with the Commission, not later than the 9th day of September, A. D. 1920, a report in detail of the manner and form in which this order has been conformed to.

FEDERAL TRADE COMMISSION

v.

GALENA SIGNAL OIL CO.

COMPLAINT IN THE MATTER OF THE ALLEGED VIOLATION OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER 26, 1914, AND OF THE OBLIGED VIOLATION OF SECTIONS 2 AND 3 OF AN ACT OF CONGRESS APPROVED OCTOBER 15, 1914.

Docket 24.—June 29, 1920.

SYLLABUS.

Where a corporation engaged in the manufacture and sale of lubricating oils, greases, and compounds to railroad companies operating approximately 74 per cent of the entire railroad mileage of the United States, and possessing exact information of the detailed cost to each of said companies of the consumption of lubricants by locomotives, passenger cars, and freight cars per 1,000 miles run,

Entered into contracts with different companies which provided—(*a*) that said corporation should supply and the company purchase all needed lubricants at an invoice price to be uniform to all; but the total cost thus incurred to be subject to rebate or refund in the event that it should prove to exceed certain guaranteed unit costs per thousand miles run by different classes of equipment, which costs were neither uniform as to all companies nor so fixed as to yield a uniform net price per gallon or per pound from each company; such rebates or refunds being conditioned in most of the contracts upon exclusive use of the corporation's lubricants: (*b*) that, in many cases, any saving upon any class or classes of equipment should not be set off against the excess cost upon any other class or classes, with an additional resulting advantage thereby in such cases to the company; and (*c*) that, in many contracts, should the cost at invoice price fall below a point called the "measure figure," then the guaranteed cost should be further reduced upon a sliding scale, usually one-half the difference between

the actual cost and the measure figure, which bore a substantially different ratio to the guarantee figure in the case of different companies;

With the result that in many cases the total cost of lubricants to a company was much less than the invoice cost; that the net cost per gallon or per pound varied greatly with different companies; that in many cases the total actual cost was much less than the total actual cost of many other companies consuming an equal or smaller quantity of the various kinds of lubricants per thousand miles run upon their several classes of equipment; and that in order to obtain any possible refunds the different companies uniformly purchased from said corporation all the lubricants required by them:

Held, (*a*) That the effect of such contracts and the practices thereunder was, and might be, to substantially lessen competition and tend to create a monopoly in the sale to railroad companies of lubricating oils, greases, and compounds;

(*b*) that such discrimination in price between different railroad companies, under the circumstances, constituted a violation of section 2 of the act of October 15, 1914;

(*c*) that such contracts and the sales made thereunder, and the methods and practices set forth constituted, under the circumstances, a violation of section 3 of the act of October 15, 1914:

(*d*) that the use of such contracts and practices constituted, under the circumstances set forth, an unfair method of competition in violation of section 5 of the act of September 26, 1914.

COMPLAINT.

The Federal Trade Commission having reason to believe from a preliminary investigation made by it, that the Galena-Signal Oil Co., hereinafter referred to as the respondent, has been and is using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect, on information and belief as follows:

I.

PARAGRAPH 1. That the respondent, the Galena-Signal Oil Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania,

having its principal office and place of business in the city of Franklin, said State, and is now, and has for more than two years last past, engaged in the manufacture and sale in commerce among the various States and Territories of the United States and the District of Columbia, of lubricants consisting of oils, greases, and other ingredients used by railroads for lubricating rolling stock, and a cooling compound used by them for preventing or remedying hot boxes on said railroad rolling stock.

PAR. 2. That the respondent, with the purpose, intent, and effect of stifling and suppressing competition and of building up and maintaining a monopoly in the manufacture and sale of lubricating oils and greases in interstate commerce, for many years last past has sold, and is now selling, lubricating oils and greases to railroad companies under a system or method of contracting, whereby it agrees to sell and deliver to the purchaser all of the lubricants, which such purchaser may require in the operation of its rolling stock, at certain fixed prices per gallon or per pound, guaranteeing to such purchaser that in the exclusive use of respondent's lubricants the average cost per thousand miles run for lubricating certain specified classes of its equipment shall not exceed fixed and definite amounts, and agreeing in the event that the cost of lubricants used exceeds, at the contract or invoice price, such guaranteed cost, to refund or rebate the excess to the purchaser; that the respondent has for many years last past, and is now, paying or refunding such excess cost to its customers. The effect of this system of selling and the payment of rebates or refunds thereunder has been, and is, to prevent competitors of the respondent from selling lubricants to any railroad company which purchases to any extent from the respondent company, and thus to induce or procure the exclusive patronage of such companies. Under this system of selling, the respondent has also for many years last past, and does now, arbitrarily so adjust or fix the guarantees of cost of lubrication per thousand miles run, contained in its contracts with various railroads, as to require the respondent to pay to certain railroads varying refunds or rebates from the invoice prices paid by such roads, with

the result that the respondent has discriminated, and does discriminate, in the net price per gallon or per pound charged various railroads purchasing lubricating oils and greases from it.

II.

The Federal Trade Commission, having reason to believe, from a preliminary investigation made by it, that the Galena Signal Oil Co., hereinafter referred to as respondent, has violated, and is violating, the provisions of section 2 and section 3 of the act of Congress approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," hereinafter referred to as the Clayton Act, issues this complaint, stating its charges in that respect, on information and belief, as follows:

PARAGRAPH 1. That the respondent, the Galena Signal Oil Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania, having its principal office and place of business in the city of Franklin, said State, and is now, and has for more than two years last past, engaged in the manufacture and sale in commerce among the various States and Territories of the United States, and the District of Columbia, of lubricants consisting of oils, greases, and other ingredients used by railroads for lubricating rolling stock, and a cooling compound used by them for preventing or remedying hot boxes on said railroad rolling stock.

PAR. 2. That the respondent for several years last past, in the course of interstate commerce, in violation of section 2 of the Clayton Act, has discriminated in price and is now discriminating in price between different purchasers of lubricant, which said lubricant is sold for use, consumption, or resale within the United States and the Territories thereof, and the District of Columbia, and that the effect of such discrimination may be and is to substantially lessen competition or tend to create a monopoly in the business of manufacturing and selling lubricants used by railroads in the operation of their rolling stock.

PAR. 3. That the respondent for several years last past in the course of interstate commerce, in violation of section 3 of the Clayton Act, has sold and made contracts for sale of large quantities of lubricants used by railroads in the operation of their rolling stock for use and consumption throughout the United States, the Territories thereof, and the District of Columbia, and has fixed and is now fixing the price charged therefor or discount from, or rebate upon such price on the condition, agreement, or understanding that the purchaser thereof shall not use the goods, wares, merchandise, supplies, or other commodities of a competitor or competitors of respondent, and that the effect of such sales and contracts of sale or such conditions and agreements or understandings may be and is to substantially lessen competition and to tend to create a monopoly.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER.

The Federal Trade Commission having issued and served its complaint herein, wherein it is alleged that it had reason to believe that the above-named respondent, Galena Signal Oil Co., has been and now is using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and has been and is violating the provisions of sections 2 and 3 of an act of Congress approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and that a proceeding by it in respect of such alleged violation of section 5 of the act of September 26, 1914, would be to the interest of the public, and fully stating its charges in that respect, and the respondent having entered its appearance by Frank L. Crawford, Esq., its attorney, and having duly filed its answer, admitting certain of the allegations of said complaint and denying certain others thereof, and containing certain allegations as affirmative defense, and the Commission having offered testimony in support of the charges

of said complaint, and the respondent having rested its case at the close of the Commission's case, and counsel for both parties having waived the filing of briefs and hearing of argument, and the Commission having duly considered the record and being fully advised in the premises, now makes its report and findings as to the facts and conclusions:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. That the respondent, Galena Signal Oil Co., is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, pursuant to an agreement of consolidation and merger, made September 30, 1901, between the Galena Oil Co. and the Signal Oil Co., both corporations duly organized and existing under and by virtue of the laws of the State of Pennsylvania, whereby said respondent, the Galena Signal Oil Co. succeeded to the rights, privileges, and franchises of the Galena Oil Co. and the Signal Oil Co., subject to all of the restrictions, disabilities, and duties of each of the said corporations so consolidated. That the purposes for which the Galena Oil Co. was organized and the character of the business it was empowered to do was manufacturing lubricating oils, and particularly the oil known as Galena oil, selling its own manufactured products, purchasing materials used in said manufacture, purchasing and owning the real estate and buildings necessary in said manufacture and doing all things necessary to carry on said manufacture and to market the products; that the purposes for which the Signal Oil Co. was organized and the powers which under its charter it was authorized to exercise and the business to transact was manufacturing valve and Signal oils, and particularly oils known as Perfection valve oils and Signal oils, selling its own manufactured products, purchasing materials used in said manufacture, purchasing and owning real estate and buildings necessary in said manufacture, and doing all things necessary to carry on said manufacture and to market the products.

PAR. 2. That respondent since its organization has continued to carry on the business, among others, of manufacturing and selling to railroad companies certain lubricating oils,

greases, and compounds. That before and since the service of the complaint herein respondent was and has been selling its said lubricating oils, greases, and compounds to railroad companies owning and operating approximately 74 per cent of the entire railroad mileage of the United States.

PAR. 3. That in the course of its said business of manufacturing and selling its said products, the respondent has purchased and transported its raw materials into and through various States of the United States, and has sold and shipped its refined and manufactured products into and through various States and Territories of the United States and the District of Columbia to various railroad companies having their respective offices and places of business, and their respective lines of railroads and receiving points for the said lubricating oils, greases and compounds in the various States and Territories of the United States and the District of Columbia.

PAR. 4. That during the four years last past up to the commencement of this proceeding and prior thereto, respondent in the course of its said business has entered into certain contracts with various railroad companies to which respondent sells its said lubricating oils, greases, compounds, and Signal Oil in and by which said respondent has agreed to sell and deliver to said railroad companies respectively all of said lubricating oils, greases, compounds, and Signal oil which said railroad companies respectively may require for their use upon their respective locomotives, passenger cars, and freight cars in use upon their present mileage or any additional mileage, and said railroad companies have agreed to purchase all of the oils, greases, and lubricating compounds which they respectively may require for such purposes from respondent. That the said contracts have been and were made and entered into in most cases upon a standard printed form. That certain contracts with certain railroad companies have been entered into upon special forms which differed in certain particulars from said standard printed forms. That in and by each and all of said contracts entered into as aforesaid respondent has agreed to sell and deliver, and does agree to sell and deliver, to the said

railroad companies respectively its lubricating oils, greases, and compounds at the uniform equal invoice prices prevailing at the date of said contract in all cases and in each and all of said contracts it was and is provided that:

> The first party agrees that should a reduction be made to any other railroad in the invoice prices named in said section 1 (excepting reductions due to decreases in freight rates) for the same oils or greases during the period covered by this contract, the second party hereto is to receive the benefit of a like reduction for the remaining period of this contract.

