

IN THE MATTER OF
AMERICAN SMELTING & REFINING COMPANY

COMPLAINT, OPINION, AND ORDER OF DISMISSAL IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 7 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914

Docket 2102. Complaint, Apr. 26, 1933—Order, June 25, 1934

CLAYTON ACT, SECTION 7—MOTION TO DISMISS—JURISDICTION—SAVING PRO-
VISOS—FORMATION OF SUBSIDIARIES WHERE COMPETITION NOT SUBSTANTIALLY
LESSENED.

Respondent's motion to dismiss goes only to the jurisdiction of the Com-
mission, and the facts must be assumed to be as stated in the complaint.
Therefore, the respondent can derive no benefit from the third paragraph of
Section 7, concerning subsidiaries which do not substantially lessen compe-
tition, inasmuch as substantial lessening of competition must be assumed.

CLAYTON ACT, SECTION 7—"COMMERCE"—INTERPRETATION OF STATUTE—CORPO-
RATE IDENTITY.

Corporate forms will be disregarded when necessary in order to carry out
the substantive purpose of a statute. Therefore, the newly created sub-
sidiary must be deemed identical with the parent company and so engaged
in "commerce".

CLAYTON ACT, SECTION 7—ACQUISITION OF STOCK IN COMPETITOR—ACQUISITION OF
ASSETS PRIOR TO COMPLAINT—SCOPE OF SECTION—JURISDICTION.

The decisions in *Thatcher Manufacturing Co. v. Federal Trade Commission*,
272 U. S. 554, and *Arrow-Hart & Hegeman Electric Co. v. Federal Trade
Commission*, 291 U. S. 587, make it clear that the Commission has no power
to divest assets, even though acquired by unlawful purchase of stock, and
that Section 7 only outlaws mergers effected by stock acquisition. While
the instant case of acquisition of assets through a subsidiary might be dis-
tinguished, the substance of the decisions makes the question of violation one
of means rather than economic consequences. Therefore, the new corpora-
tion must be regarded as a subsidiary of the acquiring company and the
transaction complained of as an acquisition of assets over which this
Commission has no jurisdiction but for which "a remedy is provided through
the courts." *Thatcher Manufacturing Co. v. Federal Trade Commission*, 272
U. S. 554, and *Arrow-Hart & Hegeman Electric Co. v. Federal Trade Com-
mission*, 291 U. S. 587.

CLAYTON ACT, SECTION 7—ACQUISITION OF STOCK IN COMPETITOR—ACQUISITION
OF ASSETS PRIOR TO COMPLAINT—STOCK OF CORPORATE SUBSIDIARY AS ASSET—
JURISDICTION.

Respondent's contention that acquisition of assets prior to the filing of
the complaint defeats the jurisdiction of the Commission cannot be sustained
since the respondent's ownership of the assets is dependent on the stock
ownership of the new corporation, and so an order requiring parting with
the stock of the latter would not be futile, thus distinguishing the instant

case from *Thatcher Manufacturing Co. v. Federal Trade Commission*, 272 U. S. 554, and *Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission*, 291 U. S. 587.

Mr. Everett F. Haycraft for the Commission,
Sherley, Faust & Wilson and *Covington, Burling, Rublee, Acheson & Shorb*, of Washington, D. C., for respondent.

COMPLAINT

The Federal Trade Commission charges that respondent, American Smelting & Refining Company, hereinafter called respondent, has violated and is violating the provisions of Section 7 of an Act of Congress approved October 15, 1914 (the Clayton Act), entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", and states its charges in that respect as follows:

PARAGRAPH 1. Respondent, American Smelting & Refining Company, is a corporation organized April 4, 1899, under the laws of the State of New Jersey, having its principal office and place of business at 120 Broadway, in the City of New York, State of New York, and is engaged in the business of smelting and refining primary and secondary nonferrous metals, including particularly, gold, silver, lead, copper, spelter (zinc), and in the sale in interstate and foreign commerce of said products and a varied line of by-products, including bismuth, cadmium, antimony, arsenic, platinum, palladium, selenium, tellurium, thallium, zinc dust, zinc chloride, copper sulphate and nickel sulphate, and also mixed metals, as follows: Sheet lead, calking lead, type metal, babbitts, solders, tin pipe, and sheet tin. Respondent owns smelters and refining plants in the United States as follows:

Maurer, N. J. (Perth Amboy Plant).	Durango, Colo.
Alton, Ill. (Federal plant).	Baltimore, Md.
Reading, Pa. (leased).	Omaha, Nebr.
East Helena, Mont.	Denver, Colo. (Globe plant).
Garfield, Utah.	Murray, Utah.
Sand Spring, Okla.	Amarillo, Tex.
Hayden, Ariz.	El Paso, Tex.
Leadville, Colo. (Arkansas Valley plant).	San Francisco, Calif. (Selby plant).
	Tacoma, Wash.

