1964

# Double Jeopardy: Contempt Citation Does Not Bar Later Conviction for Substantive Crime

Minn. L. Rev. Editorial Board

# Case Comments

## Double Jeopardy: Contempt Citation Does Not Bar Later Conviction for Substantive Crime

While testifying in his own defense on a federal narcotics charge, appellant stood up and threw the witness chair on which he had been sitting at an Assistant United States Attorney.[1] He was held to be in contempt of court and was summarily sentenced to imprisonment for one year.[2] When appellant was later

1. The chair was thrown some 15 feet and struck the jury rail about three feet from the lectern where the Assistant United States Attorney was standing. This incident was one of many that occurred during a retrial upon an indictment charging defendant and 28 others with violations of the Narcotic Drugs Import and Export Act, 35 Stat. 614 (1909), 21 U.S.C. §§ 173, 174 (1958). The first trial ended in a mistrial when the foreman of the jury sustained injuries on the eve of summation, at which time no alternate jurors remained. At the conclusion of the first trial and prior to the declaration of a mistrial, defendant was summarily held in contempt of court and sentenced to 20 days in jail for refusing upon repeated warnings to stop talking to the judge and sit down. United States v. Galante, 298 F.2d 72 (2d Cir. 1962). For an insight into the incredible and bizarre behavior of the defendants, see Brief for Appellees, United States v. Bentvena, 308 F.2d 47 (2d Cir. 1962). See also United States v. Bentvena, 304 F.2d 883 (2d Cir. 1962); United States v. DiPietro, 302 F.2d 612 (2d Cir. 1962); United States v. Galante, *supra*; United States v. Bentvena, 288 F.2d 442 (2d Cir. 1961). Some of the more egregious incidents were the storming of the jury box by the defendant, Panico; Panico's faked hanging attempt and his attempt to slash his wrists in jail; the constant outbursts by the defendants in the presence of the court. United States v. Panico, 308 F.2d 125 (2d Cir. 1962), *vacated*, 375 U.S. 29 (1963); United States v. Bentvena, 308 F.2d 47 (2d Cir. 1962).

2. FED. R. CRIM. P. 42(a) provides:

> *Summary Disposition*: A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

Punishment is considered discretionary under this rule. MacInnis v. United States, 191 F.2d 157, 162 (9th Cir. 1951), *cert. denied*, 342 U.S. 953 (1952); see United States v. Bollenbach, 125 F.2d 458 (2d Cir. 1942); United States v. Landes, 97 F.2d 378 (2d Cir. 1938). Where sentencing has been severe, however, the appellate courts have been inclined to remand. See Yates v. United States, 355 U.S. 66, 75–76 (1957); Nilva v. United States, 352 U.S. 385, 396 (1957). In United States v. Barnett, 32 U.S.L. WEEK 4303 (Apr. 7, 1964) the Court expressed the opinion that "some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." *Id.* at 4307.

indicted for assaulting a federal officer as a result of the chair-throwing incident,[3] he moved to dismiss the indictment on the ground that it was based on the same facts and proof as the contempt citation and thus violated the fifth amendment's guarantee against double jeopardy.[4] The court denied the motion and *held* that the double jeopardy clause does not prevent punishment both by summary contempt and by indictment where a contumacious act contains the elements of a substantive crime. *United States v. Mirra*, 220 F. Supp. 361 (S.D.N.Y. 1963).

The double jeopardy clause — which protects a person from being "twice put in jeopardy of life or limb" for the same offense — has not achieved the stature of other clauses of the Bill of Rights.[5] It is not one of the guarantees of the Bill of Rights, for example, that has been made wholly binding on the states through the due process clause of the fourteenth amendment.[6] And in federal prosecutions, the right of protection against double jeopardy has been narrowly confined. The federal courts, in determining if a second prosecution or a multiple-count indictment violates the clause, have tended to look at whether the "same evidence" is required to prove the charge in both indictments or the several counts in a single indictment. If one extra or one different fact is necessary to the proof of the offense charged in the second count or indictment, the successive prosecution or multiple-count indictment has been held outside the purview of the clause, on

3. Appellant was indicted under 18 U.S.C. § 111 (1958), which provides: *Assaulting, resisting, or impeding certain officers or employees:* Whoever forcibly assaults . . . or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years or both.

4. " . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

5. See generally Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960); Note, 65 YALE L.J. 339 (1956).

6. Bartkus v. Illinois, 359 U.S. 121 (1959) (5 to 4 decision). In addition, a single criminal act may be the subject of successive prosecutions by both a state and the federal government. Abbate v. United States, 359 U.S. 187 (1959); Jerome v. United States, 318 U.S. 101 (1943); United States v. Lanza, 260 U.S. 377 (1922). The rationale underlying this principle is that the double jeopardy clause is a guarantee only as against successive federal prosecution; that an act made a crime by both national and state sovereignties is an offense against both and may be punished by both. This result is said to be compelled by our concept of federalism. Abbate v. United States, *supra* at 195; see WESTIN, AN AUTOBIOGRAPHY OF THE SUPREME COURT 354–55 (1963).

the ground that the second trial or punishment is for a different offense.[7]

The "same evidence" test has been most often applied where a single act constitutes a violation of two or more statutes or sections of a single statute.[8] Where, under the test, different facts are requisite to the proof of a second offense, multiple-count indictments and consecutive punishments in a single trial have been held not to violate the double jeopardy clause;[9] conviction or acquittal for the death or injuries of one has not barred a second prosecution and punishment for the death or injuries of another, where a single criminal act caused multiple injuries or deaths;[10] and a conviction for one violation has not been a bar to subsequent trial and punishment for a second violation of another section of the same statute or another statute, both violations being based on a single act.[11]

---

But the result has evoked much criticism. See Abbate v. United States, *supra* at 201 (1959) (Black, J., dissenting); Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932); Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4. U.C.L.A.L. REV. 1 (1956); Note, 55 COLUM. L. REV. 83 (1955). For a somewhat different and cogent argument, see Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961).

All but five of the states have double jeopardy provisions in their constitutions. See ALI, ADMINISTRATION OF CRIMINAL LAW: DOUBLE JEOPARDY 56–58 (1935).

7. See, *e.g.*, Young v. United States, 288 F.2d 398 (D.C. Cir. 1961), *cert. denied*, 372 U.S. 919 (1963); McGann v. United States, 261 F.2d 956 (4th Cir. 1958), *cert. denied*, 359 U.S. 974 (1959); Duke v. United States, 255 F.2d 721 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958); Montgomery v. United States, 146 F.2d 142 (5th Cir. 1945).

The "same evidence" test is also used by most state courts. See Note, 7 BROOKLYN L. REV. 79, 81 n.26 (1937). A few states, however, utilize a "same transaction" test. The question asked is whether both violations are part of the same criminal transaction. If they are, to try the accused for both would be to put him twice in jeopardy for the same offense. See, *e.g.*, Roberts v. State, 14 Ga. 8 (1853); State v. Mowser, 92 N.J.L. 474, 106 Atl. 416 (1919); State v. Cooper, 13 N.J.L. 361 (1833); *cf.*, State v. Shedrick, 69 Va. 428, 38 Atl. 75 (1897); 33 HARV. L. REV. 110 (1919). *But see* 68 U. PA. L. REV. 70 (1919).

8. See, *e.g.*, Gore v. United States, 357 U.S. 386 (1958); Bell v. United States, 349 U.S. 81 (1955); Albrecht v. United States, 273 U.S. 1 (1927).

9. Gore v. United States, 357 U.S. 386 (1958); Blockburger v. United States, 284 U.S. 299 (1932); United States v. Jones, 248 F.2d 772 (7th Cir.), *cert. denied*, 356 U.S. 923 (1957); United States v. Johnson, 235 F.2d 159 (7th Cir.), *cert. denied*, 352 U.S. 1006 (1956). *But see* Ballerini v. Aderholt, 44 F.2d 352 (5th Cir. 1930). See also Gore v. United States, *supra* at 393 (Warren, C.J., dissenting).

10. *Cf.* Ciucci v. Illinois, 356 U.S. 571 (1958); Hoag v. New Jersey, 356 U.S. 464 (1958).