That respondent in each and all of the said contracts has agreed to guarantee and does agree to and does guarantee that the cost to the said railroad companies respectively for lubricating their respective locomotives, passenger cars, and freight cars per thousand miles run shall not exceed a certain specified amount for locomotives, a certain specified amount for passenger cars, and a certain specified amount for freight cars.

PAR. 5. That it has been the practice of the respondent for many years to require, and it is expressly provided in most of the contracts entered into by the respondent with the railroad companies respectively that said railroad companies shall furnish to respondent monthly statements showing the actual amount of lubricating oils and greases and lubricating compounds consumed per thousand miles run on the locomotives, passenger cars, and freight cars of said respective railroad companies, with a detailed statement showing the invoice prices of the lubricants consumed by each class, the total number of miles run by each class of equipment, and the number of miles per pint; and the respondent has at all times during the four years last past and prior thereto had full and complete statements and statistics showing the actual cost of lubricating at invoice prices, the several classes of equipment of the railroad companies respectively and the actual amount of the different kinds of lubricating oils and greases and lubricating compounds consumed per thousand miles run by the various classes of equipment of said railroad companies respectively.

PAR. 6. That the said guaranteed costs per thousand miles run for the different classes of equipments specified in the

several contracts entered into by the respondent up to the commencement of this proceeding as aforesaid, were not and are not uniform in the case of all railroad companies, but the ratio between the said guaranteed costs per thousand miles run and the actual cost per thousand miles run at the uniform invoice price has varied and the said guaranteed costs per thousand miles run for the several classes of equipment have not been fixed upon any basis or in any manner whereby the respondent would receive from all railroad companies a uniform net amount per gallon or per pound for the lubricants sold by it to said railroad companies respectively.

PAR. 7. That in said contracts entered into as aforesaid by the respondent with said railroad companies respectively respondent has agreed and does agree to refund to the said railroad companies respectively the difference, if any, between the total cost at the uniform invoice prices of the lubricants, oils, greases, and lubricating compounds required per thousand miles run for the several classes of equipment and the total guaranteed cost per thousand miles run. That under the said contracts the respondent has paid and given and does pay and give to various railroad companies the respective refunds aforesaid, whereby the cost to the railroad companies for lubricating their several classes of equipment per thousand miles run varies at different ratios to the cost at uniform invoice price of the several kinds of lubricating materials actually consumed per thousand miles run.

PAR. 8. That the quantity of lubricants per thousand miles run necessary for the different classes of equipment varies in the case of different railroad companies; but in many cases, under the contracts aforesaid, respondent has offered and given, and does offer and give, to railroad companies guaranteed costs per thousand miles run for the several classes of equipment, such that the total cost to the railroad company of lubricating the said equipment was and is much less than the cost at invoice prices of the lubricants so consumed, and such that in many cases the total actual cost of lubricating the said equipment was and is much less than the total actual cost in the case of many other railroads which consumed an

equal or a smaller quantity of the various kinds of lubricants per thousand miles run upon their several classes of equipment.

PAR. 9. That during the four years last past up to the commencement of this proceeding, and prior thereto, respondent by the contracts aforesaid has agreed to offer and give, and has offered and given, to various railroad companies certain guaranteed costs per thousand miles run, as a result of which the net cost per gallon or per pound for the various kinds of lubricants furnished and delivered by said respondent has varied greatly in the case of the different railroad companies.

PAR. 10. That the guaranteed cost in each service is computed by multiplying the number of miles run by the guaranty, and that the sum of the guaranteed costs for each class of equipment is the total guaranteed cost. That the total invoice cost is the amount paid by the railroad companies respectively, unless the total guaranteed costs is a smaller sum, in which case the latter is paid.

PAR. 11. That in many cases, by the contracts aforesaid, respondent has offered and given, and does give to railroad companies an additional advantage in that the said respondent has agreed and does agree that in the event of any saving upon any class or classes of equipment, the same shall not be set off against the excess cost upon any other class or classes, each class being treated separately.

PAR. 12. That during the four years last past, up to the commencement of this proceeding, and prior thereto, the ratio between the invoice prices specified in the said several contracts and the total guaranteed costs actually paid by the several railroad companies has varied substantially.

PAR. 13. That in most of the said contracts entered into by the respondent with said railroad companies respectively during the four years last past, up to the commencement of this proceeding, and prior thereto, it is provided, among other things, that the said guaranteed costs per thousand miles run for the several classes of equipment aforesaid shall be allowed and given only in consideration of the exclusive use by said railroad companies respectively of the lubricants furnished by the respondent, for such purposes. That pur-

suant to said guarantee provisions, and in order to obtain any refunds provided for thereby, the railroad companies with which respondent has respectively entered into guaranty contracts have uniformly purchased from the respondent all lubricating oils and greases and lubricating compounds required for the lubrication of their respective several classes of rolling stock and have not purchased from any competitor of the respondent any of the lubricating oils and greases or lubricating compounds required for the lubrication of their said rolling stock.

PAR. 14. That in many of the contracts entered into by the respondent with various railroad companies, it has been expressly provided that in case the actual cost at uniform invoice prices falls below a certain figure, termed the "measure figure"—usually the previous actual cost at invoice prices—the guaranteed cost specified in said contracts should be further reduced upon a sliding scale, usually measured by one-half the difference between the measure figure and the actual cost. The ratio between the guaranty figure and the measure figure substantially varied in the case of different railroad companies.

PAR. 15. That many of the contracts, made and entered into by the respondent with various railroad companies, have been expressly limited in duration, but contain further provisions that they shall continue in force and effect unless terminated by either party upon different periods of notice.

CONCLUSIONS.

That by reason of the aforesaid contracts entered into up to the commencement of this proceeding, and the terms and conditions thereof, and by reason of the varying ratio between the said guaranteed costs and the said actual costs at uniform invoice prices, the net cost per gallon or per pound for the various kinds of lubricants furnished and delivered by said respondent has varied greatly in the case of different railroad companies, with the result that there has been discrimination in price between different purchasers of the commodities manufactured and sold by respondent in interstate commerce.

That the respondent has made contracts for the sale of and has sold under such contracts commodities manufactured by it and has fixed prices therefor, and discounts from and rebates upon such prices, on the conditions, agreements, or understanding that the purchasers thereof under such contracts should not use or deal in the goods, wares, merchandise, or other commodities of a competitor or competitors of the respondent.

That the effect of such contracts for sale and the sales made thereunder, and the methods and practices hereinbefore set forth, is and may be to substantially lessen competition and tend to create a monopoly in the line of commerce in which the respondent is engaged.

That such contracts for sale and the sales made thereunder and methods and practices hereinabove set forth, constitute a violation of section 2 of an act of Congress approved October 15, 1914, entitled, "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes."

That such contracts for sale and the sales made thereunder and methods and practices hereinabove set forth constitute a violation of section 3 of an act of Congress approved October 15, 1914, entitled, "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes."

That the methods and practices of the respondent hereinabove set forth, constitute unfair competition within the meaning of section 5 of an act of Congress approved September 26, 1914, entitled, "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST.

The Federal Trade Commission having issued and served its complaint herein wherein it is alleged, among other things, that it had reason to believe that the above-named respondent, Galena Signal Oil Co. " has been and is using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of an act of Congress approved Septem-

ber 26, 1914, entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,'" and "has violated and is violating the provisions of sections 2 and 3 of the act of Congress, approved October 15, 1914, entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,'" and that a proceeding by it in respect of such alleged violation of section 5 of the act of September 26, 1914, would be to the interest of the public, and fully stating its charges in that respect, and the respondent having entered its appearance by Frank L. Crawford, Esq., its attorney, and having duly filed its answer, admitting certain of the allegations of said complaint and denying certain others thereof, and containing certain allegations as affirmative defense; and the Commission having offered testimony in support of the charges of said complaint, and the respondent having rested its case at the close of the Commission's case and counsel for both parties having waived the filing of briefs and hearings of argument, and the Commission having duly considered the record and being fully advised in the premises, and having made and filed its report and findings as to the facts and conclusions, which report, findings, and conclusions are hereby referred to and made a part hereof: Now, therefore,

It is ordered, That respondent, Galena Signal Oil Co., shall forever cease and desist:

(1) From entering into or making any contract or contracts with any railroad company wherein or whereby such railroad company is permitted, allowed, or enabled to purchase from respondent the lubricating oils, greases, and compounds sold by respondent at prices lower than the prices offered and given by respondent to other railroad companies purchasing the same grade of products at the same period of time.

(2) From selling or offering to sell to any railroad company the lubricating oils, greases, and compounds sold by it at prices lower than those offered and given to other railroad companies purchasing the same grade of products at the same period of time.

(3) From making or entering into any contract or contracts with any railroad company wherein and whereby the said respondent agrees to or does guarantee to such railroad company that the cost of lubricating said company's locomotives, passenger cars, and freight cars shall bear a smaller ratio to the actual cost at uniform invoice price than the ratio between the guaranteed cost and actual cost at invoice price, in the case of other railroad companies purchasing the same grade of products from respondent.

(4) From directly or indirectly discriminating in price between different purchasers of the same grade of commodities sold by respondent, except that existing contracts which are specifically shown in the schedule attached hereto shall not be affected by this paragraph or by paragraph 2 hereof until they expire or may be terminated by respondent, nor shall this paragraph nor paragraphs 1 or 2 be construed as prohibiting the use of a group of alternative plans for the purchase of commodities uniformly submitted to all prospective customers and resulting in no unlawful discriminations.

(5) From making or entering into any contract or contracts with any railroad company wherein or whereby the said respondent agrees to or does guarantee to said railroad company, a maximum cost of lubrication per thousand miles run, or a maximum cost of lubrication based on any similar standard of measure, for locomotives, passenger cars, and freight cars, in consideration that the said railroad company shall purchase and use exclusively the lubricating products sold by respondent.

(6) From making or entering into any contract or contracts with any railroad company wherein or whereby the respondent agrees to or does guarantee to said railroad company a specified cost of lubrication per thousand miles run, or a specified cost of lubrication based on any similar standard of measure, on the condition, agreement, or understanding that the said rail-

road company shall not buy or use the goods, wares, merchandise, or other commodities of a competitor or competitors of the respondent.