In addition, the respondent has producing interests in foreign countries, including Mexico, Peru, Newfoundland, and British Columbia. Respondent is the largest nonferrous smelting enterprise in the world. Its income is derived in the major part, from the sale of products and by-products resulting from the smelting and refining

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of copper and lead ores from its own mines and from mines of other large producers, such as Kennecott Copper Corporation, St. Joseph Lead Company, and other prominent copper and lead companies; but respondent also acts as sales agent for a number of small producers of nonferrous metals, by-products and mixed metals.

Respondent is represented in the metal fabricating industry through the ownership of stock in a number of subsidiary and affiliated corporations engaged in the manufacture of various lines of bronze, brass, and copper products, including the General Cable Corporation and Revere Copper & Brass, Inc.

As of December 31, 1931, respondent was capitalized as follows:

500,000 shares preferred stock 7% cumulative (par \$100)-----	\$50,000,000
200,000 shares second preferred 6% cumulative (par \$100)-----	\$20,000,000
1,829,940 shares no par common stock (out of an authorized common stock of 4,000,000 shares)	

Its total assets on said date amounted to approximately----- \$215,850,000

Said respondent, in the course and conduct of its said business, caused its said products, when sold, to be transported from the places of manufacture to the purchasers thereof, located in States other than the State of manufacture, and in foreign countries.

PAR. 2. Federated Metal Corporation is a corporation organized under the laws of the State of Delaware, on June 10, 1924, at which time it acquired the business and substantially all of the assets of the following corporations engaged in smelting and refining primary and secondary nonferrous metals, and in the manufacture and sale of by-products and mixed metals:

Great Western Smelting & Refining Company, of Chicago.

Duquesne Reduction Company, of Pittsburgh.

Union Smelting & Refining Company.

Trenton Smelting & Refining Company, and the

Eagle Smelting & Refining Works.

The said Federated Metals Corporation, which will be hereinafter referred to as the Federated Corporation, in September, 1932, was engaged in the business of smelting and refining nonferrous primary and secondary metals, including copper, brass, lead, tin, zinc, aluminum, antimony and alloys, and in the sale of the same in interstate and foreign commerce in the form of ingots, bars and blocks of pure metal or alloys, such as brass, bronze, babbitts, and other white metal alloys, or in the form of finished articles such as pipe, wire, type metals and solders. It also is engaged in the scrap metal business, that is, buying scrap metal and other secondary metals from junk dealers and others and reconditioning these materials and reselling the same in interstate and foreign commerce in the shape of

mixed metals and semi-fabricated metals, such as babbitts, solders, type metal, brass, and similar products. It dealt in all usual forms of nonferrous secondary metal (exclusive of gold, silver, and other rare or precious metals), such as scrap residues, drosses, ashes, oxides, etc., and in the purchase, handling, treating, smelting, refining and alloying of these materials, and in the sale in interstate and foreign commerce of the resulting alloys or mixed metals, with smelters and refineries located at Trenton, N. J., Newark, N. J., Pittsburgh, Pa., Detroit, Mich., Whiting, Ind., Chicago, Ill., St. Louis, Mo., and San Francisco, Calif. Its principal place of business in September, 1928, was located at 295 Madison Avenue, in the City and State of New York.

Said Federated Corporation, in the course and conduct of its said business, caused its said products, when sold, to be transported from the places of manufacture to the purchasers thereof located in States other than the State or States where manufactured, and in foreign countries, in competition with said respondent, American Smelting and Refining Company.

As of September 30, 1932, the said Federated Corporation had an authorized stock as follows:

400,000 shares common, no par value, of which
249,845 shares were outstanding and
36,040 shares were held in the treasury.