11. McGann v. United States, 261 F.2d 956 (4th Cir. 1958), *cert. denied*, 359 U.S. 974 (1959); Nemec v. United States, 191 F.2d 810 (9th Cir. 1951);

Several recent Supreme Court decisions, however, indicate that the "same evidence" test may no longer be acceptable in all federal prosecutions. In *Abbate v. United States*,[12] Mr. Justice Brennan emphasized in a separate opinion that the Supreme Court has never recognized the "same evidence" test in successive prosecutions.[13] The recent case of *United States v. Maraker*,[14] where the Supreme Court reversed without opinion appellant's conviction for illegally bringing narcotics into the country, after he had been acquitted when prosecuted for conspiracy, appears to substantiate Mr. Justice Brennan's views.[15] The government already seems to have accepted this position, for in *United States v. Petite*[16] it moved for an order to vacate a second conviction, obtained on substantially the same facts as the first, on the ground that it was against government policy to have successive prosecutions.[17]

The Supreme Court's recent approach, that at least in federal cases the prosecution is barred from subsequently prosecuting another act out of the same transaction once the first prosecution has been taken to a verdict,[18] will not work an unreasonable hardship on federal prosecutors. That an accused may be tried a second time for the same offense where he has obtained the reversal

Lewis v. United States, 6 F.2d 222 (9th Cir. 1925); Coy v. United States, 5 F.2d 309 (9th Cir. 1925); Bell v. United States, 2 F.2d 543 (8th Cir. 1924); United States v. Mandile, 119 F. Supp. 266 (E.D.N.Y. 1954).

12. 359 U.S. 187 (1959).

13. *Id.* at 198 n.2 (1959) (opinion of Brennan, J.).

14. 370 U.S. 723 (1962).

15. The Court did not write an opinion. Mr. Justices Black, Douglas, and Brennan, however, stated that their reason for reversing was that the second trial was a violation of the double jeopardy clause; they cited Mr. Justice Brennan's separate opinion in *Abbate* as authority. *Cf.* United States v. Crosby, 314 F.2d 654, 657 (1963). It appears that at least successive prosecutions under the "same evidence" test will, in the future, be found violative of the double jeopardy clause.

16. 361 U.S. 529 (1960).

17. The government said that its general policy was that where several offenses arise out of a single transaction they should be alleged and tried together and should not be made the basis of multiple prosecutions: "a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement." *Id.* at 530.

18. The adoption of a more liberal federal double jeopardy standard may eventually require the states to adhere to a similar standard. Although the double jeopardy provision of the fifth amendment has not heretofor been incorporated into the fourteenth amendment, a changed standard at the federal level may influence the Court to take another look at what is required by due process. See Ciucci v. Illinois, 356 U.S. 571 (1958); Hoag v. New Jersey, 356 U.S. 464 (1958).

of a conviction by his own appeal is already well established.[19] Also, even though jeopardy attaches in a jury trial when the entire jury has been empaneled and sworn[20] and in a trial without a jury after the first witness is sworn,[21] jeopardy is not regarded as ended so as to bar a second trial for the same offense in those cases where unforeseeable circumstances arise during the first trial making its completion impossible; for example, the failure of the jury to agree on a verdict.[22]

A most persuasive argument, however, for overruling the "same evidence" test in all federal prosecutions is that where the same act violates different federal statutes or sections of a single statute protecting separate federal interests, those interests can be adequately protected in a single trial by the imposition of consecutive punishments for each violation;[23] where the federal interests are not separate, consecutive punishments and, of course, multiple-count indictments are undesirable.[24] By requiring the federal government to litigate all its grievances against an individual arising out of a single criminal act in one trial, the Supreme Court would best carry out the underlying policies of the double jeopardy clause. This frees an accused from the anxiety and expense of defending against repeated prosecutions for a single wrongful act as well as from the imposition of more than the statutory maximum punishment for his offense.