(7) From continuing beyond the period at which any contracts may be terminated by respondent on notice, and from renewing or extending any such contracts wherein or whereby it is provided that the railroad companies severally making said contracts shall purchase and use exclusively the lubricating oils, greases, and compounds sold by respondent.

(8) From doing anything having the same effect as that resulting from the practices herein prohibited, and by reason of which this order is made.

Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation or discrimination in price in the same or different communities made in good faith to meet competition.

And it is further ordered, That under and by virtue of the authority conferred on the Commission by paragraph B of section 6 of an act of Congress, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, that the respondent, Galena Signal Oil Co., shall, within 60 days report in writing to the Federal Trade Commission, fully setting forth the nature of the changes made in the conduct of its business, with respect to the subject matter involved in this order to cease and desist; and shall set forth in such report, in complete detail, the plan or plans adopted by respondent for the sale and distribution of its lubricating oils, greases, and compounds.

CASES IN WHICH ORDERS OF DISCONTINUANCE OR DISMISSAL HAVE BEEN ENTERED.

Dates of orders.	Docket Nos.	Respondents.	Commodities.	Charges.	Answer, stipulation, or trial.	Reasons for discontinuance or dismissal.
1919.						
July 18	127	Mecanno Ltd., Mecanno Co., Inc.	Building toys	Threatening competitors	Answer	No public interest.
July 18	252	Mercury Tire Co., Inc.	Used automobile tires	Misbranding; false and misleading advertising.	do	Respondent dissolved and ceased to do business.
Sept. 24	245	The Harrison Specialty Co.	Plugs for leaking boiler tubes.	Bribery	Answer and trial	Dismissed without prejudice; charge not sustained.
Sept. 24	298	National Oil Products Co.	Oil, soap, and grease products.	do	do	Do.
Oct. 14	242	Niles Normalizing Machine Co.	Flesh-reducing apparatus.	Threatening competitors	do	Do.
Nov. 17	39	The Coca Cola Co.	Beverage sirup	Espionage with respect to competitors' business secrets; refusal to sell to dealers not agreeing not to handle competitors' products; resale price maintenance; system of cumulative rebates or discounts calculated to cause dealers to confine their purchases largely or exclusively to respondent's products; exclusive contracts.	Answer and stipulation	Dismissed without prejudice; no public interest.
Nov. 17	144	Weyl-Zuckerman & Co.	Farm products and foodstuffs.	Securing preferential treatment in the furnishing of freight cars by falsely representing shipments for war use by Government.	Answer	No present public interest appearing.
Nov. 17	145	Consolidated Rendering Co., New Haven Rendering Co., Atlantic Packing Co., and L. T. Frisbie Co.	The rendering business	Pushing prices competitors' raw materials to prohibitive figures.	do	Dismissed without prejudice; no reason assigned.
Nov. 17	198	Closset & Devers, Inc.	Coffee	Resale price maintenance	No answer filed, or hearing had.	Charge not sustained.
Nov. 17	199	National Grocery Co.	do	do	do	Do.
Nov. 17	200	The Rogers Co.	do	do	do	Do.

CASES IN WHICH ORDERS OF DISCONTINUANCE OR DISMISSAL HAVE BEEN ENTERED—Continued.

Dates of orders.	Docket Nos.	Respondents.	Commodities.	Charges.	Answer, stipulation, or trial.	Reasons for discontinuance or dismissal.
1919.						
Nov. 17	201	Schwabacher Bros. & Co., Inc.	Coffee	Resale price maintenance	No answer filed, or hearing had.	Charge not sustained.
Nov. 17	202	Seattle Grocery Co.	do	do	do	Do.
Nov. 17	203	Washington Retail Grocers' & Merchants' Association.	do	do	do	Do.
Nov. 17	204	Commonwealth Color & Chemical Co. and Herbert L. Wittnebel.	Colors, chemicals, dyestuffs, and similar products.	Bribery	Answer and trial	Do.
Nov. 17	221	Vapo-Cresolene Co.	Proprietary medicine	Resale price maintenance	Answer	Do.
Nov. 17	249	The Corcoran Manufacturing Co.	Automobile radiators	Simulation of competitor's product, so as to deceive purchasers.	do	No reason assigned.
Nov. 17	302	North American Construction Co.	Lumber and building materials (cut and prepared for standardized houses).	False representations as to respondent's and its competitors' prices and products.	do	Dismissed without prejudice; respondent discontinued business.
Nov. 19	84	Cutler Mail Chute Co.	Mail chutes and boxes	Selling below cost	Answer and trial	Practices of respondent shown by testimony not prohibited by Federal Trade Act.
Nov. 24	130	Gilbert & Barker Manufacturing Co.	Automatic measuring oil pumps, tanks, and other outfits, and patented devices for the storage, handling, and automatic measuring of oils, gasoline, and other volatile liquids.	Misrepresenting competitors' products and prices thereof; bringing about and attempting to bring about cancellation of orders for competitors' products; false representations by respondent's agents that they were also agents of competitors; price discrimination.	Answer	No reasons assigned.
Nov. 24	136	American Oil Tank & Pump Co.	do	Bringing about and attempting to bring about cancellation of orders for competitors' products.	do	New evidence.

Nov. 24	138	Tokheim Manufacturing Co.	.....do.....	.....do.....	.....do.....	Do.
Nov. 24	139	Guarantee Liquid Measure Co.	.....do.....	Bringing about and attempting to bring about cancellation of orders for competitors' products; misrepresenting competitors' products.	.....do.....	Do.
Nov. 29	283	Webb-Jensen-Davis Co., Inc.	Printing ink and kindred products.	Bribery.....	.....do.....	Charge not sustained.
Dec. 31	83	American Mailing Device Corporation.	Mail chutes and boxes....	Selling below cost.....	Answer and trial.....	Practices of respondent shown by testimony not prohibited by Federal Trade Act.
Dec. 31	371	Visigraph Typewriter Manufacturing Co., Inc.	Typewriters.....	System of cumulative rebates or discounts calculated to cause dealers to confine their purchases largely or exclusively to respondent's products.	Answer.....	Respondent dissolved and ceased to do business.
1920.						
Jan. 29	445	Louisville Soap Co., Inc...	Soap.....	Guarantee against decline...	.....do.....	Do.
Jan. 29	507	A. Anagnostopulos, trading under the name and style of Arabian Coffee Co.	Coffee and tea.....	Exclusive and tying contracts.	No answer or trial.....	Respondent gone out of business; successor not indulging in practice complained of.
Feb. 5	278	Tokheim Oil Tank & Pump Co.	Automatic measuring oil pumps, tanks, and other outfits, and patented devices for the storage, handling, and automatic measuring of oils, gasoline, and other volatile liquids.	Enticing competitors' employees.	Answer.....	Charge not sustained.
Feb. 5	416	Jay Printing Ink Co., Inc.	Printing ink and kindred products.	Bribery.....	Answer and trial.....	Do.
Mar. 3	211	The Henry-Miller Foundry Co.	Furnace casings, gas rings, and similar fittings.	System of cumulative rebates or discounts calculated to cause dealers to confine their purchases largely or exclusively to respondent's products.	Answer.....	Interstate commerce not involved.

CASES IN WHICH ORDERS OF DISCONTINUANCE OR DISMISSAL HAVE BEEN ENTERED—Continued.

Dates of orders.	Docket Nos.	Respondents.	Commodities.	Charges.	Answer, stipulation, or trial.	Reasons for discontinuance or dismissal.
Mar. 25	128	The Vaudeville Managers Protective Association, The National Vaudeville Artists, Inc., The United Booking Offices (The B. F. Keith Vaudeville Exchange), Vaudeville Collection Agency, E. F. Albee, Sam A. Scribner, Marcus Loew, Martin Beck, B. S. Moss, and Sime Silverman.	Vaudeville business.....	Making membership in National Vaudeville Artists condition precedent to employment; circumventing New York law limiting theatrical employment agencies to 5 per cent; requiring actors to advertise in publication owned by one of respondents; conspiring to make and publish black lists of actors not in good standing.	Answer and trial.....	Violation of Federal Trade Commission Act, or secs. 2, 3, 7, and 8 of Clayton Act do not appear.
Apr. 7	265	Butterick Co., Federal Publishing Co., Standard Fashion Co., Butterick Publishing Co., and New Idea Pattern Co.	Manufacture of paper dress patterns and publication of periodicals and catalogues describing garments made therefrom.	Resale price maintenance; exclusive and tying contracts.	.....do.....	Dismissed, on Commission's motion, without prejudice to right of Commission to issue another complaint with respect to same matter, directed to such respondents as Commission may elect.
May 7	5	The Shredded Wheat Co..	Shredded wheat biscuit...	Exclusive contract with only concern making machinery capable of manufacturing respondent's product, to prevent said concern manufacturing for competitor; espionage upon business of competitor; misrepresenting quality of competitor's product; threatening customers of competitor; prosecution of vexatious suit with	.....do.....	No reasons assigned.

				wide publicity; endeavoring to prevent competitor from securing advertising space.		
May 13	345	New England Bakery Co.	Bread	Giving free loaves to retailers for distribution to customers.	Answer	Dismissed without prejudice; no reasons assigned.
May 20	92	Standard Oil Co. of New York and Magnolia Petroleum Co.	Petroleum products	Acquisition of large amount of stock in competing corporation where the effect may be to substantially lessen competition or tend to create a monopoly.	Answer and trial	No reason assigned.
May 20	546	National Wire Wheel Works, Inc.	Wire wheels for automobiles.	False representations as to possession of certain patents, whereas patents only applied for.	Answer	Advertisement published but once, and promptly discontinued upon notice. Public interest not sufficient to warrant order to cease and desist.
May 25	156	Purity Preserving Co. and R. J. Meguiar Co.	Tomato catsup	Failure on part of one of respondents to fill contracts after sharp rise in price, and offer by second respondent, composed substantially of same officers, directors, and stockholders, of catsup made by first corporation's plant, and employees at market prices in competition with manufacturers in active competition with first corporation.	do	Dismissed without prejudice.
June 3	330	Richardson Lubricating Co.	Petroleum products	Leasing devices used in connection with respondent's products at a nominal consideration, under circumstances tending to cause dealers to purchase respondent's products largely or exclusively.	Answer and stipulation	Practice abandoned.

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CASES IN WHICH ORDERS OF DISCONTINUANCE OR DISMISSAL HAVE BEEN ENTERED—Continued.

