nopoly" (Standard Stations dissent), and candidly revealed his view of mergers in general three years ago. In reviewing a new biography of Louis D. Brandeis, he wrote that Justice Brandeis had:

> proved over and over again the truth about mergers – that economy in operations was a false purpose, that the growth of power and strengthening of monopoly were the real purposes.
>
> *New York Times Book Magazine*, July 5, 1964

In the face of such ardor, the acquisition by the biggest company, in a big industry, of the biggest company in a small industry, didn't stand much chance.

However, the decision was not just Douglas speaking. The opinion was 7 to 0. Nor was it just another merger case. This was a major decision in the burgeoning field of "conglomerate" mergers. Habit and history lead the layman to think of mergers as between competitors – that is, "horizontal." This was a "product-extension" merger. And sheer size was an important consideration.

Story of a "Product-Extension" Merger

Liquid household bleach, which is easy to make, sells mostly on advertising. The Clorox people, after building their company up to doing nearly half the nation's business in this item, proposed a merger to P & G. The latter's research people figured the acquisition was a natural. Clorox bleach sits on the same grocery shelves with Procter's goods, and could be economically handled by its marketing people. Even more important, Clorox could be advertised, especially on TV, at the exceedingly low quantity rates enjoyed by P & G as the biggest TV advertiser in the country.

The researchers reported that P & G *could* invade the bleach market *by itself* but that acquiring Clorox would make entrance vastly cheaper. In August, 1957, the merger was made. In September, 1957, the Federal Trade Commission issued a complaint against Procter & Gamble, charging that the merger had violated Section 7 of the Clayton Act as amended by Congress in 1950.

The F.T.C.'s final order (Docket No. 6901, November 26, 1963) written by Commissioner Philip Elman, was thorough and scholarly, and in effect "threw the book at" P & G, including the doctrines of oligopoly, incipiency, potential competition, internal expansion, and social purpose.

The opinion spelled out the cost advantages of the merger, particularly in advertising, but then said that these were "offensive to the spirit . . . of the antitrust laws" because they were "achievable

only by firms of very large absolute size," and "more important . . . there does come a point at which . . . mass advertising loses its informative aspect and merely entrenches market leaders. . . ."

But the gist of the objection appeared to be that, by such acquisition, a giant company had taken over nearly half a pigmy industry.

The Supreme Court went even further. It ruled that the acquisition was illegal because of P & G's "huge assets and advertising advantages," and that "possible economies" from the merger "cannot be used as a defense."

(As did the F.T.C., the high court based its finding on the allegedly *anti*competitive effect of the merger; it found that it tended to "substantially lessen competition." This is a quirk in antitrust interpretation which may, but shouldn't, confuse the layman. By it, a big-company action that, it is feared, will *aggravate* competition, is condemned for threatening to *lessen* it. This is a dialectic device, built on the "oligopoly" theory, that the fewer and bigger the sellers, the more sluggish the competition.)

The Will of Congress

But whatever one may think of the views expressed in this case by the F.T.C., and the Supreme Court, it would be hard to argue that they stretch the letter or the spirit of the law on mergers since Congress drastically rewrote it in 1950. The debates and reports on the Celler-Kefauver Anti-Merger Act of 1950 made it explicit, not only that all kinds of mergers were affected, but also that relative size was an important Congressional concern.

Thus, for instance, the House Report listed as among the results it wanted to prevent, an "increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive."

(And, perhaps odd to relate, both the F.T.C. and Justice Douglas may deserve some of the credit [or blame] for this. The Commission's 1948 "Report on Mergers," which was grist to the legislative mill, said, "There are few greater dangers to small business [sic] than the continued growth of the conglomerate corporation." And the Supreme Court's 1948 approval, in the Columbia Steel case [334 U.S. 495] of "Big Steel's" acquisition of a West Coast steel fabricator – including Justice Douglas' fiery dissent–is widely thought to have added to the steam under the antimerger bill.)

But antibigness, in some form,