Under the new standard federal judges will ask the following question: Were both violations part of the same criminal transaction? If they were, to try the accused for both would be to put

19. United States v. Ball, 163 U.S. 662 (1896). The new trial is generally considered a second jeopardy, but most courts justify it on the ground that appellant has "waived" his plea of former jeopardy by asking that the conviction be set aside. See, *e.g.*, Brewster v. Swope, 180 F.2d 984 (9th Cir. 1950). Some courts view the second trial as continuing the same jeopardy that had attached at the first trial because that jeopardy does not come to an end until the accused has been acquitted or his conviction has become final. See, *e.g.*, State v. Aus, 105 Mont. 82, 69 P.2d 584 (1937); *cf.* Griffin v. Illinois, 351 U.S. 12, 18 (1956).

20. Downum v. United States, 372 U.S. 734 (1963); Wade v. Hunter, 336 U.S. 684 (1949); Kepner v. United States, 195 U.S. 100 (1904); see 1 WHARTON, CRIMINAL LAW AND PROCEDURE 308–09 (12th ed. 1957).

21. See Clawans v. Rives, 104 F.2d 240 (D.C. Cir. 1939); 1 WHARTON, *op. cit. supra* note 20, at 309–10.

22. Wade v. Hunter, 336 U.S. 684 (1949). See also 38 ST. JOHN'S L. REV. 158 (1963).

23. See, *e.g.*, Gore v. United States, 357 U.S. 386 (1958); Bell v. United States, 349 U.S. 81, 82–83 (1955).

24. See, *e.g.*, Gore v. United States, 357 U.S. 386, 393 (1958) (Warren, C.J., dissenting); *id.* at 395 (Douglas, J., dissenting); *id.* at 397 (Brennan, J., dissenting). See also Note, 57 YALE L.J. 132 (1947).

him twice in jeopardy for the same offense. The new test cannot be rigidly applied, for in some situations the policies underlying the double jeopardy clause must give way to successive prosecutions.[25] Where an accused is convicted of a lesser crime and subsequently, through no oversight of the prosecutor, it becomes evident that he is guilty of a greater crime, for example, the first conviction should not bar a subsequent trial for the greater crime, even though it arose out of the same criminal transaction. Thus, where an individual is convicted of an assault and battery and, at a later date, the victim dies, the former conviction should not bar a subsequent prosecution for the greater crime.[26] On the other hand, if the accused were acquitted of the assault and battery charge he could not later be retried for murder, since the state has already had an opportunity and failed to show an essential element of the offense.

The court in the instant case correctly decided that a summary contempt citation[27] should not bar the subsequent prosecu-

25. In State v. Currie, 197 A.2d 678 (N.J. 1964), the New Jersey Supreme Court flexibly applied the prohibition against double jeopardy, considering the underlying policies of the clause rather than its technisms. The court held that a municipal court conviction for reckless driving and leaving the scene of an accident did not bar the subsequent prosecution for assault and battery growing out of the same incident. The court emphasized the dissimilar nature of the two offenses — the assault and battery charge requiring criminal intent — and the dissimilar methods of disposing of them — the driving charges before local police magistrates, usually without counsel, and with relatively minor maximum fines and terms of imprisonment. In light of these differences, the court found that a

> refusal to permit the proceeding before the magistrate to bar subsequent criminal prosecution for the death or the serious injury caused by the defendant is readily comprehensible. The elements of oppression or harassment historically aimed at by the constitutional and common law prohibition are not significantly involved; and permitting the second prosecution would not violate the reasonable expectations attendant upon the first proceeding while barring it would operate with gross unfairness to the State.

197 A.2d at 685. Compare State v. Mowser, 92 N.J.L. 474, 106 Atl. 416 (1919); State v. Cooper, 13 N.J.L. 361 (1833).

26. See Hopkins v. United States, 4 App. D.C. 430 (1894).

27. FED. R. CRIM. P. 42(a) provides that "criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. . . ." *But see* Sacher v. United States, 343 U.S. 1, 14 (1952) (Black, J., dissenting); FORKOSCH, CONSTITUTIONAL LAW § 112 (1963); Frankfurter & Landis, *Power to Regulate Contempts*, 37 HARV. L. REV. 1010 (1924); Goldfarb, *The Constitution and Contempt of Court*, 61 MICH. L. REV. 283 (1962); Goldfarb, *The Varieties of the Contempt Power*, 13 SYRACUSE L. REV. 44 (1961); Nelles, *The Summary Power To Punish for Contempt*, 31 COLUM. L. REV. 956 (1931).