Dates of orders.	Docket Nos.	Respondents.	Commodities.	Charges.	Answer, stipulation, or trial.	Reasons for discontinuance or dismissal.
June 8	31	National Biscuit Co.....	Uneeda biscuits, and other bakery products.	System of cumulative rebates or discounts calculated to cause dealers to confine their purchases largely or exclusively to respondent's products; price discriminations; contracts for important advertising space or displays, reserving right to cancel at end any month if advertisement of products of competitors shown.	Answer and trial.....	Dismissed without prejudice to right of Commission to rule against cumulative discount principle in application to a different state of facts, it appearing that respondent confines its calculations to periods not exceeding one month, so that the tendency to create an exclusive dealing relationship and restrict competition is negligible.
June 8	443	David D. Levitt, doing business under the trade name and style of The Sport Shop.	Fishing tackle, guns, rifles, ammunition, camping and outing supplies, and similar products.	Simulation of firm name of competitor.	Answer and stipulation.	No reasons assigned.
June 14	514	Albert H. Harman and Horace C. Klein, partners, styling themselves the Webb Publishing Co.	Agricultural journals.....	Price discriminations (for advertising space).	Answer.....	Dismissed without prejudice. Interstate commerce not involved.
June 18	33	American Radiator Co....	Radiators.....	System of cumulative rebates or discounts calculated to cause dealers to confine their purchases largely or exclusively to respondent's products.	.....do.....	Charges not sustained.

APPENDIX I.

ACTS OF CONGRESS FROM WHICH THE COMMISSION DERIVES ITS POWERS, WITH ANNOTATIONS.

FEDERAL TRADE COMMISSION ACT.[1]

[Approved Sept. 26, 1914.]

[PUBLIC—No. 203—63d CONGRESS.]

[H. R. 15613.]

AN ACT To create a Federal Trade Commission, to define its powers and duties, and for other purposes.

Sec. 1. CREATION AND ESTABLISHMENT OF THE COMMISSION.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of

Five commissioners. Appointed by President, by and with, etc. Not more than three from same political party.

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[1] The annotations are from decisions handed down before July 1, 1920, on petitions to review orders of the Commission, except in the *Nulomoline*, *Basic Products*, and *Maynard Coal Co.* cases, in which injunctions were sought against the Commission, in the first to prevent the taking of certain testimony, and in the last two to prevent the requiring of certain reports.

With respect to the petitions on decisions to review it should be noted that in the case of *Beech-Nut Packing Co.* v. *Federal Trade Commission*, 264 Fed. 885, decided adversely to the Commission, petition for certiorari was granted by the United States Supreme Court June 1, 1920.

With respect to the *Basic Products* and *Maynard Coal Co.* cases, involving the requiring of reports by the Commission under section 6, under the circumstances there concerned, it should be noted with respect to the general question involved, that after decision in the case last referred to

Sec. 1. CREATION AND ESTABLISHMENT OF THE COMMISSION—Continued.

each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

Term, seven years.

Chairman to be chosen by commission.

Pursuit other business prohibited.

Removal by President.

Vacancy not to impair exercise of powers by remaining commissioners.

Seal judicially noticed.

The commission shall have an official seal, which shall be judicially noticed.

Sec. 2. SALARIES. SECRETARY. OTHER EMPLOYEES. EXPENSES OF THE COMMISSION. OFFICES.

Commissioner's salary $10,000.

SEC. 2. That each commissioner shall receive a salary of $10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States. The commission shall appoint a secretary, who shall receive a salary of $5,000 a year, payable in like manner, and it

Appointment of secretary. Salary, $5,000.

(on motion for temporary injunction restraining the Commission from requiring reports under section 6), a temporary injunction restraining the Commission from requiring such reports was secured from the Supreme Court of the District of Columbia in the case of *Claire Furnace Co. et al.* v. *Federal Trade Commission* (June 19, 1920. No opinion); that such injunction also had the effect of staying certain mandamus proceedings against two of the petitioners in the *Claire Furnace* case, theretofore instituted by the Attorney General under section 9, at the request of the Commission, to compel the companies in the two cases to file reports previously demanded under section 6 (*United States* v. *Bethlehem Steel Co.*, petition filed June 4, 1920, Eastern District of Pennsylvania, and *United States* v. *Republic Iron and Steel Co.*, petition filed June 7, 1920, District of New Jersey); that the answer of the Commission in the *Claire Furnace* case prayed in the alternative form that (1) the bill be dismissed; that (2) the bill be dismissed as to the two petitioners above referred to (the defendants in the two mandamus proceedings); that (3) the temporary restraining order and preliminary injunction be modified so as to clearly exclude the prosecution of such mandamus proceedings by the Attorney General against the two defendants; and that at this writing (Sept. 20, 1920), neither the *Maynard Coal* case, *Claire Furnace* case, nor mandamus proceedings have been heard. In this general connection (injunctions sought to restrain the Commission from proceeding under the act) reference should also be made to the case of *T. C. Hurst & Son* v. *Federal Trade Commission* (Sept. 20, 1920, D. C. for E. D. of Va., before Judge Waddill, not yet reported), in which the Court sustained the constitutionality of the act and refused the injunction.

In connection with the history in Congress of the Federal Trade Commission Act, see address of President Wilson delivered at a joint session on Jan. 20, 1914 (Congressional Record, vol. 51, pt. 2, pp. 1962–1964.

shall have authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

Other employees. Salaries fixed by Commission.

With the exception of the secretary, a clerk to each commissioner, the attorneys, and such special experts and examiners as the commission may from time to time find necessary for the conduct of its work, all employees of the commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the commission and by the Civil Service Commission.

Except for secretary, commissioners' clerks, and such special experts and examiners as Commission may find necessary, all employees part of classified service.

All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the commission.

Expenses of commission allowed and paid on presentation of itemized approved vouchers.

Until otherwise provided by law, the commission may rent suitable offices for its use.

Commission may rent suitable offices.

The Auditor for the State and Other Departments shall receive and examine all accounts of expenditures of the commission.

Auditing of accounts.

63d Cong., 2d sess.) ; report of Senator Summins from the Committee on Interstate Commerce on Control of Corporations, Persons, and Firms engaged in Interstate Commerce (Feb. 26, 1913, 62d Cong., 3d sess., Rept. No. 1326) ; Hearings on Interstate Trade Commission before Committee on Interstate and Foreign Commerce of the House, Jan. 30 to Feb. 16, 1914, 63d Cong., 2d sess. ; Interstate Trade, Hearings on Bills relating to Trust Legislation before Senate Committee on Interstate Commerce, 2 vols., 63d Cong., 2d sess. ; report of Mr. Covington from the House Committee on Interstate and Foreign Commerce on Interstate Trade Commission (Apr. 14, 1914, 63d Cong., 2d sess., Rept. No. 533) ; also parts 2 and 3 of said report presenting the minority views respectively of Messrs. Stevens and Lafferty ; report of Senator Newlands from the Committee on Interstate Commerce on Federal Trade Commission (June 13, 1914, 63d Cong., 2d sess., Rept. No. 597) and debates and speeches, among others, of Congressmen Covington for (references to Congressional Record, 63d Cong., 2d sess., vol. 51), part 9, pp. 8840–8849 ; 9068 ; 14925–14933 (part 15) ; Dickinson for, part 9, pp. 9189–9190 ; Mann against, part 15, pp. 14939–14940 ; Morgan, part 9, 8854–8857, 9063–9064, 14941–14943 (part 15) ; Sims for, 14940–14941 ; Stevens of N. H. for, 9063 (part 9) ; 14941 (part 15) ; Stevens of Minn. for, 8849–8853 (part 9) ; 14933–14939 (part 15) ; and of Senators Borah against, 11186–11189 (part 11) ; 11232–11237, 11298–11302, 11600–11601 (part 12) ; Brandegee against, 12217–12218, 12220–12222, 12261–12262, 12410–12411, 12792–12804 (part 13), 13103–13105, 13299–13301 ; Clapp against, 11872–11873 (part 12), 13061–13065 (part 13), 13143–13146, 13301–13302 ; Cummins for, 11102–11106 (part 11), 11379–11389, 11447–11458 (part 12), 11528–11539, 12873–12875 (part 13), 12912–12924, 12987–12992, 13045–13052, 14768–

Sec. 3. BUREAU OF CORPORATIONS. OFFICE OF THE COMMISSION. PROSECUTION OF INQUIRIES.

Bureau of Corporations absorbed by Commission.

SEC. 3. That upon the organization of the commission and election of its chairman, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist; and all pending investigations and proceedings of the Bureau of Corporations shall be continued by the commission.

Clerks, employees, records, papers, property, appropriations, transferred to Commission.

All clerks and employees of the said bureau shall be transferred to and become clerks and employees of the commission at their present grades and salaries. All records, papers, and property of the said bureau shall become records, papers, and property of the commission, and all unexpended funds and appropriations for the use and maintenance of the said bureau, including any allotment already made to it by the Secretary of Commerce from the contingent appropriation for the Department of Commerce for the fiscal year nineteen hundred and fifteen, or from the departmental printing fund for the fiscal year nineteen hundred and fifteen, shall become funds and appropriations available to be expended by

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14770 (part 15); Hollis for, 11177–11180 (part 11), 12141–12149 (part 12), 12151–12152; Kenyon for, 13155–13160 (part 13); Lewis for, 11302–11307 (part 11), 12924–12933 (part 13); Lippit against, 11111–11112 (part 11), 13210–13219 (part 13); Newlands for, 9930 (part 10), 10376–10378 (part 11), 11081–11101, 11106–11116, 11594–11597 (part 12); Pomerene for, 12870–12873 (part 13), 12993–12996, 13102–13103; Reed against, 11112–11116 (part 11), 11874–11876 (part 12), 12022–12029, 12150–12151, 12539–12551 (part 13), 12933–12939, 13224–13234, 14787–14791 (part 15); Robinson for, 11107 (part 11), 11228–11232; Saulsbury for, 11185, 11591–11594 (part 12); Shields against, 13050–13061 (part 13), 13146–13148; Sutherland against, 11601–11604 (part 12), 12805–12817 (part 13), 12855–12862, 12980–12986, 13055–13056, 13109–13111; Thomas against, 11181–11185 (part 11), 11598–11600 (part 12), 12862–12869 (part 13), 12978–12980; Townsend against, 11870–11872 (part 12); and Walsh for, 13052–13054 (part 13).

