NOTES

THE COLUMBIA STEEL CASE: NEW LIGHT ON OLD ANTITRUST PROBLEMS*

IT is an old paradox in the law of antitrust that, while A and B may not agree to fix prices, A may be permitted to acquire B, thereby eliminating competition even more effectively than under a price-fixing arrangement. The inhibiting force of the Sherman Act has, until recently, operated far more stringently against loose associations than against close-knit combinations. Only lately has there been a successful series of attacks on the elimination of competitive forces through the concentration of highly integrated enterprises. A series of cases—*Alcoa*, *American Tobacco*, *Paramount*, *Schine*, and *Griffith*—has now established the doctrine that a degree of market control which gives the power to exclude competition or to fix prices is illegal, regardless of whether that power has actually been exercised or whether any "specific intent" to violate the antitrust laws can be shown.[1] Various commentators have hailed the emergence of a "new" Sherman Act, whose legal prohibitions are based on economic reality.[2]

But in *United States v. Columbia Steel Co.*,[3] the first trial of strength for the "new" Sherman Act against corporate aggrandizement through merger, the Government's case was rejected by the Supreme Court in a 5–4 decision. This result raises grave questions as to the efficacy in combatting mergers of the body of doctrine described as the "new" Sherman Act.

The facts of the case—and some facts outside the case—are of central importance.

During the war, United States Steel Corporation built and operated for the Government a large rolled steel plant at Geneva, Utah. The plant's average annual output capacity was 1,200,000 tons. At the close of the war,

* United States v. Columbia Steel Co., 334 U.S. 495 (1948).

1. United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945) (control of 90% of virgin aluminum ingot production illegal as monopoly under § 2); American Tobacco Company v. United States, 328 U.S. 781 (1946) (power to exclude competition rather than actual exclusion is test of illegality); United States v. Griffith, 334 U.S. 100 (1948) and Schine Chain Theaters v. United States, 334 U.S. 110 (1948) (use of monopoly power as leverage for obtaining advantages over independent competitors is illegal restraint of trade); United States v. Paramount Pictures, 334 U.S. 131 (1948) (remedy for possession and use of illegal monopoly power may be divestiture).

2. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. OF CHI. L. REV. 567 (1947); Rostow, *Monopoly Under the Sherman Act: Power or Purpose?* 43 ILL. L. REV. 745 (1949); Levi, *The Antitrust Laws and Monopoly*, 14 U. OF CHI. L. REV. 153 (1947).

For a critical appraisal of the new trend, see Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289 (1948). See also Wood, *The Supreme Court and a Changing Antitrust Concept*, 97 U. OF PA. L. REV. 309 (1949).

3. 334 U.S. 495 (1948).

the Government sought a purchaser for the Geneva plant. U. S. Steel considered submitting a bid, but decided against it "because of the speculative nature of the venture and attacks by people within and without the government." [4] But under pressure from the Surplus Property Administrator, the Steel Corporation reconsidered its decision and submitted a bid which the War Assets Administration accepted. Shortly thereafter, the Attorney General advised the Administrator that the purchase of Geneva by U. S. Steel did not violate the antitrust laws. His opinion placed great reliance on the *Alcoa* case and Judge Learned Hand's dictum that, while 90% of industry capacity would constitute monopoly, 64% was doubtful and 33% certainly would not.[5] The Attorney General concluded that the Geneva purchase, which would raise U. S. Steel's ingot output from 31.4% to 32.7% of national capacity, would not be objectionable.[6]

U. S. Steel now desired to assure itself of a West Coast market for Geneva's rolled steel output. Purchase of Consolidated Steel, the largest independent steel fabricator on the West Coast, offered that assurance. Impetus for the sale seems to have come originally from Consolidated's own president. U. S. Steel postponed the deal until completion of the Geneva sale. Thereafter, U. S. Steel, through its wholly-owned subsidiary, the Columbia Steel Co., arranged to buy the assets of Consolidated for $8,250,000. The announced purpose of the transaction was to give U. S. Steel a market for a substantial part of Geneva's rolled steel output. The deal represented a forward integration of West Coast facilities by U. S. Steel.