There were also authorized and outstanding \$4,000,000 par value 15-year 7-percent convertible sinking fund gold bonds, of which \$1,181,000 par value were held in the sinking fund and \$620,500 par value were held in the treasury. The total value of the Federated Corporation's assets as of that date was approximately \$14,000,000.

As of September 30, 1932, said Federated Corporation owned and held the entire authorized and outstanding capital stock of the Missouri Zinc Company, an Illinois corporation, engaged in smelting and refining spelter (zinc) with its plant at Beckemeyer, Ill.

PAR. 3. On September 30, 1932, the said respondent entered into an agreement of reorganization with the said Federated Corporation, and, pursuant to said agreement, said respondent, on or about December 1, 1932, organized a "New Company", under the name of Federated Metals Corporation, under the laws of the State of Delaware, and acquired all of the capital stock of said New Company by exchanging therefor \$3,500,000 par value of American Smelting & Refining Company first mortgage 30-year 5 percent gold bonds, series "A", due 1947, and warehouse certificates representing copper, lead, and spelter in marketable form, of the approximate value of \$2,129,555.66, and the said respondent has continued to own and hold all of

the outstanding capital stock of the said New Company, the name of which has been changed to F. E. D. Corporation.

Pursuant to said agreement, the said Federated Corporation transferred and delivered, or caused to be transferred and delivered to the said "New Company" organized by the respondent as aforesaid, on the date of its organization, all of the said Federated Corporation's business, assets, goodwill, etc., in exchange for the said bonds of the said respondent and said warehouse certificates, which were at that same time transferred to said New Company by said respondent, in exchange for said capital stock of said New Company, as set forth herein; and said New Company has continued since that day to own and operate the business of the said Federated Corporation under the control of said respondent. The said Federated Corporation, since December 1, 1932, after receiving the proceeds from the sale of its business and assets to the said New Company, has distributed the same, pro rata, among its stockholders, and is now in the process of dissolution.

PAR. 4. The acquisition by the respondent of all the capital stock, or share capital, of the said New Company (the Federated Metals Corporation of Delaware), as hereinbefore set out, was contrary to law and in violation of Section 7 of said Clayton Act, and the effect of such acquisition has been, is and may be:

(a) To substantially lessen competition in interstate and foreign commerce between the said American Smelting & Refining Company and the Federated Metals Corporation of Delaware and its predecessor, the said Federated Metals Corporation of New Jersey, during and since the year 1932, in the sale and distribution of nonferrous metals, by-products and mixed metals, including copper, lead (in various forms), spelter (zinc), zinc dust, lead and tin pipe, babbitts, type metals, solders, etc.

(b) To restrain interstate commerce in the sale of nonferrous metals, by-products and mixed metals, in certain sections or communities of the United States.

(c) To tend to create a monopoly in the respondent, American Smelting & Refining Company, in the sale and distribution in interstate and foreign commerce, of nonferrous metals, by-products and mixed metals, including copper, lead (in various forms), spelter (zinc), zinc dust, lead and tin pipe, babbitts, type metals, and solders.

OPINION OF THE COMMISSION

This is a proceeding against the American Smelting & Refining Company (hereinafter referred to as the Smelting Company), a New Jersey Corporation, for violation of Section 7 of the Clayton Act

(38 Stat. 731; 15 U. S. C. Section 18). Prior to September 30, 1932, according to the complaint, the Smelting Company was in competition with the Federated Metals Corporation, organized under the laws of Delaware. The name of this corporation was subsequently changed to F. E. D. Corporation, but it will hereinafter be referred to as the Federated. The Smelting Company and the Federated were engaged in the smelting and refining and sale in interstate and foreign commerce of various nonferrous metals. Under date of September 30, 1932, the Smelting Company and Federated entered into an agreement whereby Federated agreed to transfer its assets to a new corporation to be created by the Smelting Company. The latter was to subscribe to the total capital stock of the new corporation and pay therefor with its own bonds and certificates representing quantities of various metals of a specified value. These bonds and the ownership of the metals were in turn to be transferred by the New Company to the Federated in payment for the assets. Pursuant to the agreement, the Smelting Company organized under the laws of Delaware a new company named Federated Metals Corporation (hereinafter referred to as the New Company), and the conveyances of bonds, certificates, and assets were then made. Among the assets thus acquired by respondent was the entire outstanding and authorized capital stock of the Missouri Zinc Company, engaged in smelting and refining spelter (zinc).¹ The Federated, after receiving the proceeds from the sale of its business and assets to the New Company, distributed them pro rata among its stockholders and is now in process of dissolution.