See also Letters from the Interstate Commerce Commission to the Chairman of the Committee on Interstate Commerce, submitting certain Suggestions to the Bill creating an Interstate Trade Commission, the first being a letter from Hon. C. A. Prouty dated Apr. 9, 1914 (printed for the use of the Committee on Interstate Commerce, 63d Cong., 2d sess.); Letter from the Commissioner of Corporations to the Chairman of the Committee on Interstate Commerce, transmitting certain suggestions relative to the Bill (H. R. 15613) to create a Federal Trade Commission, first letter dated July 8, 1914 (printed for the use of the Committee on Interstate Commerce, 63d Cong., 2d sess.); Brief by the Bureau of Corporations, relative to Section 5 of the Bill (H. R. 15613) to create a Federal Trade Commission, dated Aug. 20, 1914 (printed for the use of the Committee on Interstate Commerce, 63d Cong., 2d sess.); Brief by George Rublee relative to the Court Review in the Bill (H. R. 15613) to create a Federal Trade Commission, dated Aug. 25, 1914 (printed for the use of the Committee on Interstate Commerce, 63d Cong., 2d sess.); and dissenting opinion of Justice Brandeis in *Federal Trade Commission* v. *Grats*, 253 U. S. 421, 429–442 (p. 564 at pp. 570–579 of this volume).

the commission in the exercise of the powers, authority, and duties conferred on it by this Act.

Principal office in Washington, but Commission may meet elsewhere.

The principal office of the commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

May prosecute any inquiry anywhere in United States.

Sec. 4. DEFINITIONS.

SEC. 4. That the words defined in this section shall have the following meaning when found in this Act, to wit:

"Commerce."

"Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation."

"Corporation" means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence."

"Documentary evidence" means all documents, papers, and correspondence in existence at and after the passage of this Act.

"Acts to regulate commerce."

"Acts to regulate commerce" means the Act entitled "An Act to regulate commerce," approved February fourteenth, eighteen hundred and eighty-seven, and all Acts amendatory thereof and supplementary thereto.

"Antitrust acts."

"Antitrust acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; also the sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved August twenty-seventh, eighteen hundred and ninety-four; and also the Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen

Sec. 4. DEFINITIONS—Continued.

hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen.

Sec. 5. UNFAIR COMPETITION. COMPLAINTS, FINDINGS, AND ORDERS OF COMMISSION. APPEALS. SERVICE.

Unfair methods unlawful.

SEC. 5. That unfair methods of competition in commerce are hereby declared unlawful.

Commission to prevent. Banks and common carriers excepted.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Commission to issue complaint when unfair method used and to public interest.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such

To serve same on respondent with notice of hearing.

Respondent to have right to appear and show cause, etc.

Intervention allowed on application and good cause.

Testimony to be reduced to writing and filed.

If method prohibited, Commission to make written report stating findings, and to issue and serve order to cease and desist on respondent.

method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

Modification or setting aside by the Commission of its order.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by

Disobedience of order. Application to Circuit Court of Appeals by Commission.

Action by Court. Notice to respondent. Decree affirming, modifying, or setting aside Commission's order.

Commission's findings. Conclusive if supported by testimony.

Introduction of additional evidence, if reasonable grounds for failure to adduce theretofore.

May be taken before Commission.

Commission may make new or modified findings by reason thereof.

Judgment and decree subject to review upon certiorari, but otherwise final.

Sec. 5. UNFAIR COMPETITION. COMPLAINTS, FINDINGS, AND ORDERS OF COMMISSION. APPEALS. SERVICE—Continued.

the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Petition by respondent to review order to cease and desist.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy

To be served on Commission.

of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript

Jurisdiction of Court of Appeals same as on application by Commission, and Commission's findings similarly conclusive.

the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

Jurisdiction of Court exclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Proceedings to have precedence over other cases.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same

Liability under antitrust acts not affected.

shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.

Service of Commission's complaints, orders, and other processes.

Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (a) by delivering

Personal;

a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the cor-

At office or place of business; and

poration to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person,

By registered mail.

partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or

Verified return by person serving, and return post-office receipt, proof of service.

place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint,

order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

"UNFAIR METHODS OF COMPETITION."

1. "The petitioner urges that the declaration of section 5 must be held void for indefiniteness unless the words 'unfair methods of competition' be construed to embrace no more than acts which, on September 26, 1914, when Congress spoke, were identifiable as acts of unfair trade then condemned by the common law as expressed in prior cases. But the phrase is no more indefinite than 'due process of law.' * * * If the expression 'unfair methods of competition' is too uncertain for use, then under the same condemnation would fall the innumerable statutes which predicate rights and prohibitions upon 'unsound mind,' 'undue influence,' 'unfaithfulness,' 'unfair use,' 'unfit for cultivation,' 'unreasonable rate,' 'unjust discrimination,' and the like. This statute is remedial, and orders to desist are civil; but even in criminal law convictions are upheld on statutory prohibitions of 'rebates or concessions' or of 'schemes to defraud,' without any schedule of acts or specific definition of forbidden conduct, thus leaving the courts free to condemn new and ingenious ways that were unknown when the statutes were enacted. Why? Because the general ideas of 'dishonesty' and 'fraud' are so well, widely, and uniformly understood that the general term 'rebates or concessions' and 'schemes to defraud' are sufficiently accurate measures of conduct." Baker, J., in *Sears, Roebuck & Co.* v. *Federal Trade Commission*, April 29, 1919, 258 Fed. 307, 310, 311. (See case in this vol., p. 536, at p. 541.)

2. "It seems to us that unfair methods of competition between individuals are not contemplated by the Act. Congress could not have intended to submit to the determination of the Commission such questions as whether a person, partnership, or corporation had treated or bribed the employees of a competitor for the purpose of inducing them to betray their employer. We think the unfair methods, though not restricted to such as violate the Antitrust Acts, must be at least such as are unfair to the public generally. It seems to us that section 5 is intended to provide a method of preventing practices unfair to the general public, and very particularly such as if not prevented will grow so large as to lessen competition and create monopolies in violation of the Antitrust Acts. Such a preliminary inquiry and determination constitutes a most important supplement in carrying on the public policy which those acts are intended to vindicate. * * *

3. "No authority is given to any individual to present his grievances and the commission is to interpose only in the interest of the public. * * *

4. "Counsel for the commission calls our attention to the opinion of the Circuit Court of Appeals for the Seventh Circuit, not yet reported, Sears, Roebuck & Co., petitioners, against Federal Trade Commission, respondent. The practice there prohibited as unfair was extensive advertising containing false and misleading statements calculated to deceive all purchasers and to discredit all competitors. It was clearly a method unfair to the public generally." Ward, J., in *Federal Trade Commission* v. *Gratz*, May

ANNOTATIONS, Sec. 5—Continued.

"UNFAIR METHODS OF COMPETITION"—Con.

14, 1919, 258 Fed. 314, 316, 317. (See case in this vol., p. 545, at pp. 548, 549.

5. "In my opinion, Congress had in mind, in this legislation, the prevention of acts which amount to unfair competition at their very inception. In this manner the anti-trust law was supplemented. To make successful either a criminal prosecution or other liability under the Clayton Act, it is necessary to find that a trust or monopoly is created which restrains trade. One act which may be an act of unfair competition may, of itself, restrain trade and may do damage to a complainant. The Federal Trade Commission Act was intended to reach such an unfair business method where the antitrust law could not do so. Of course, if all unfair acts were dealt with by the Federal Trade Commission, there would be no monopoly or trust created. It was intended by section 5 of the act to prevent practices or methods of business unfair to the public which, if not prevented, would grow and create monopolies, and thus restrain trade and lessen competition." Manton, J., concurring in *Beechnut Packing Co.* v. *Federal Trade Commission*, February 26, 1920, 264 Fed. 885, 890. (See case in this vol., p. 556, at p. 562.)

6. "The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The Act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade." McReynolds, J., in *Federal Trade Commission* v. *Gratz*, June 7, 1920, 253 U. S., 421, 427, 40 Sup. Ct. 572, 575. (See case in this vol., p. 564, at p. 569.)

7. "Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the Act left the determination to the commission. Experience with existing laws had taught that definition, being necessarily rigid, would prove embarrassing and, if rigorously applied, might involve great hardship. Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another industry, or even in the same industry under different circumstances, be entirely unobjectionable. Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition must necessarily soon prove incomplete, as with new conditions constantly arising novel unfair methods would be devised and developed. * * * Recognizing that the question whether a method of competitive practice was unfair would ordinarily depend upon special facts, Congress imposed upon the commission the duty of finding the facts; and it declared that findings of fact so made (if duly supported by evidence) were to be taken as final. The question of whether the method of competition pursued could, on those facts, reasonably be held by the commission to constitute

an unfair method of competition, being a question of law, was necessarily left open to review by the court." Brandeis, J., dissenting in *Federal Trade Commission* v. *Gratz*, June 7, 1920, 253 U. S., 421, 436, 437, 40 Sup. Ct. 572, 578. (See case in this vol., p. 564, at pp. 575, 576.)

8. "The reason assigned by the Circuit Court of Appeals for so holding [that the order of the commission must be set aside, because the commission was 'without authority to determine the merits of specific individual grievances'] was that the evidence failed to show that the practice complained of (although acted on in individual cases by respondents) had become their 'general practice.' But the power of the Federal Trade Commission to prohibit an unfair method of competition found to have been used is not limited to cases where the practice had become general. What section 5 declares unlawful is not unfair competition. That had been unawful before. What that section made unlawful were 'unfair methods of competition'; that is, the method or means by which an unfair end might be accomplished. The commission was directed to act, if it had reason to believe that an 'unfair method of competition in commerce has been, or is being used.' The purpose of Congress was to prevent any unfair method which may have been used by any concern in competition from becoming its general practice. It was only by stopping its use before it became a general practice, that the apprehended effect of an unfair method in suppressing competition by destroying rivals could be averted." Brandeis, J., dissenting in *Federal Trade Commission* v. *Gratz*, June 7, 1920, 253 U. S. 421, 441, 40 Sup. Ct. 572, 579. (See case in this vol., p. 564, at pp. 578, 579.)

PRACTICES IN PARTICULAR CASES—REPRESENTATIONS CALCULATED TO DECEIVE.

9. "In the second paragraph of the order petitioner is commanded to cease selling sugar below cost. We find in the statute no intent on the part of Congress, even if it has the power, to restrain an owner of property from selling it at any price that is acceptable to him, or from giving it away. But manifestly in making such a sale or gift the owner may put forward representations and commit acts which have a capacity or a tendency to injure or to discredit competitors and to deceive purchasers as to the real character of the transaction. That paragraph should therefore be modified by adding to it 'by means of or in connection with the representations prohibited in the first paragraph of this order, or similar representations' ". Baker, J., modifying as above, but otherwise affirming Commission's order in 1 F. T. C. 163. *Sears Roebuck & Co.* v. *Federal Trade Commission*, April 29, 1919, 258 Fed. 307, 312. (See case in this vol., p. 536, at p. 542.)