After the sale was announced, the Government brought suit to enjoin its consummation under Sections 1 and 2 of the Sherman Act.

These facts, without more, show the great difficulty under which the Government labored in making its case. In effect, the Government had to contend that the sale of Consolidated to U. S. Steel would unreasonably restrain trade and tend toward monopoly while the sale of Geneva had not. Furthermore, the purchase of Consolidated was designed to complement the Geneva transaction, which had received the Attorney General's *non obstat.*

In view of these undisputed facts, any appraisal of the result in *Columbia Steel* must take into account the quasi-estoppel element interposed by the Geneva deal and its relation to the Consolidated purchase. That it bulked large in the Court's determination is suggested by the prominence given the Geneva transaction in the Court's statement of facts.[7] It could have been ignored. But by placing the Consolidated purchase in close relation to the Geneva deal, the Court virtually foreclosed the Government from winning

4. United States v. Columbia Steel Co., 334 U.S. 495, 503 (1948), quoting almost verbatim Brief of Appellees Columbia Steel Co. *et al.*, p. 10.

5. United States v. Aluminum Company of America, 148 F.2d 416, 424 (2d Cir. 1945), *supra* note 1.

6. Letter from the Attorney General to the Administrator, War Assets Administration, June 17, 1946. Record on Appeal 679, 682.

7. 334 U.S. 495, 503-7 (1948).

the case. In that sense, all other elements of the decision, doctrinally intriguing though they are, cannot be considered crucial for purposes of *this* case. Their significance, which may be considerable, lies in the light which they shed on recurrent problems in the field of antitrust.

Geography and Technology—The Problem of Market Definition

As the necessary first step, the Court was faced with the problem of defining the relevant market in which the putative injury to competition had occurred. Two distinct types of injury were alleged. First, the Government charged that the Consolidated purchase deprived producers of rolled steel other than U. S. Steel of a market for their product. Second, it was alleged that the acquisition eliminated competition between U. S. and Consolidated in the sale of fabricated steel products.

The elimination of Consolidated as a purchaser of rolled steel in the competitive market may be characterized as vertical integration. Its legality was disputed in terms of sharply differing market criteria. The Steel Corporation maintained that, since rolled steel is sold on a nation-wide basis, the entire national market should be the yardstick. Consolidated's purchases were only a fraction of one per cent of the total rolled steel sales in the country, obviously an insignificant amount.[8] The Government, on the other hand, contended that the relevant market was the market for plates and shapes (the types of rolled steel which Consolidated used) in the eleven-state Western area in which Consolidated sold its fabricated steel. Consolidated's purchases amounted to thirteen per cent of the market, so defined.[9] The Court accepted the geographic but rejected the technological narrowing of the market for which the Government contended. Holding that it did not appear that other forms of rolled steel might not easily be produced instead of plates and shapes, the trial court found—and the Supreme Court agreed—that the relevant market was the *total* sale of rolled steel in Consolidated's eleven-state area.[10] Of that market, Consolidated accounted for three per cent of rolled steel purchases.[11]

The Court was more favorable to the Government in defining Consolidated's share of the fabricated steel market for purposes of testing the effect of eliminating competition between Consolidated and U. S. in the sale of fabricated steel—the horizontal integration. Resolving technological questions of the similarity between U. S.'s and Consolidated's structural fabrications in the Government's favor, the Court agreed that Consolidated—again in the eleven-state market—accounted for eleven per cent of the structural steel sales.[12]

8. 334 U.S. 495, 508 (1948).
9. *Id.* at 509.
10. *Id.* at 511.
11. *Id.* at 508–9.
12. *Id.* at 512–3.

Long-range significance attaches to this perpetuation of the Court's recent tendency narrowly to define the market wherein illegal control is alleged.[13] Clearly, the narrower the market, the easier it is to show an illegal degree of control. The Court's careful consideration not only of the market's geographical scope, but also of its delimitation in terms of technical factors of product similarity, suggests that this important factor of proof will continue to be made easy for antitrust plaintiffs.