The pertinent provisions of Section 7 of the Clayton Act are as follows:

That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially 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 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 of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially 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 tend to create a monopoly of any line of commerce.

¹ The complaint makes no specific allegation of competition in interstate or foreign commerce between the Zinc Company and respondent, but such could be proved under the allegation of such competition on the part of the parent corporation.

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.

No hearings have been held in this proceeding, but respondents have filed a motion to dismiss the complaint on the ground that the facts therein stated do not set forth a violation of Section 7 of the Clayton Act. The complaint alleges that the effect of respondent's acquisition of the stock of the New Company and the assets of Federated was to substantially lessen competition in interstate and foreign commerce between respondent on the one hand and the New Company and Federated on the other, to restrain interstate commerce, and to tend to create a monopoly in the respondent. Respondent's motion to dismiss urges the following grounds: (1) that respondent did not acquire the stock "of another corporation engaged also in commerce", as required by the statute, and that the acquisition of the stock of the New Company had no effect either in lessening competition between it and respondent, in restraining commerce, or in tending to create a monopoly; (2) that the acquisition by the New Company of the assets of the Federated involved no violation of the act since the New Company acquired no stock of the Federated and the transaction resulted in no substantial lessening of competition between the New Company and Federated or between respondent and Federated; and (3) that, as shown by the complaint, prior to the filing thereof the properties and assets of Federated had been acquired by the New Company whose stock had been acquired by respondent.

Respondent's grounds for its motion to dismiss are to be considered only insofar as they go to the jurisdiction of the Commission as shown by the complaint and motion. The disputed facts with regard to the existence of competition, the lessening thereof, restraint of commerce, and tendency toward monopoly, must for the purposes of this proceeding be assumed to be as stated in the complaint. For this reason, the respondent can derive no benefit from the last sentence of the third paragraph of the statute, which does not regard the formation of subsidiary corporations as a violation of the main injunction of the statute where the effect of such formation does not substantially lessen competition. The substantial lessening of

competition being conceded for the purposes of this proceeding, the exception is not applicable, and thus the main question of whether there has been a violation of the statute remains.

The statute by its terms requires that both the acquiring corporation and the one whose stock is acquired be engaged in "commerce." But it is to the substance of a statute that one must look for its meaning. To insist upon too literal an interpretation of a statute is frequently to deprive the statute of its ability to accomplish the great objective toward which it was directed. Under some circumstances it seems clear that the technical distinctions of corporate identity may be disregarded in the sense that the substance of the stock acquisition may be looked to in order to determine whether or not it is of the type that the statute sought to make illegal. For example, respondent concedes that if the New Company had acquired the stock of the Federated instead of its assets, the Smelting Company would have been guilty of violating the statute. But that is so only because under such circumstances one would be justified in stripping the New Company of its separate corporate identity, regarding it in its position as a subsidiary as being substantially identical with the Smelting Company, and thus reaching the conclusion that the New Company, as the acquiring corporation, was engaged in commerce because the Smelting Company was so engaged in commerce, with the result that there would be an acquisition of the stock of Federated in violation of Section 7 of the Clayton Act.

The basis for the respondent's position must then be that the substance of the transaction was an acquisition of the assets of the Federated by the Smelting Company and not an acquisition of stock of the type that violates the Clayton Act. *Thatcher Manufacturing Co. v. F. T. C.*, 272, U. S. 554 (1926). Or, to apply the principle of the illustration given above, the New Company would not be "another corporation whose stock is acquired", but the acquiring corporation itself which acquired not stock but assets. The only ground upon which the conclusion can be contested is by regarding the New Company as substantially identical with the Federated and not with the Smelting Company, and thus regarding the acquisition of the stock of the New Company as an acquisition of stock of the Federated and consequently a violation of Section 7 of the Clayton Act.