PRACTICES IN PARTICULAR CASES—FULL LINE FORCING.

10. "That the commission did not find sufficient proof to sustain the second count in the complaint, viz, that the method of the respondent found to be unfair violated section 3 of the Act of October 15, 1914, known as the Clayton Act, which makes unfair any condition, agreement, or understanding that may lessen competition or tend to create a monopoly shows that the method found to be unfair must have been unfair in certain individual transactions. And we discover no evidence to support the finding in paragraph 2, that the respondents 'adopted and practiced the policy of refusing to sell steel ties to those merchants and dealers who wished to buy them

ANNOTATIONS, Sec. 5—Continued.

PRACTICES IN PARTICULAR CASES—FULL LINE FORCING—Continued.

from them unless such merchants and dealers would also buy from them a corresponding amount of jute bagging.' It is the natural and prevailing custom in the trade to sell ties and bagging together, just as one witness testified it is to sell cups and saucers together. Such evidence as there is of a refusal to sell is a refusal to sell at all to certain persons with whom the respondents had previous unsatisfactory relations and a refusal to sell ties without bagging at the opening of the market in 1916 and 1917 when there was fear that owing to scarcity of ties and the prospect of large crops, the marketing of the cotton crop might be endangered by speculators creating a corner in ties." Ward, J., reversing Commission's order in 1 F. T. C. 249. *Federal Trade Commission* v. *Gratz*, 258 Fed. 314, 317. (See case in this vol., p. 545, at pp. 548, 549.)

11. "The complaint contains no intimation that Warren, Jones & Gratz did not properly obtain their ties and bagging as merchants usually do; the amount controlled by them is not stated, nor is it alleged that they held a monopoly of either ties or bagging or had ability, purpose, or intent to acquire one. So far as appears, acting independently, they undertook to sell their lawfully acquired property in the ordinary course, without deception, misrepresentation, or oppression, and at fair prices, to purchasers willing to take it upon terms openly announced.

12. "Nothing is alleged which would justify the conclusion that the public suffered injury or that competitors had reasonable ground for complaint. All question of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell except in conjunction, such closely associated articles as ties and bagging. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved. *United States* v. *Colgate*, 250 U. S. 300; *United States* v. *A. Schrader's Son, Inc.* (Mar. 1, 1920), 252 U. S. 85.

13. "The first count of the complaint fails to show any unfair method of competition practiced by respondents and the order based thereon was improvident." McReynolds, J., affirming decision of lower court, in *Federal Trade Commission* v. *Gratz*, June 7, 1920, 253 U. S., 421, 428, 40 Sup. Ct. 572, 575. (See case in this vol., p. 564, at p. 570.)

Brandeis, J. dissenting, at pp. 438–441. (See case in this vol., p. 564, at pp. 576–578.)

14. "It is obvious that the imposition of such a condition [that the purchaser of ties must also purchase bagging] is not necessarily and universally an unfair method, but that it may be such under some circumstances is equally clear. Under the usual conditions of competitive trade the practice might be wholly unobjectionable. But the history of combinations has shown that what one may do with impunity may have intolerable results when done by several in cooperation. Similarly what approximately equal individual traders may do in honorable rivalry may result in grave injustice and public injury if done by a great corporation in a particular field of business which it is able to dominate. In other words, a method of competition fair among equals may

be very unfair if applied where there is inequality of resources. * * *

15. "The following facts found by the commission and which the Circuit Court of Appeals held were supported by sufficient evidence, show that the conditions in the cotton, tie and bagging trade were in 1918 such that the Federal Trade Commission could reasonably find that the tying clause here in question was an unfair method of competition. * * * By virtue of their selling agency for the Carnegie Co., Warren, Jones & Gratz held a dominating and controlling position in the sale and distribution of cotton ties in the entire cotton-growing section of the country and thereby it was in a position to force would-be purchasers of ties to also buy from them bagging manufactured by the American Manufacturing Co. A great many merchants, jobbers, and dealers in bagging and ties throughout the cotton-growing States were many times unable to procure ties from any other firm than Warren, Jones & Gratz. In many instances Warren, Jones & Gratz refused to sell ties unless the purchaser would also buy from them a corresponding amount of bagging, and such purchasers were oftentimes compelled to buy from them bagging manufactured by the American Manufacturing Co. in order to procure a sufficient supply of steel ties.

16. "These are conditions closely resembling those under which 'full line forcing,' 'exclusive dealing requirements,' or 'shutting off materials, supplies, or machines from competitors'—well-known methods of competition—have been held to be unfair when practiced by concerns holding a preponderant position in the trade."

PRACTICES IN PARTICULAR CASES—FREE GOODS AS AN INDUCEMENT TO PURCHASE.

17. Commission's order in *Ward Baking Co.* case, 1 F. T. C. 388, reversed in *Ward Baking Co.* v. *Federal Trade Commission*, February 26, 1920, 264 Fed. 330, on ground that interstate commerce not involved. See digest of case, *infra*, pars. 25, 26. (See case at pp. 550–552 of this vol.)

PRACTICES IN PARTICULAR CASES—GRATUITIES TO CUSTOMERS TO INDUCE PURCHASES.

18. Where the commission found that respondent had been "lavishly giving gratuities such as luncheons, cigars, meals, theater tickets, and entertainment to employees of customers as an inducement to influence their employers to purchase or to contract to purchase from the said respondent" its various products, without other consideration therefor, and held such methods of competition unfair and in violation of section 5, and the Court, examining the evidence to see whether the Commission's findings were supported by the testimony or not, found "that the officers of the company in the year 1918 did entertain at the company's expense both customers and employees of customers; and that the salesmen down to May 1 were employed on a salary or on a salary and commission basis and were allowed to charge in their monthly accounts reasonable lump sums for entertainment. After May 1 they were on a commission basis only, and any entertainment given by them was given at their own expense," a charge in the complaint of giving valuable presents and sums of money having been abandoned by the Commission, *held*, in *New Jersey Asbestos Co.* v. *Federal Trade Commission*, February 6, 1920, 264 Fed. 509, reversing the order of the Commission in 1 F.T.C.

ANNOTATIONS, Sec. 5—Continued.

PRACTICES IN PARTICULAR CASES—GRATUITIES TO CUSTOMERS TO INDUCE PURCHASES—Con.

472 on the basis of the decision of the lower court in the Gratz case (see pp. 545–549 of this vol.), that the matter was one not so affecting the public as to be within the jurisdiction of the Commission. (See case at pp. 553–556 of this vol.)

PRACTICES IN PARTICULAR CASES—RESALE PRICE MAINTENANCE.

19. Where it appeared, among other things, that respondent adopted a resale price maintenance policy by advising those with whom it dealt, that it would not sell to any one failing to observe the resale prices suggested by it, or to any dealer in its chain of distribution selling to a distributor failing to observe suggested resale prices, but where it did not appear that there were any express contracts between the respondent and any of its distributors, *held*, in *Beechnut Packing Co.* v. *Federal Trade Commission*, Feb. 26, 1920, 264 Fed. 885 (pp. 556–564 of this volume) reversing the Commission's order in the *Beechnut Packing Co.* case, 1. F. T. C. 516, that the Commission's conclusions that the methods of competition in the case in question were unfair, could not be sustained in the face of the decision in *United States* v. *Colgate Co.*, 250 U. S. 300.[1]

ADMINISTRATION.

20. "On the face of this statute the legislative intent is apparent. Commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The commissioners, representing the Government as *parens patriae*, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases. But the restraining order of the commissioners is merely provisional. The trader is entitled to his day in court, and then the same principles and tests that have been applied under the common law or under statutes of the kind hereinbefore recited, are expected by Congress to control." Baker, J., in *Sears Roebuck & Co.* v. *Federal Trade Commission*, April 29, 1919, 258 Fed. 307, 311. (See case in this vol., p. 536, at p. 541.)

21. " * * * the act undertook to preserve competition through supervisory action of the commission. The potency of accomplished facts had already been demonstrated. The task of the commission was to protect competitive business from further inroads by monopoly. It was to be ever vigilant. If it discovered that any business concern had used any practice which would be likely to result in public injury—because in its nature it would tend to aid or develop into a restraint of trade—the commission was directed to intervene before any act should be done or condition arise violative of the anti-trust act. And it should do this by filing a complaint with a view to a thorough investigation; and, if need be, the issue of an order. Its action

[1] But *see United States* v. *Schrader's Son, Inc.*, Mar. 1, 1920, 252 U. S. 85, distinguishing Colgate case from Dr. Miles's Medical Co. case.

was to be prophylactic. Its purpose in respect to restraint of trade was preventive of diseased conditions, not cure." Brandeis, J., dissenting in *Federal Trade Commission* v. *Gratz*, June 7, 1920, 253 U. S. 421, 435, 40 Sup. Ct. 572, 577 (see case in this vol., p. 564, at p. 574).

CONSTITUTIONALITY.

22. "But such a construction of section 5 [one not construing the words "unfair methods of competition" to embrace no more than acts which, on September 26, 1914, when Congress spoke, were identifiable as acts of unfair trade then condemned by the common law as expressed in prior cases] according to petitioner's urge, brings about an unconstitutional delegation of legislative and judicial power to the commission. Grants of similar authority to administrative officers and bodies have not been found repugnant to the Constitution. [Citing cases.]

23. "With the increasing complexity of human activities many situations arise where governmental control can be secured only by the 'board' or 'commission' form of legislation. In such instances Congress declares the public policy, fixes the general principles that are to control, and charges the administrative body with the duty of ascertaining within particular fields from time to time the facts which bring into play the principles established by Congress. Though the action of the commission in finding the facts and declaring them to be specific offenses of the character embraced within the general definition by Congress may be deemed to be quasi legislative, it is only so in the sense that it converts the actual legislation from a static into a dynamic condition. But the converter is not the electricity. And though the action of the commission in ordering desistance may be counted quasi judicial on account of its form, with respect to power it is not judicial, because a judicial determination is only that which is embodied in a judgment or decree of a court and enforceable by execution or other writ of the court." Baker, J., in *Sears Roebuck & Co.* v. *Federal Trade Commission*, April 26, 1919, 258 Fed. 307, 311. (See case in this vol., p. 536, at p. 542.).