tion of the contumacious act as a substantive crime. Although only a single act had been committed, it constituted two separate and unrelated offenses. One offense was against the dignity and effectiveness of the court in its administration of the laws, and the other was against the public peace guarded by the state through criminal sanctions.[28] The first offense must be punished when it occurs to enable a court to control the conduct of those appearing before it.[29]

Unlike other offenses that arise from the "same transaction," where the public interest can be protected in one trial and by the imposition of one penalty, the contumacious act must be punished immediately. Although the courts and the state undoubtedly have the same general interest in the punishment of antisocial behavior, the courts have a further substantial and exclusive interest to protect.[30] In order to give speedy, orderly and just treatment to those appearing before it, the court must be able to command respect and control the actions of those persons. To allow an individual to escape the consequences of his contumacious act through the double jeopardy clause would be to countenance a state of affairs where judges could become ineffectual in restoring judicial decorum for fear that a contempt conviction would bar a subsequent prosecution for the same act.[31]

## Clayton Act: Private Party Denied Treble Damages for Violation of Section 7

Plaintiffs, shareholders of General Motors Corporation, brought a derivative suit against E. I. duPont de Nemours & Company seeking treble damages for injuries allegedly caused by duPont's

28. See O'Mally v. United States, 128 F.2d 676 (8th Cir.), *rev'd on other grounds*, 317 U.S. 412 (1942), where the court held that a contempt conviction was not a bar to a proceeding for conspiracy even though both proceedings were based on the same act. *Cf.* Long v. Commonwealth, 197 S.W. 848 (Kent. 1917); State v. Yancy, 4 N.C. 133, 1 L. Rep. 519 (1813). See also State v. Woodfin, 27 N.C. 199 (1844) (contempt and perjury); Ricketts v. State, 111 Tenn. 380, 77 S.W. 1076 (1903) (contempt and perjury); 1 BISHOP, CRIMINAL LAW § 1067 (9th ed. 1923); 22 C.J.S. *Criminal Law* § 293 (1961).

29. See Yates v. United States, 355 U.S. 66 (1957); *Ex parte* Terry, 128 U.S. 289 (1888).

30. *But see* Goldfarb, *supra* note 27, 316–17.

31. The other alternative would be for the court summarily to hold the prosecutor of the act in contempt and pronounce a sentence equalling that which could be had in a criminal prosecution. The defendant in such a proceeding might be summarily sentenced to ten years without any of the procedural safeguards present in the usual criminal proceeding.

violations of sections 1 and 2 of the Sherman Act[1] and section 7 of the Clayton Act.[2] Plaintiffs invoked section 5 of the Clayton Act[3] for proof of the antitrust violations, relying on a prior government case[4] in which duPont was found to have violated section 7 of the Clayton Act by acquiring and holding 23 percent of the stock of General Motors Corporation. In a ruling given to define the scope of pretrial discovery proceedings, a federal district court *ruled* that a private treble damage action could not be based on a violation of section 7 of the Clayton Act.[5] *Gottesman v. General Motors Corp.*, 221 F. Supp. 488 (S.D.N.Y. 1963).

Congress, in designing the Clayton Act, provided in section 4 a supplement to governmental agency enforcement of the antitrust laws by giving to private parties injured by their violation a right to sue for treble damages.[6] Section 4 was intended to af-

1. Section 1 makes any trust or conspiracy in restraint of trade illegal. Section 2 provides that monopolizing or attempting to monopolize trade is a misdemeanor. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1958).

2.

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

38 Stat. 730 (1914), as amended, 15 U.S.C. § 18 (1958).

3.

> A final judgement or decree . . . rendered in any civil . . . proceeding brought by . . . the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action . . . brought by any other party . . . under said laws . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.

38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(a) (1958).

4. United States v. E. I. duPont de Nemours & Co., 353 U.S. 586 (1957).

5. The court also held that the prior government judgment was not available to aid plaintiffs in proving their claims because it covered a period before the date when they became shareholders of General Motors. Gottesman v. General Motors Corp., 28 F.R.D. 325 (S.D.N.Y. 1961).