Vertical Integration—The Problem of Exclusive Arrangements

The Government's principal line of attack was aimed at the vertical integration which foreclosed Consolidated as a market for the competitive sale of rolled steel. Competition for Consolidated's rolled steel purchases was not thereby restricted; it was wiped out. And the Government contended that this point alone was sufficient to make its case.

The Government's contention placed primary reliance on the recent *Yellow Cab* case.[14] There, a taxicab manufacturing company foreclosed its operating affiliate as a market for taxicabs produced by other manufacturers. Coloring the case was the existence of unpleasant practices, including the fixing of a price above market for the defendant's cabs. The allegations of the complaint were held to state a cause of action under the Sherman Act.[15] That decision, the Government said, was authority for the proposition that the removal of a buyer from the competitive market is a *per se* violation of Section 1 of the Sherman Act, without reference to the amount of the market thereby controlled. By deeming illegal the insulation of a small part of the taxicab market from competitive selling, *Yellow Cab*, in the Government's view, made such vertical integration illegal *per se*.[16]

Rejection of the Government's contention resulted in acceptance of the paradox of differing standards of illegality for integrated combinations and loose associations. The *Associated Press* case had held that a concerted refusal by members of the principal news-gathering association to sell the association's product to non-members was illegal *per se*.[17] While the court

13. *E.g.*, United States v. Yellow Cab Co., 332 U.S. 218 (1947) (market for taxicabs in four cities); Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948) (market for sugar beets in small area of California).

14. United States v. Yellow Cab Co., 332 U.S. 218 (1947).

15. The Government appealed the granting of defendent's motion to dismiss a complaint alleging violation of Sections 1 and 2 of the Sherman Act. The alleged violations arose from the activities of a vertically integrated company which forced its operating subsidiary to purchase only cabs of its own manufacture, thereby excluding the competition of other taxicab manufacturers. The Supreme Court held, in reversing the trial court, that the alleged exclusion of competitors was not insulated from the Sherman Act simply because the defendant was a vertically integrated enterprise.

16. 334 U.S. 495, 521 (1948).

17. Associated Press v. United States, 326 U.S. 1 (1945); see also Fashion Originators' Guild Association v. FTC, 312 U.S. 457 (1941) (boycott against retailers who sold pirated dress designs held illegal *per se*).

might have predicated that holding on the unique nature of the product involved, it did not do so. Instead it purposefully used most generalized language. The lesson of *Associated Press* was not related to the problem of free communication.[18] It spoke for free trade.

Now, despite an explicit disclaimer entered by the Court in the *Paramount* case,[19] the Government contended that the leap from boycotts by loose associations to exclusion by integration was completed by the *Yellow Cab* case.[20] Consequently, elimination of a buyer or seller from the competitive market by vertical integration is, without more, an illegal restraint of trade. The Court had a very practical reason for disagreeing with this contention. In effect, to decide otherwise would have been to hold that all exclusive dealing arrangements are illegal *per se.*

Can General Motors designate *one* agent in a town to sell its cars? Can Rexall exclude all but *one* brand of drugs from its counters? A negative answer seems incredible; yet, because the Government's view was to some extent supported by the language of the case, the Court felt constrained to deny with great vigor that *Yellow Cab* placed it in that extreme position.[21]

A legalistic answer got the Court out of this practical difficulty. The *Yellow Cab* case, said the majority, had come up on a motion to dismiss. All that was before the Court was the sufficiency of the complaint to state a cause of action. It had been held sufficient because *in addition* to the allegation of restraint of trade through exclusion of competitors, there was an allegation of intent to achieve that forbidden end, manifested by a number of predatory practices. These *together* made the alleged restraint unreason-

18. The Court rejected the argument that the Associated Press was immunized against antitrust prosecution by the First Amendment. 326 U.S. 1, 20 (1945). This was underscored by the citation of cases from fields as far removed from the realm of free speech as the bathtub industry. *Id.* at 18–9.