This is the position taken by counsel for the Commission and three cases are relied upon in support of that contention. In the first of these, *Aluminum Company of America v. F. T. C.*, 284 Fed. 401, (C. C. A. 3d, 1922), certiorari denied in 261 U. S. 616 (1923), the

Aluminum company and the Cleveland company had agreed to organize the Rolling Mills Company to take over the aluminum rolling business and plant of the Cleveland company. The Aluminum company acquired two thirds and the Cleveland company one third of the stock of the Rolling Mills Company. In sustaining the issuance of a cease and desist order for violation of Section 7 of the Clayton Act, the court said:

Assuming for a moment that at the time of the stock acquisition the new corporation had not become engaged in commerce because it had not begun rolling sheets and, therefore, had not been in competition with the Aluminum company we doubt that the Aluminum company could be saved from violating the section in view of the next fact that by the terms of the arrangement the Aluminum company at once put the new corporation into commerce, and put it into commerce in a way which forever prevented competition with itself.

The court then went on to say that the Rolling Mills Company was engaged in commerce at the time of the stock acquisition, pointing out that the stock subscriptions of the Aluminum company were taken up at monthly intervals over a period of six months after the transfer of the assets. Respondent distinguishes this case upon the ground that since the Cleveland company had a substantial interest in the Rolling Mills Company, the latter was not to be treated as purely a subsidiary of the Aluminum company, and hence the case falls without the principle for which respondent contends. Though the interest of the Cleveland company in the Rolling Mills Company was a minority interest and thus for many purposes the Rolling Mills Company should be regarded as a subsidiary of the Aluminum company, there is some basis for not so regarding it in this connection. This arises from the fact that the major portion of the purchase price for the mill of the Cleveland company seems to have consisted in the \$200,000 transferred to that company in stock of the Rolling Mills Company, and that the \$400,000 paid by the Aluminum company to the Rolling Mills Company for the stock acquired by it went into extension of the plant and working capital.²

Thus a distinction between the Aluminum case and that now at issue might be drawn on the theory that substantially no funds of the Aluminum company went into the purchase of the assets of the

² The exact purchase price and the nature of the consideration for the Cleveland company's mill is not specifically set forth in the findings of the Commission. It is stated, however, that the Rolling Mills Company paid to the Cleveland company \$34,890.70 "over and above the original cost of the land and buildings purchased by it" and that the total cost of the rolling mill and the land was \$227,154.64. The Cleveland company acquired "\$200,000 worth" of the stock of the Rolling Mills Company, but nowhere is it stated in the findings what the Cleveland company paid the Rolling Mills Company for this stock.

Cleveland company, but that those funds went to acquire a majority interest in a corporation that had acquired the assets of the Cleveland company for its own stock and was operating them in commerce. The element of time in the acquisition of these assets of the competing corporation would not seem determinative, but the source of their acquisition is relevant in determining whether or not the company whose stock is acquired is merely an *alter ego* of the acquiring corporation or a corporation with enough separate identity to permit the substance of such a transaction to be regarded otherwise than as an acquisition of the assets of the competing corporation through the mechanism of creating a subsidiary to acquire these assets. Cf. *Aluminum Co. v. F. T. C.* 299 Fed. 361 (C. C. A. 3d. 1924).

The second case, *United States v. New England Fish Exchange*, 258 Fed. 732 (D. C. Mass. 1919), was a proceeding under the Sherman and Clayton Acts to dissolve certain organizations of fish dealers. Among these was the Bay State Fishing Company which acquired the control of corporations of dealers, each of which was a Massachusetts corporation. In six of these cases,³ new corporations were organized, the stock of which was held by the Bay State Fishing Company, to which the dealer corporations transferred their assets, thus making the individual dealers the employees of the Bay State Fishing Company and ending competition between them. This transaction was held to be a violation of the Clayton Act, the court saying:

We also are of the opinion that the acquisition by the Bay State Fishing Co. of the stock in the eight corporations in its combination is likewise in violation of the Clayton Act. The fact that five out of eight of the corporations whose stock was taken over by the Bay State Fishing Co. were organized under the laws of Maine, to whom the Massachusetts corporations bearing the same names conveyed their businesses and assets, does not make the situation different than it would have been, and no less a violation of the Clayton Act, had it taken over the stock of the Massachusetts corporations directly. The respective Maine and Massachusetts corporations were in substance the same, and the effect of the formation of the Maine corporations and the taking over of their stock was to defeat competition between all of the subsidiary corporations. The combination of these corporations with the Bay State Fishing Co. was therefore a violation of the Clayton Act and must be dissolved (258 Fed. at 746).