"TO THE INTEREST OF THE PUBLIC"—ISSUANCE OF ORDERS AFTER PRACTICE ABANDONED.

24. "Petitioner insists that the injunctional order was improvidently issued because, before the complaint was filed and the hearing had, petitioner had discontinued the methods in question and, as stated in its answer, had no intention of resuming them. For example, no sugar offers of the character assailed were made after August, 1917. But respondent was required to find from all the evidence before it what was the real nature of petitioner's attitude. It was permissible for respondent to take judicial notice of the Government's war-time control of sugar sales and consumption. It was also proper to note that petitioner was contending (and still contends) that the Act is void for indefiniteness, that the Act is unconstitutional, and that the Act, even if valid, under any proper construction, has not been infringed by petitioner's practices. * * * no assurance is in sight that petitioner, if it could shake respondent's hand from its shoulder, would not continue its former course." Baker, J., in *Sears Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307-310. (See case in this vol., p. 536, at p. 540.)

ANNOTATIONS, Sec. 5—Continued.

INTERSTATE COMMERCE.[1]

25. Where "it appeared from the testimony that the respondent transported the bread in question in its own wagons from Fall River, Mass., to Tiverton and Stone Bridge, R. I., their wagons calling at the retail stores in those places and their drivers then and there selling the respondent's bread to such storekeepers as wanted to buy, and then and there delivering additional bread gratis to the purchasers," *held*, on basis of decision in *Wagner* v. *City of Covington*, December 8, 1919, 251 U. S. 95, that interstate commerce was not involved, and that the Commission therefore had no jurisdiction to hold unfair the giving of bread gratis under the circumstances concerned. *Ward Baking Co.* v. *Federal Trade Commission*, February 26, 1920, 264 Fed. 330 (See case at pp. 550–552 of this vol.), reversing Commission's order in 1 F. T. C. 388.

The Court stated at page 331 (p. 551 of this vol.):

26. "Doubtless bread sold in Massachusetts to be delivered to the purchaser in Rhode Island would be interstate commerce, but that is not this case. Moreover, the commission is not finding the act of transportation from Massachusetts to Rhode Island unfair, but the method of local sales made in Rhode Island. If the respondent had its own stores in Rhode Island and carried to them from Massachusetts bread to be there sold, this method of selling could not be considered interstate commerce."

PLEADING.

27. "If, when liberally construed, the complaint is plainly insufficient to show unfair competition within the proper meaning of these words, there is no foundation for an order to desist—the thing which may be prohibited is the method of competition specified in the complaint. Such an order should follow the complaint; otherwise it is improvident and, when challenged, will be annulled by the court."

28. "The complaint contains no intimation that Warren, Jones & Gratz did not properly obtain their ties and bagging as merchants usually do; the amount controlled by them is not stated; nor is it alleged that they held a monopoly of either ties or bagging or had ability, purpose, or intent to acquire one. . So far as appears, acting independently, they undertook to sell their lawfully acquired property in the ordinary course, without deception, misrepresentation, or oppression, and at fair prices, to purchasers willing to take it upon terms openly announced.

29. "Nothing is alleged which would justify the conclusion that the public suffered injury or that competitors had reasonable ground for complaint. * * *

30. "The first count of the complaint fails to show any unfair method of competition practiced by respondents and the order based thereon was improvident." McReynolds, J., in *Federal Trade Commission* v. *Gratz*, June 7, 1920, 253 U. S. 421, 427–429, 40 Sup. Ct. 572, 574, 575. (See case in this vol., p. 564, at pp. 569, 570.)

INTERLOCUTORY ORDER NOT REVIEWABLE.

31. In complaint No. 29, *Federal Trade Commission* v. *The Nulomoline Co.*[2] (see 1 F. T. C. 400), the

[1] On interstate commerce, see also *post*, pars. 33–44 (pp. 484–486), and annotations to Clayton Act, pars. 32–35 (p. 500).

[2] A more complete report of this case will appear in the next volume of the Commission's decisions.

United States Circuit Court of Appeals of the Second Circuit, sitting in New York City, refused on August 16, 1918, to interfere with the Commission in the taking of testimony.

32. The respondent contended that the Commission was undertaking to pass upon the validity of a patent which under the law the Commission had no right to do. The Court, however, decided the order of the Commission requiring the taking of testimony was interlocutory and for this reason refused to interfere.

Sec. 6. FURTHER POWERS.

SEC. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

To gather and compile information, and to investigate with reference to organization, business, etc., of corporations, except banks and common carriers.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

To require annual or special reports from corporations, except banks and common carriers.

Such reports to be under oath, or otherwise, and filed within such reasonable period as commission may prescribe.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

To investigate, either on own initiative or application of Attorney General, observance of final decree entered under antitrust acts.

To transmit findings and recommendations to Attorney General.

Sec. 6. FURTHER POWERS—Continued.

To investigate, on direction President or either House, alleged violations of antitrust acts.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

To investigate and make recommendations, on application of Attorney General, for readjustment of business of alleged violator of antitrust acts.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

To make public, as it deems expedient, portions of information obtained.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

To make reports to Congress, together with recommendations for new legislation.

To provide for publication of its reports and decisions.

To classify corporations, and make rules and regulations incidental to administration of Act.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

To investigate foreign trade conditions involving foreign trade of United States, reporting to Congress with recommendations deemed advisable.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

"MANUFACTURE" OR "PRODUCTION," DISTINGUISHED FROM "COMMERCE"—AS AFFECTING RIGHT TO INVESTIGATE CONCERN UNDER CLAUSE A.[1]

33. Where it appeared that the Commission, at the request of the Navy Department, undertook to make an investigation to ascertain costs of production of a patented product, in the manufacture of which certain secret processes were also involved; that the purpose of said investigation was to furnish the Navy Department with information to enable it to come to a conclusion as to the price it should pay for said product; that no complaint of unfair competition had been made against the manufacturer concerned; that no such element, furthermore, was in any way involved in the case and that nowhere had it been made to appear that the defendant was "engaged in interstate commerce in any other way than any other corporation or any citizen may be so engaged, by making one or more shipments of manufactured goods from one State into another."

[1] On interstate commerce, see also *ante*, pars. 25, 26 (p. 482) and annotations to Clayton Act, pars. 32–35 (p. 500).

Held in *United States* v. *Basic Products Co.*, Sept. 9, 1919, 260 Fed. 472; that such investigation, under the circumstances involved, was beyond the powers of the Commission.

The court stated, *inter alia* (p. 481):

34. "* * * investigation under subdivision (a), section 6, is limited to corporations engaged in interstate commerce. The defendant is engaged in manufacture.

35. "A comprehensive consideration of the lack of constitutional authority over industry is found in the language of Mr. Justice Lamar, who delivered the opinion of the court in *Kidd* v. *Pearson*, 128 U. S. 1, 20, 21, 9 Sup. Ct. 6, 10 (32 L. Ed. 346), as follows:

36. " 'No distinction is more popular to the common mind or more clearly expressed in economic or political literature than that between manufacture and commerce. Manufacture is a transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. * * * If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market * * *.' "

"MANUFACTURE" OR "PRODUCTION" AS DISTINGUISHED FROM "COMMERCE"—AS AFFECTING RIGHT TO DEMAND REPORTS UNDER CLAUSE B.

37. "The plaintiff is a corporation engaged in the mining, production, and sale of bituminous coal. It owns and operates mines in Kentucky and Ohio. Practically all of the coal mined in Kentucky and about one-half of the coal mined in Ohio is shipped to points without those States, and the remainder of that mined in Ohio to points in that State. On January 31, 1920, the defendant commission served upon a large number of coal-mining corporations, including the plaintiff, an order requiring them to report 'monthly costs of production and other data, as set out in specification accompanying the order,' * * *." No question of unfair competition was involved, but defendant "asserts that such information is sought for a lawful purpose within the scope of the powers conferred upon the defendant by section 6 of the said commission act." *Held*, that under the circumstances the commission had no right to demand such a report. *Maynard Coal Co.* v. *Federal Trade Commission*,[2] April 19,

[1] The case came up on a petition for a writ of mandamus against the company filed by the Attorney General at the request of the Commission. Demurrer to the answer of defendant was overruled and the petition refused. In connection with this case see third paragraph of footnote to Federal Trade Commission Act on pp. 467, 468.

[2] Granting temporary injunction against the Commission. In connection with this case see third paragraph of footnote to Federal Trade Commission Act on pp. 467, 468.

ANNOTATIONS, Sec. 6—Continued.

"MANUFACTURE" OR "PRODUCTION" AS DISTINGUISHED FROM "COMMERCE"—AS AFFECTING RIGHT TO DEMAND REPORTS UNDER CLAUSE B—Continued.

1920, Supreme Court of the District of Columbia.

The court stated *inter alia:*

38. "* * * the commission in its answer 'denies that the plaintiff has the right to segregate its business and to say that part of its business is interstate and part is intrastate, but in order to ascertain if defendant is engaged in commerce the courts will look to the entire business transactions of the plaintiff, and if any part of its business is intrastate and a part interstate and the whole business is conducted under one organization as is set forth and admitted in the plaintiff's bill, then the defendant insists that the plaintiff, considering its business as a whole (is engaged in) interstate commerce and the defendant has the right to ask the information sought.'

39. "And the information sought in this case is such as would apply as well to a corporation whose business was wholly intrastate as to the plaintiff. The defendant unquestionably is demanding information as to intrastate commerce and as to coal production, and frankly asserts the right to do so.

40. "That there is a radical distinction between production and commerce is clear. [Also quoting that part of *Kidd* v. *Pearson*, 128 U. S. 1, 20, quoted in *United States* v. *Basic Products Co.*, *supra* (par. 36, p. 485).]"

41. "In the case of a corporation doing a wholly intrastate business could it be said that Congress had any visitorial power under the commerce clause of the Constitution of the United States? Clearly it has not. The fact that it happens to be the same corporation in this instance which mines and ships the coal does not give Congress any greater powers to regulate production to the intrastate commerce of such corporation. The visitorial power of Congress is limited to that part of the business over which it has control, and which under the Constitution it has the power to regulate."

42. "The power claimed by the commission is vast and unprecedented. The mere fact that a corporation engaged in mining ships a portion of its product to other States does not subject its business of production or its intrastate commerce to the powers of Congress * * *."

43. "The corporations referred to in the act are, by its terms, limited to those engaged in 'commerce' as defined in the act, and all the powers vested in the commission should be, and it seems may be, construed with this limitation. But the commission has undertaken to construe the act otherwise, and to take steps under its construction of the act to require information and reports not relating to interstate commerce, but relating chiefly or wholly to production, and under its order the information which it has the power to demand can not be separated from that over which it has no control * * *.