6. "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained . . . ." 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

A treble-damage recovery entails proof of three elements—an antitrust violation, an injury to the plaintiff, and a causal relation between the violation and the injury. Radovich v. Nat'l Football League, 352 U.S. 445, 453 (1957); Hudson Sales Corp. v. Waldrip, 211 F.2d 268, 274 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954); *cf.* Keogh v. Chicago & N.W. Ry., 260 U.S.

ford injured parties a means of redress,[7] deter infraction of the antitrust laws by providing a heavy penalty for their violation,[8] and insure their vigorous enforcement through private execution as an adjunct to government enforcement.[9]

To further encourage actions by injured private parties, Congress provided in section 5 of the Clayton Act that a final judgment rendered in an antitrust suit brought by the United States constitutes prima facie evidence of an antitrust violation in a private treble damage suit.[10] Since recovery in a private suit depends on proof of an injury caused by a violation of the antitrust laws,[11] the individual's burden of proof is considerably reduced where he can invoke a prior government judgment.

---

156, 165 (1922). See also Timberlake, *Federal Antitrust Treble Damage Actions*, 9 N.Y.L.F. 145, 150 (1963).

7. *Hearings Before the House Committee on the Judiciary*, 63d Cong., 2d Sess., ser. 7, pt. 16, at 638 (1914) [hereinafter cited as *1914 Hearings*]; see Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751–52 (1947); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 378 (1955). See generally Barber, *Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience*, 30 GEO. WASH. L. REV. 181 (1961).

It has been suggested that one of the reasons for allowing threefold damages is to assure ample recovery where actual damages are too obscure or difficult of proof or too speculative to be estimated. *Hearings on H. R. 4597 Before a Subcommittee of the House Committee on the Judiciary*, 83d Cong., 1st Sess. 9, 10 (1953) (bill to make recovery of treble damages discretionary with the trial court).

8. *1914 Hearings* pt. 16, at 647; see Maltz v. Sax, 134 F.2d 2, 5 (7th Cir. 1943). For examples of some large amounts awarded in treble damage actions, see Note, 61 YALE L.J. 1010, 1063 (1952).

9. See Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751 (1947); Hess v. Anderson, Clayton & Co., 20 F.R.D. 466, 475 (S.D. Cal. 1957); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 378 (1955); Timberlake, *supra* note 6, at 148. "[W]e have . . . begun to see the development of private litigation under the triple-damage statute, which is of substantial help. It already is a deterrent." *Hearings on H. R. 3408 Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 82d Cong., 1st Sess., ser. 1, pt. 3, at 15 (1951) (bill to allow the government to sue for damages from antitrust violations); see Note, 61 YALE L.J. 1010, 1061, 1063 (1952).

10. See note 3 *supra*. The purpose of § 5 is to minimize the burdens of litigation facing injured private suitors by "making available to them all matters previously established by the Government in antitrust actions." Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951); see H. R. REP. No. 627, 63d Cong., 2d Sess. 14 (1914); S. REP. No. 698, 63d Cong., 2d Sess. 44 (1914). There seems to be no reason for denying this advantage to a private plaintiff where the previous suit resulted in a finding of a § 7 violation.

11. Monticello Tobacco Co. v. American Tobacco Co., 197 F.2d 629 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952); Turner Glass Corp. v. Hartford-Empire Co., 173 F.2d 49 (7th Cir.), *cert. denied*, 338 U.S. 830 (1949); Burn-

The plaintiffs in the instant case sought to recover treble damages on the basis of a violation of section 7 of the Clayton Act. Section 7 proscribes corporate stock or asset acquisitions the effect of which "may be substantially to lessen competition, or tend to create a monopoly" in any line of commerce;[12] that section was drafted to increase the efficacy of the antitrust laws by arresting restraints or monopolies in their incipiency.[13] Since an actual restraint of trade need not be proved, the burden of proving a section 7 violation is less than that for proving other antitrust violations. For this reason the government has come increasingly to rely on section 7 to prove antitrust violations.[14] In addition, in cases where the government alleges both a violation of section 7 and the Sherman Act, courts generally will not even look to see if the evidence proves a Sherman Act violation where they can find that the defendant has violated section 7.[15] Indeed,

ham Chem. Co. v. Borax Consol., 170 F.2d 569, 571 (9th Cir. 1948), *cert. denied*, 336 U.S. 924 (1949); see Timberlake, *supra* note 6, at 150; *cf.* Keogh v. Chicago & N.W. Ry., 260 U.S. 156, 165 (1922).