³ The stock of two of the corporations was acquired outright. The assets of one Massachusetts corporation were transferred to another Massachusetts corporation that had been organized by the Bay State Fishing Company. The assets of the other five Massachusetts corporations were transferred to Maine corporations organized by the Bay State Fishing Company.

Respondent distinguishes this case on the ground that the new corporations were simply successors of the old and thus that they were not truly subsidiaries of the Bay State Fishing Company. It states that the owners and stockholders of the old corporation were the owners and stockholders of the new corporation. But the report of the case is not wholly clear in this respect. The new corporations were, according to the court, "organized" by the Bay State Fishing Company and their stock was "transferred" to the Bay State Fishing Company (248 Fed. at 743). If the stock had been "issued" to the Bay State Fishing Company, the case would be directly in point with the transaction of which complaint is now made.

The third case upon which counsel for the Commission rely is *F. T. C. v. Vivaudou, Inc.*, 13 F. T. C. 306 (1930). There the respondent was ordered to divest itself of stock in Parfumerie Melba, Inc., a corporation which it had organized for the purpose of taking over the assets of its competitor, the Melba Manufacturing Co., under a contract with the Manufacturing company in which it was stipulated that the respondent might assign the contract to a subsidiary which would assume its obligations under the contract. This case, like the New England Fish Exchange case, is similar to that now under consideration.⁴ But the points now advanced by the respondent were only incidental to the main issues involved in that proceedings; nor were they considered by the Circuit Court of Appeals which reversed the Commission's order on the ground that the necessary substantial lessening of competition had not been established.

The authority of both the Aluminum case and the New England Fish Exchange case on the question now before us is considerably weakened by the decision of the Supreme Court in *Thatcher Manufacturing Co. v. F. T. C.*, *supra*. See also *Arrow-Hart & Hegeman Electric Co. v. F. T. C.*, 291 U. S. 587 (1934). In the Thatcher case, the Court held that an acquisition of stock followed by an acquisition of assets prior to the commencement of proceedings by the Commission precluded the issuance of a cease and desist order for violation of Section 7 of the Clayton Act, on the ground that the Commission had neither power nor authority to bring about a divestiture of assets even though these assets were secured through an unlawful purchase

⁴ The Commission's findings do state that "having purchased trade upon which to start and having started upon the trade it had purchased, the new corporation, Parfumerie Melba, Inc., was engaged in commerce at the time its capital stock was acquired by the respondent" (13 F. T. C. at 318). But this finding, taken almost verbatim from the Aluminum opinion (284 Fed. at 408), contradicts the other findings of the Commission to the effect that upon the organization of Parfumerie Melba, Inc., all of its 1,000 shares of no par common stock were issued to the respondent. *Ibid*.

of stock. The case illustrates that Section 7 of the Clayton Act must be construed as outlawing mergers effected through stock acquisition (and not resulting in the acquisition of assets by such stock acquisition prior to the initiation of a complaint by the Commission) rather than as outlawing mergers of equal economic significance effected by the acquisition of assets. This conception of the function of Section 7 of the Clayton Act was not clearly before the courts either in the Aluminum or the New England Fish Exchange cases, and no acute discussion of the problem that now faces the Commission is contained in either of the opinions. The courts there considered economic consequences attendant upon the fact of merger rather than means of effecting these mergers, whereas the means, since the decisions of the Supreme Court referred to above, make the difference between right and wrong.

Much might have been said prior to the Thatcher and Arrow-Hart cases for a liberal interpretation of the statute that had regard for the great objectives of the Clayton Act—an interpretation which would give the Commission effective powers to strike at growing combinations of corporate power. See Laidler, *Concentration in American Industry*, 409; National Industrial Conference Board, *Mergers and the Law*, 111; McFarland, *Judicial Control of the F. T. C.*, 68; Berle and Means, *The Modern Corporation and Private Property*, *passim*. But, however one may deprecate the limiting language of the statute or the enhancement of those limitations by judicial construction, the Commission cannot ignore the line of cleavage cut by the decisions referred to above. True, it would be possible to make of the method of acquiring assets through a subsidiary a distinction which would take the case out of the precise facts of the controlling cases, but such a distinction would have no regard to the substance of the principle that they embody.