19. Justice Douglas there remarked that "the majority of the Court does not take [the] view" that vertical integration is illegal *per se.* 334 U.S. 131, 174 (1948). He went on to enumerate factors for determining the legality of a particular vertical integration, such as intent to gain market control, achievement of the power to exclude competition, the nature of the market, and leverage on the market made possible by the integration. *Ibid.*

20. The Government might also have cited the incautious language of International Salt Co. v. United States, 332 U.S. 392, 396 (1947): "[I]t is unreasonable, *per se*, to foreclose competitors from any substantial market," citing Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941) (*supra* note 17). The Court's overly-generalized statement of the holding in that case ignores the distinction between two types of exclusion: trade boycott by an association's members, and restriction of trade by an integrated enterprise to the components of that enterprise. The *Fashion Originators' Guild* case hit at the former type of exclusion from a market. Nothing that was said in that case supports the view that it is *per se* illegal for a company which owns a steel fabricating plant to buy rolled steel exclusively from a mill which it also owns. But that sort of exclusion of competitors seems, equally with the trade boycott, "to foreclose competitors from [a] substantial market."

21. "Nothing in the *Yellow Cab* case supports the theory that all exclusive dealing arrangements are illegal *per se.*" 334 U.S. 495, 523 (1948).

able, and therefore sufficient if proven.[22] And vertical integration, as such, was not of itself illegal.[23]

On this rock the Government's case foundered. The Court had no difficulty in coming to the conclusion that *this* vertical integration was not illegal. As to power, the pre-empting of three per cent of the rolled steel market in the Consolidated area did not strike the Court as unreasonable. And as to purpose, the Court did not find the otherwise reasonable restraint tainted by wicked motives. But in its anxiety to clarify the problem, the Court used sweeping language which somewhat obscures the role of intent in fixing antitrust liability.

The Court, in dealing with the problem of the intent behind this transaction, indulges in what may be a misleading dichotomy. It divides unreasonable (*i.e.*, illegal) restraints into two classes: those which are unreasonable *per se* and those which, while otherwise reasonable, are "accompanied with a specific intent to accomplish a forbidden restraint." [24] If "illegal *per se*" refers only to a few *types of conduct* such as price-fixing or market division, then the Court's language, read literally, would seem to undo the work of *Alcoa*, *American Tobacco*, and *Griffith*, which set up market control—the mere existence of the power to influence prices or to exclude competitors—as a criterion of illegality without reference to actual exercise of the power, or of intent to engage in forbidden conduct. The Court seems to be saying that market control becomes illegal only upon a showing of *specific* intent to restrain trade or monopolize. But this possible interpretation, which would be a most disturbing feature of the case, was apparently remedied in another part of the opinion. The Court, in its discussion of the *Paramount* case, inferentially rejects this narrow position and reaffirms the central doctrine of the "new" Sherman Act—that achievement of a prohibited degree of market control is illegal without a showing of "specific" intent.[25] And a general purpose to violate the law will be inferred from the mere existence of illegal power.

The instant case, however, did not strike the Court as exhibiting an illegal degree of market control. The percentages of the market preempted by the vertical and horizontal integrations did not seem to vest in U. S. Steel the power to exclude competitors or to control prices in the Consolidated market. Satisfied with the absence of illegal power, the Court turned to the intent problem and found nothing to make an otherwise reasonable restraint unreasonable. The business practices of U. S. Steel could not be called predatory, nor did its motives in purchasing Consolidated appear suspect. This conclusion stemmed from two factors: the estoppel element involved in the

22. *Id.* at 522.

23. It was not, apparently, in *Yellow Cab*. After remand, in a trial on the merits, the Government lost its taxicab case. United States v. Yellow Cab Co., 80 F. Supp. 936 (N.D. Ill. 1948).

24. 334 U.S. 495, 522 (1948).

25. *Id.* at 524–5.

Geneva transaction, and the peculiar antitrust history of the United States Steel Corporation.

In determining the absence of specific intent to attempt monopolization, the Court looked to prior acquisitions by U. S. Steel. It noted that, in the 1920 *Steel* case,[26] the engorgement of 180 independent concerns had not made U. S. Steel a violator of Section 2. Subsequent to that case, U. S. Steel had pulled in its horns and made only 8 acquisitions in the next twenty years. The Court did not labor the point;[27] but the inference seems clear.