12. 64 Stat. 1125–26 (1950), 15 U.S.C. § 18 (1963). The original Clayton Act was amended in 1950 to proscribe asset as well as stock acquisitions, thereby closing a loophole in the act.

13. "[T]he bill . . . seeks . . . to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914). According to S. REP. No. 1775, 81st Cong., 2d Sess. 6 (1950), the "reasonable probability" standard of § 7 embodied in the words "may be" was written in by Congress "to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act." See United States v. E. I. duPont de Nemours & Co., 353 U.S. 586, 589 (1957); Transamerica Corp. v. Board of Governors, 206 F.2d 163, 169 (3d Cir. 1953). See generally *1914 Hearings* pts. 1–35. The United States Supreme Court commented in Brown Shoe Co. v. United States, 370 U.S. 294, 317–18 (1962):

> [I]t is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum.

14. Of 84 § 7 cases brought by the Department of Justice between 1914 and January 1, 1963, 68 were filed after January 1, 1955. In only 16 of these cases were there also attempts to prove violations of other sections of the antitrust laws. ABA SECTION OF ANTITRUST LAW, MERGER CASE DIGEST (1963) contains a compilation of cases. See Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629 (1961); 64 COLUM. L. REV. 597, 599 (1964).

15. See, *e.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 323–

that is exactly what happened in the government suit relied on by plaintiffs in the instant case.[16]

By denying private parties the possibility of recovering treble damages in a section 7 case,[17] the court in the instant case, in effect, required a greater burden of proof of an antitrust violation for recovery by private parties than for the government to establish such a violation.[18] By doing so, the instant court decreased the availability of the private remedy. Treble-damage recovery is therefore made more difficult by this decision because injured parties must prove a Sherman Act violation — an actual restraint of trade — and because they often will be unable to rely on a prior government judgment; this difficulty may influence plaintiffs who are considering whether to institute a treble-damage suit based on questionable antitrust activity.[19]

The result reached by the court clearly seems inconsistent with the purpose underlying section 4 of the Clayton Act;[20] nor was the result reached by the court compelled by the language of the

24 (1963); United States v. E. I. duPont de Nemours & Co., 353 U.S. 586, 588 n.5 (1957).

16. "Thus, a finding of conspiracy to restrain trade or attempt to monopolize was excluded from the Court's decision." United States v. E. I. duPont de Nemours & Co., 366 U.S. 316, 340 (1961) (Frankfurter, J., dissenting) (referring to the Court's decision on the merits).

17. Although the court's holding is technically dicta, its "explicitness and candor leave no doubt that its ruling was advertent." 64 COLUM. L. REV. 597, 601 (1964).

No case has been found where a private party successfully based a treble damage action solely on a § 7 violation although allegations of violations of § 7 along with other of the antitrust laws have been the basis for such suits. See Kogan v. Schenley Industries, Inc., 20 F.R.D. 4 (D. Del. 1956); Ozdoba v. Verney Brunswick Mills, Inc., 152 F. Supp. 136 (S.D.N.Y. 1946).

Courts have upheld such complaints against motions to dismiss, however. For example, in one case where a plaintiff based a treble damage suit solely on an allegation of a § 7 violation, the court denied a motion to dismiss without discussing the conceivability of proving injury to the plaintiff flowing from the violation, declaring that "a complaint should not be dismissed unless it appears to a certainty that plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim . . . ." Foreign Car Div., Inc. v. Chrysler Corp., 1960 Trade Cas. ¶ 76688 (W.D. Pa. 1960).

18. For a discussion of the burden facing a private litigant in an antitrust case, see Loevinger, *Private Action — The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 169 (1958).

