competition Suits," 53 YALE L. J. 514 (1944); Berge, "Problems of Enforcement and Interpretation of the Sherman Act," PAPERS AND PROCEEDINGS OF THE SIXTIETH ANNUAL MEETING OF THE AMERICAN ECONOMIC ASSOCIATION 172 (1948).