Still more important, the Court focused its attention on the Geneva purchase. Here was the stated purpose of the Consolidated acquisition, and the Court found itself unable to condemn as illegal the lesser part of a deal whose greater part the Attorney General had certified as legal. If, in the Geneva purchase, U. S. Steel did not think it violated the antitrust laws, how could the acquisition of Consolidated be viewed otherwise than as the fulfillment of a legitimate business purpose?

Horizontal Integration—The Problem of Prospective Restraint

In considering the legality of the termination of competition between U. S. and Consolidated in the sale of fabricated steel products, the Court was not forced to consider vexatious questions of doctrine. Its approach here was essentially economic.

In this aspect of the case, the market control criteria of the "new" Sherman Act stood forth as inapplicable to a merger situation. What had been talked about in *Alcoa*, *American Tobacco*, and *Paramount* was present, not prospective, control. The doctrine that market control is a Sherman Act offense is not too instructive when the problem concerns only one step on the road to the achievement of the forbidden degree of control.

The Court looked to the existing market situation. It did not find it possible to say that, as to present competition in structural and pipe fabrication, the elimination of Consolidated's autonomy was an unreasonable restraint. But what of the future? What of U. S. Steel's enhanced strategic position in the expanding West Coast steel market? Too speculative, the Court firmly replied. And in terms of a view of market control which concentrates on the present rather than the prospective degree of power, it is hard to quarrel with the Court's decision. For aid in merger cases, failing proof of "specific" intent, the Government would have to look elsewhere.

A New Use for an Old Statute—The Problem of Clayton Act Section 7

As so frequently seems to occur in antitrust cases, *Columbia Steel's* most fascinating suggestion is hardly more than an aside. At the outset of the Court's opinion, Justice Reed remarks—in a footnote—that, although this is a Sherman Act proceeding involving the purchase of the assets rather than

26. United States v. United States Steel Corp., 251 U.S. 417 (1920).
27. 334 U.S. 495, 532 (1948).

the stock of a competing concern, the Court will take into account *the policy behind* Section 7 of the Clayton Act, which forbids the purchase of the *stock* of a competitor where the result may be a substantial lessening of competition or a tendency toward the creation of monopoly.[28]

The matter-of-fact setting of Justice Reed's remark is belied by its revolutionary implications. For the footnote suggests that the one provision of antitrust legislation squarely aimed at mergers may finally be given some effect.

The story of Section 7's judicial emasculation has been told elsewhere.[29] Suffice it to say that its intended prophylactic effect has been completely vitiated by a combination of bad draftsmanship and unsympathetic construction. It has been interpreted to prevent only those mergers effected by stock purchase; the device of asset acquisition used in the present case has provided an easy escape, and Section 7 today is little more than a dead letter.[30] Legislative reshaping has seemed the only real answer.[31] But Justice Reed's dictum may change the picture. The policy behind Section 7—the inhibition of movements toward illegal market control through merger—may now have a judicial outlet.

The suggestion is all the more fascinating because of its novelty. Never before in a Sherman Act merger case has it been suggested that the policy of Section 7 should influence the outcome. More important, the point was not raised by counsel in this case. It seems to have been the Court's own inspiration; and it is not unreasonable to suppose that the dissenters would be even more likely than the majority to support it.

Yet appraisal of the dictum's significance should be ventured only with great caution. A recent article has enthusiastically suggested that the Court is going to overrule its established narrow construction of Section 7, thereby permitting cases to be brought directly under that section.[32] But the Court's recent handling of a parallel problem in *United States v. South Buffalo Ry. Co.*[33] forecasts a reluctance to revivify Section 7 itself by overruling previous

28. *Id.* at 507 n.7.