19. The effectiveness of private action as an adjunct to government enforcement will be diminished if treble-damage actions are not to be allowed for § 7 violations. However, private injunctive relief can still be obtained under § 16 of the Clayton Act. 38 Stat. 737, 15 U.S.C. § 26 (1958).

20. See notes 7-9 *supra* and accompanying text.

act. On the contrary, section 7 is expressly incorporated in the antitrust laws,[21] and it is the violation of the antitrust laws that gives rise to a private cause of action under section 4. In addition, the fact that section 5 does not except prior judgments of section 7 violations from constituting prima facie evidence of an antitrust violation reinforces this conclusion.[22]

The court, however, found that the plaintiffs could not be injured by the potential restraints of trade proscribed by section 7. In the context of the instant case — a derivative suit by shareholders in an acquired corporation — the decision may be justifiable. Although derivative suits have played an increasingly important antitrust role,[23] their utility in section 7 cases is limited.[24] The justification for derivative suits lies in the economic benefit to the corporation.[25] For example, a derivative suit seeking an injunction against particular corporate activity that is likely to produce multiple treble-damage claims would provide such justification. But merger activity is unlikely to produce demonstrable damage to potential plaintiffs because of the indefiniteness of the criteria necessary to prove a section 7 violation.[26] In addition, a shareholder's proof of injury to the corporation caused by the merger would be equally, if not more, difficult than a private party's or the government's proof because of the shareholder's relationship to the corporation. The merger would have taken place at the instance of the company's management, and presumably they acted to increase the economic benefit to the corporation and to these shareholder plaintiffs. Furthermore, the inherent difficulty of derivative suits would be compounded here by the burden of proving economic detriment to the corporation caused by the merger. Finally, the possibility of such suits in combination with their expense to the corporation might encourage "strike suits."

21. 38 Stat. 730 (1914), 15 U.S.C. § 12 (1958).

As originally drawn, section 4 would have authorized treble-damage actions only for violations of §§ 1, 2, or 3 of the Sherman Act. *1914 Hearings* 1849, 1852. As finally reported, however, the bill authorized such suits for violations of any of the antitrust laws. H.R. REP. No. 627, 63d Cong., 2d Sess. 1 (1914).

22. See note 3 *supra*.

23. See Blake, *The Shareholders' Role in Antitrust Enforcement*, 110 U. PA. L. REV. 143, 144 (1961).

24. See Gomberg v. Midvale Co., 157 F. Supp. 132 (E.D. Pa. 1955); *cf.* Fanchon & Marco v. Paramount Pictures, Inc., 202 F.2d 731 (2d Cir. 1953). *Contra* Ramsburg v. American Inv. Co., 231 F.2d 333 (7th Cir. 1956).

25. See Blake, *supra* note 23, at 156.

26. *Ibid.*

In a broader context, however, a distinction should be drawn between the plaintiffs such as those in the instant case and sellers competing in the same market. Competitors of the acquired corporation could conceivably be injured by reason of a merger which violates section 7. For example, suppose Clorox and Procter & Gamble proposed to merge. If such a merger is given wide publicity and wholesalers and retailers believe that the net result will be to give Clorox the dominant position in the bleach market, they might increase their Clorox purchases in order to establish themselves as "good" customers of Clorox before it gains the dominant position in the market,[27] thereby placing themselves in a better position to reap available benefits from a solid customer relationship at the time that Clorox becomes the leading bleach manufacturer. Although other bleach manufacturers' burden of proving injury by reason of this proposed merger is great, due to the difficulty of proving a causal relationship between the violation and the injury, if the merger is prevented by a section 7 government suit, there appears to be little justification for not allowing these other manufacturers into court. They could conceivably prove such injury and that possibility should be sufficient to allow them to rely on the section 7 violation, thereby giving them the opportunity to prove the relationship between the injury and the violation. To require plaintiffs to show more than a section 7 violation in order to establish a causal relationship between an antitrust violation and their injury, as was suggested by the court in the instant case, undermines the effectiveness of private suits as a deterrent to antitrust violations.

27. In order to remain dominant, manufacturers realize the necessity for maintaining good customer relationships.