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THE DU PONT-GENERAL MOTORS DECISION: THE MERGER PROBLEM IN A NEW PERSPECTIVE A SYMPOSIUM

FOREWORD: LEGAL TOLERANCE OF ECONOMIC POWER

WALTON H. HAMILTON*

IF LORD ACTON and Mr. Justice Stone ever talked together, on this earth of ours or along the celestial shore, the records present no account of it. The shops in which they did their distinctive work lay far apart, and the craft of the one was no concern of the other. The member of the English gentry was a superb historian; he was skilled in reciting the course of human events and blessed with an uncanny gift of laying bare its meaning. The Yankee from the rocky fields of Massachusetts by way of the teaching of law became a jurist. His trade was in controversies between human beings, ordinary and extraordinary, arising out of the grand and petty affairs of life. His natural gift was to suspend judgment until every relevant fact had fallen into place and the alternatives upon which decision rested had been clearly stated. Each in his own distinctive way distilled years of experience into the values which shaped judgment. Each in the fullness of time came to recognize "power" as an unruly thing which in a civilized community had to be tamed to the common good.

The problem of antitrust is a problem of the use of power. Over the centuries and out of long experience competition has come to be recognized as offering the best over-all design for the industrial system. The general aim of public policy has come to be the imposition of the competitive pattern upon economic activity and the correction of departures from it. Like others of its kind, this general policy has not been self-enforcing. The instrument alike of imposition and of correction has come to be an appeal to the courts. But the techniques, procedures, devices, and

* Ph.D.; Southmayd Professor of Law, Emeritus, Yale University; Member of the firm of Arnold, Fortas and Porter, Washington, D. C.

rules through which public control becomes antitrust in action were never contrived to instrument so general a mandate. If the courts are to effect a return of errant industries to the competitive design, these blunt instruments, intended to serve other uses, must be bent to an alien task. They present hazards and problems which may even deflect the resort to law from its proper objective. The ordinary judge is far more at home with a controversy between private parties than in employing the judicial process to make effective public policy. He is likely to be far more sensitive to the dictates of precedents and procedures than to the departures of business from the channels into which it is intended to run. Matters of significance in private suits may be meaningless or even misleading in antitrust cases.

In substance, questions of policy are matters of political economy. In the court they go forward dressed up as law suits between adverse parties. The result is an ever-present temptation to confusion to which judges and attorneys must constantly be alerted. In private law "intent" may rank high in the equation of decision; the state of mind of the actor often determines whether the accused act is lawful or unlawful. In antitrust the harm resulting from a conspiracy in restraint of trade is the same whether the persons acting in concert have intended only their own advantage or move to the disadvantage of their victims. If the major companies in an industry gang up, it is of no consolation to the independent who is put out of business that they acted in "good faith." If a single concern comes to dominate a strategic industry the impact upon the economy and upon the fortunes of individuals is the same whether the effect is due to "natural growth" or results from a calculated course of conduct. It may be that in terms of "legal law" size is of no consequence; that it is the quality of the act which counts. But common sense tells us a tiger cannot replace a cat as a household pet, even if the feline character of the two beasts is identical. An antitrust proceeding is not punitive in nature. It is not the conduct of persons, corporate or incorporate, which are being assessed. It is rather the revision of a domain of the economy which for the sake of a common good is being reorganized. A case at law goes astray if it is not recognized that a concern with the behavior of individuals does no more than supply the forms within which a segment of industry is being put in order. All of this was clearly recognized by Mr. Justice Stone, who never confused the legal instrument with the public policy it was intended to serve. The keyword of his antitrust opinions is "power," and his concern with probing the maze of legal issues is always the existence and use of this

power. A classic case in which he spoke for the United States Supreme Court is *United States v. Trenton Potteries Co.*¹ In this case he did not, as so often he is represented, assume the role of Sir Oracle and pontificate as from Olympus that price-fixing is per se illegal. Instead, he set down a rationale which is now elementary in antitrust law. A combination of the major companies in an industrial area has the power to fix prices. The power to fix prices comprehends the power to fix unreasonable as well as reasonable prices. The courts do not possess the facilities with which to determine whether prices thus arbitrarily fixed are reasonable or unreasonable. If, therefore, the public is to be saved from having to pay unreasonable prices, the power to fix prices must itself be abated. The alternative is to convert the antitrust mandate into high-sounding and empty rhetoric. Thus, the per se rule, instead of being an arbitrary imperative, is an expression of sense and reason.

In this spirit, the editors of the GEORGETOWN LAW JOURNAL have inspired, promoted, and published the collection of articles which follows. They have refused to accept any mandate of antitrust as a dictum. They have, in an endeavor which has covered months and involved a painstaking exploration of many lines of inquiry, been guided by the precept of St. Paul, "Prove all things; hold fast to that which is good." Although the articles here brought together come from authors whose experiences have been different and who have diverse views, this Symposium makes one thing clear. It probes to fundamentals and finds the control of "power" to be the basic antitrust problem. As Mr. Justice Stone, in a series of opinions, has clearly recognized, there is in a democracy no place for the exercise of irresponsible power. Where it exists it must be broken up or directed to the public good. Those who have power must, in the words of the Constitution, "have to answer in another place" for their acts. If there is no other place in which to answer, the power itself must be denied. For, as Lord Acton has put it, "Power tends to corrupt; absolute power corrupts absolutely." In this common stance of a great English historian and a great American jurist lies the key to all that is called antitrust.

¹ 237 U.S. 392 (1927).