The case thus narrows down to the conclusion that such disregard of corporate entities as may under any circumstances be indulged in, whether it be to support the Commission's complaint or the respondent's defense, leads to regarding the New Company merely as a subsidiary of the Smelting Company and thus makes the transaction complained of an acquisition of the assets of the Federated over which this Commission has no jurisdiction, but for which, in the words of the Supreme Court, "a remedy is provided through the courts." *Thatcher Manufacturing Co. v. F. T. C.*, *supra*, at 561. The ruling on this question is, however, without prejudice to the propriety of a complaint based solely upon the respondent's acquisition, through the New Company, of the stock of the Missouri Zinc Company.

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Respondent's contention that the acquisition of assets prior to the institution of proceedings in the instant case, precludes any action by the Commission cannot be sustained. In the *Thatcher case* and *Swift & Co. v. F. T. C.*, decided at the same time, divestiture of stock alone would have been useless and the fundamental question was the Commission's jurisdiction to order a restoration of assets. In the present case, since the respondent controls the assets of Federated only through ownership of the New Company's stock, an order requiring it to part with the latter would not be a futile gesture.

Complaint dismissed.

ORDER OF DISMISSAL

This matter coming on to be heard on respondent's motion to dismiss complaint and brief in support thereof, and brief by counsel for the Commission in opposition to said motion, and the Commission having heard oral argument and having duly considered the matter and being now advised in the premises:

It is ordered, That the complaint herein be and the same hereby is dismissed, pursuant to the written opinion of the Commission filed and entered herein on June 22, 1934.

Syllabus

IN THE MATTER OF
THE CHARLES R. SPICER COMPANY, INC.

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2089. Complaint, Feb. 3, 1933—Decision, June 26, 1934

Where a corporation engaged in the sale and distribution of various proprietary medicines direct to the purchasing public, by mail, or through agents, and through wholesale druggists; in advertising the same through booklets, folders and circulars, newspapers, magazines, and testimonials.

- (a) Represented that its "Palvo" or "Palvo Vegetable Compound" constituted a cure, remedy, or competent and adequate treatment for female troubles generally, and included among those specified, serious diseases and pathological conditions classified under the general heading of female diseases, facts being that many of those named require surgical treatment for relief, and preparation in question, with mild laxative and sedative effects and antispasmodic and slight tonic properties, and a tendency to relieve pains incident to certain conditions and ailments of women, was not curative of, or an effective treatment for any serious condition of the female organs, had no curative effects where any definite pathology existed, or any effect on the causes underlying or forming the basis of female troubles and would not cure specific ailments named, but, used for pain, was purely symptomatic in its effects;
- (b) Represented that its "Spicer's Compound" was a "blood tonic and system builder" and purified the blood, and would "work the cold, bile, filth, malaria, and impurities from your system in a surprising manner, and build you up all over", and was a cure, remedy or competent and adequate treatment for "Indigestion—Sour Stomach—Constipation—Billiousness—Torpid Liver—Kidney and Bladder Troubles—Pain in the Back and Hips—Frequent Urination—Weak Bladder—Nervo Sexual Debility—Impure Blood—Sallow Complexion—Pimples and Blotches—Dull, Lazy Feeling—Loss of Appetite", facts being that preparation in question constituted a laxative, diuretic and tonic, but could not accurately or correctly be represented as a blood purifier or blood tonic, or as having results attributed to it, or as a cure, remedy or competent and adequate treatment for the various ailments or conditions mentioned; and
- (c) Represented its "Special Compound No. 141" as a cure, remedy or competent and adequate treatment for lost manhood and as a lasting tonic through such statements as "* * * It is not merely a temporary stimulant but a lasting tonic * * *", and, "Especially recommended for weak, nervous and run-down men and women who are troubled with Lost Vitality, Nervo-Sexual-Debility (lost manhood)", facts being that preparation in question, the therapeutic effects of which were limited to those of a tonic and a stimulant to the appetite, would not restore entirely lost sexual power, and had no therapeutic effect on any disease causing loss of such power, could not correctly be described as a lasting tonic, and did not constitute a cure, remedy, or competent and adequate treatment for lost manhood, lost vitality, sexual debility, or nervo-sexual debility;