29. See, for example, the discussion in Comment, 57 YALE L.J. 613 (1948).

30. FTC v. Western Meat Co., 272 U.S. 554 (1926), vacated an order directing Swift and Co. to divest itself of the acquired stock *and property* of two competing companies. The Court held that § 7's inhibition could not be directed against asset acquisition. This view was pushed to the extreme in Arrow-Hart & Hegeman Electric Co. v. FTC, 291 U.S. 587 (1934), where a merger completed by divestment of the purchased stock was held beyond the reach of § 7 and, consequently, of the FTC.

31. See Comment, 57 YALE L.J. 613 (1948).

32. Zlinkoff and Barnard, *Mergers and the Anti-Trust Laws*, 97 U. OF PA. L. REV. 151, 177 (1948).

33. 333 U.S. 771 (1948). The case involved the Commodities Clause of the Interstate Commerce Act, which forbids railroads to carry commodities which they "own." The loophole set up was just the reverse of that which vitiated § 7. Ownership of assets was forbidden but stock ownership was held to be outside the province of the Commodities Clause. United States v. Elgin, J. & E.R. Co., 298 U.S. 492 (1936). In the *South Buffalo Ry.* case a 5–4 majority said that if the *Elgin* construction of the Commodities Clause was

decisions and a probability that the section's established construction will not be changed unless the Congress acts.

If the dictum means anything—and that is itself problematical—it probably means that the Court may now be willing to canalize the general anti-merger policy of Section 7 into its consideration of merger cases under the Sherman Act. If so, the Government's quantum of proof in merger cases may be made easier to achieve, since the thrust of Section 7 is prospective: merger is forbidden where it "*may* . . . substantially lessen competition . . . or *tend* to create a monopoly." [emphasis added]. The modal auxiliary is all-important. It provides the standard of prospective illegality that has hitherto been lacking.

Any estimate of the dictum's importance must take account of its failure to alter the result in *Columbia Steel*. That it was not decisive may militate against any positive prediction for its future utility. On the other hand, the Court may well have viewed the Consolidated merger as too insignificant to come under the interdiction even of Section 7's policy, let alone that of the Sherman Act. Further, the remark, having been made, exists; like other dicta in antitrust cases,[34] it may grow in importance through continued use. Certainly the Government would be most remiss not to press for its application in future merger cases. Its advocacy will be especially appropriate since the Court has seemed to pave the way for a reshaping of doctrine by summarily rejecting the citation of old merger precedents.[35]

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wrong, it was up to Congress to correct it. Since Congress had not done so, the Court declined to overrule the *Elgin* case. The situation seems identical with that of § 7; thus the Court would probably decline a direct invitation to overrule the interpretation of § 7 expressed in the *Western Meat* and *Arrow-Hart & Hegeman* cases, *supra* note 30.

34. *E.g.*, the famous 90–64–30 dictum in the *Alcoa* case, 148 F.2d 416, 424 (2d Cir. 1945), *supra* p. 765.

35. The Court rightly rejected the Government's citation of the railroad merger cases. 334 U.S. 495, 531 n. 27 (1948). Those cases were clearly inapplicable to the present situation, since they each involved the proposed mergers of two giant railroads. A parallel situation would be a merger between U.S. Steel and Republic Steel Co. Since these cases are so completely foreign to the context of the Consolidated purchase, their non-use by the Court in this case in no way reflects on their continuing vitality as antitrust precedents.

More interesting is the Court's rejection of certain cases cited by the defendants, particularly the much-criticized cases of United States v. United Shoe Machinery Co., 247 U.S. 32 (1918), and United States v. United States Steel Corp., 251 U.S. 417 (1920). See Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 Col. L. Rev. 179, 212–24 (1932). Long considered out of step with the spirit of the Sherman Act, these cases may now be headed for desuetude.

Perhaps the Court's most significant rejection is that of International Shoe Co. v. FTC, 280 U.S. 291 (1930), a case under Section 7 of the Clayton Act. The fact situation there—absorption by one of the giants in the industry of a small independent manufacturer—seems closely to approximate that in the *Columbia Steel* case. By refusing to rely on the case, even though it reached the same result as the instant case, the Court may be signalizing its dissatisfaction with the established construction of Section 7 and its willingness to direct the general policy of the section into its consideration of merger problems.