44. "It follows, therefore, that the commission can not compel the making of the reports which it has demanded of the plaintiff."

Sec. 7. SUITS IN EQUITY UNDER ANTITRUST ACTS. COMMISSION AS MASTER IN CHANCERY.

SEC. 7. That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.

Court may refer suit to Commission.

To ascertain and report an appropriate form of decree.

Commission to proceed on notice to parties and as prescribed by court. Exceptions. Proceedings as in other equity causes.

Court may adopt or reject report in whole or in part.

"THAT IN ANY SUIT * * * THE COURT MAY, * * * REFER SAID SUIT TO THE COMMISSION AS A MASTER IN CHANCERY," ETC.

45. Above possibility called to the attention of the court, but such course not considered necessary under the circumstances of the case in *United States* v. *Eastman Kodak Co.*, Aug. 24, 1915, 226 Fed. 62, 81.

Sec. 8. COOPERATION OF OTHER DEPARTMENTS AND BUREAUS.

SEC. 8. That the several departments and bureaus of the Government when directed by the President shall furnish the commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the commission as he may direct.

To furnish, when directed by President, records, papers, and information, and to detail officials and employees.

Sec. 9. EVIDENCE. WITNESSES. TESTIMONY. MANDAMUS TO ENFORCE OBEDIENCE TO ACT.

SEC. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by supœna the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the

Commission to have access to documentary evidence and right to copy same.

May require attendance of witnesses and production of evidence.

Sec. 9. EVIDENCE. WITNESSES TESTIMONY. MANDAMUS TO ENFORCE OBEDIENCE TO ACT—Continued.

Subpœnas, oaths, affirmations, examination of witnesses. Reception of evidence.

commission may sign subpœnas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Witnesses and evidence may be required from any place in United States.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Disobedience to a subpœna. Commission may invoke aid of any United States court.

In case of contumacy or disobedience of subpœna, any district court in jurisdiction involved may order obedience.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Disobedience thereafter punishable as contempt.

Mandamus from District Courts on application of Attorney General to enforce compliance with Act.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

Commission may order depositions at any stage.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent.

May be taken before person designated by Commission.

Testimony to be reduced to writing, etc.

Appearance, testimony, and production of evidence may be compelled as in proceeding before Commission.

Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witness fees, same as paid for like services in United States courts.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall

severally be entitled to the same fees as are paid for like services in the courts of the United States.

Incriminating testimony or evidence no excuse for failure to testify or produce.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpœna of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpœna issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

But natural person shall not be prosecuted with respect to matters involved.

Perjury excepted.

Sec. 10. PENALTIES.

Failure to testify or to produce documentary evidence. Offender subject to fine or imprisonment, or both.

SEC. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpœna or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

False entries, statements, or tampering with accounts, records, or other documentary evidence, or willful failure to make entries, etc., or

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed

Willful refusal to submit documentary evidence to Commission.

Sec. 10. PENALTIES—Continued.

guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

Offender subject to fine or imprisonment or both.

Failure of corporation to file required report.

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Forfeiture for each day's continued failure.

Recoverable in civil suit in district where corporation has principal office, or does business.

Various district attorneys to prosecute for recovery.

Unauthorized divulgence of information by employee of Commission punishable by fine or imprisonment or both.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

Sec. 11. ANTITRUST ACTS AND ACT TO REGULATE COMMERCE.

Not affected by this act.

SEC. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.

Approved, September 26, 1914.

THE CLAYTON ACT.[1]

(Approved October 15, 1914.)

[PUBLIC—No. 212—63D CONGRESS.]

[H. R. 15657.]

AN ACT To supplement existing laws against unlawful restraints and monopolies, and for other purposes.

Sec. 1. DEFINITIONS.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety[2]; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an

"Antitrust laws."

[1] Annotations cover cases through 265 Fed. 464 (part 2, Advance Sheets, issued as of Aug. 26, 1920), and 40 Sup. Ct. Reporter, which disposes of all cases decided at the October term, 1919 (last decisions handed down on June 7, 1920). In the case of sections other than secs. 1, 2, 3, 7, 8 (sections administered by the Commission in so far as applicable. See first paragraph of sec. 11 on p. 518), and 11, annotation has been limited to a list of the decisions for the reason that some of such sections do not involve the Commission at all, and the rest do so only more or less remotely.

It should also be noted in connection with this law that the so-called Shipping Board Act (Sec. 15, C. 451, 64th Cong., 1st sess.) provides that "every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the act approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' and amendments and acts supplementary thereto * * *."

[2] The Sherman Act (26 Stat. 209), which, as a matter of convenience, is printed herewith. While the Act itself has not been amended, appropriations for the fiscal years ending June 30, 1920 and 1921 (Sundry Civil Appropriation Act, July 19, 1919, ch. 24, par. 1, 41 Stat., and Sundry Civil Appropriation Act, June 5, 1920, ch. —, par. 1, 41 Stat., respectively) were made contingent upon no part of the moneys being—

"Spent in the prosecution of any organization or individual for entering into any combination or agreement having in view the increasing of wages, shortening of hours or bettering the conditions of labor, or for any act done in furtherance thereof, not in itself unlawful: *Provided further*, That no part of this appropriation shall be expended for the prosecution of producers of farm products and associations of farmers who cooperate and organize in an effort to and for the purpose to obtain and maintain a fair and reasonable price for their products."

The act, omitting the usual formal "*Be it enacted*," etc., follows:

CONTRACTS, COMBINATIONS, ETC., IN RESTRAINT OF TRADE ILLEGAL.

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combina-

Sec. 1. DEFINITIONS—Continued.

Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce." "Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That

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tion or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

PERSON MONOPOLIZING TRADE GUILTY OF MISDEMEANOR—PENALTY.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

COMBINATIONS IN TERRITORIES OR DISTRICT OF COLUMBIA ILLEGAL—PENALTY.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

ENFORCEMENT.

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such

nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

"Person or persons."

"COMMERCE."

On interstate commerce, see annotations to Federal Trade Commission Act, pars. 25, 26 (p. 482), 33-44 (pp. 484-486), and annotations to this act, pars. 32-35 (p. 500).

Sec. 2. PRICE DISCRIMINATION.

SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Colum-

Unlawful where effect may be to substantially lessen competition or tend to create a monopoly.

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petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

ADDITIONAL PARTIES.

SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

FORFEITURE OF PROPERTY.

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SUITS—RECOVERY.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States, in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"PERSON" OR "PERSONS" DEFINED.

SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Sec. 2. PRICE DISCRIMINATION—Continued.

bia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

But permissible if based on difference in grade, quality, or quantity, or in selling or transportation cost, or if made to meet competition, and

Vendor may select own customers if not in restraint of trade.

LEASES.

1. "In the opinion of the court, section 2 of the act is limited to sales and not leases, and therefore does not apply to any of the acts prohibited by section 3." *United States* v. *United Shoe Machinery Co.*, March 31, 1920, 264 Fed. 138, 165.

REFUSAL TO SELL ON ACCOUNT OF FAILURE TO MAINTAIN SUGGESTED RESALE PRICES.

See also *post*, pars. 85–88.

2. *Held*, not within provisions of above section as to price discrimination. *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, July 20, 1915, 224 Fed. 566.

"THAT NOTHING HEREIN CONTAINED SHALL PREVENT PERSONS ENGAGED IN SELLING GOODS, WARES, OR MERCHANDISE IN COMMERCE FROM SELECTING THEIR OWN CUSTOMERS IN BONA FIDE TRANSACTIONS AND NOT IN RESTRAINT OF TRADE."

See also *post*, pars. 6, 9, 85–88.

3. "The vital question is whether defendant's method of business, coupled with the acquiescence of its customers therein by observing its requests or demands to maintain prices, was such cooperation between seller and purchasers as amounted to a combination in restraint of trade within the rule laid down in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, and other following cases. We are obliged to hold that the question has been clearly answered in the negative by the Supreme Court in *United States of America*, v. *Colgate & Co.*, 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992, decided June 2, 1919. The court expressly held that the announcement in advance that customers were expected to charge a price fixed by the seller and that the penalty for refusal to maintain prices would be refusal to sell to the offending customer, observance of the request to maintain prices by customers generally, and the actual enforcement of the penalty by refusal to sell to such customers as failed to maintain the price, did not constitute a violation of the trust statute. Nothing more was done by the defendant and its customers in this case.

4. "Since the defendant, under the *Colgate Case*, merely exercised the right reserved by the Clayton Act (Act Cong. Oct. 15, 1914, C. 323, par. 2, 38 Stat. 730 [Comp. St. par. 8835 b] to dealers of 'selecting their own customers in bona fide transactions and not in restraint of trade,' the plaintiff can not recover under its charge of unlawful discrimination in price." *Cudahy Packing Co.* v. *Frey & Son*, Circuit Court of Appeals, July 16, 1919, 261 Fed. 65, 67, reversing lower court.

"WHERE THE EFFECT OF SUCH DISCRIMINATION MAY BE TO SUBSTANTIALLY LESSEN COMPETITION OR TEND TO CREATE A MONOPOLY IN ANY LINE OF COMMERCE."

5. "The second cause of action, brought under the Clayton Act, is based solely upon the allegation that the defendants discriminated in the price of Goodyear supplies between dealers (including this plaintiff) and manufacturers of automobiles, and in favor of such manufacturers' * * *.

6. "There is nothing in the complaint to show how the alleged discrimination might substantially lessen competition, and it certainly could not tend to create a monopoly * * * the manufacturers sell to dealers, and the latter to the consumer. There is apparently no competition between the manufacturers of tires and the dealers, nor is it alleged that any exists. The differentiation in price would not therefore substantially lessen competition. If such would be the effect, it must be set forth in some discernible way, and not in the mere language of the statute. There is no unreasonable arrangement set forth, nor is it made apparent how competition may be substantially lessened, or how the defendants were doing more than to select 'their own customers in bona fide transactions and not in restraint of trade.' More than mere sweeping conclusions in the language of the statute should be alleged to subject parties to trial. I can see no basis for the second cause of action." Hand, District Judge, sustaining demurrer in *Baran* v. *Goodyear Tire & Rubber Co.*, Jan. 17, 1919, 256 Fed. 571, 574.

WORDS AND PHRASES—"RESTRAINT OF TRADE."

7. "It must be admitted that there is abundant authority for the general proposition that preventing competition is restraint of trade; but it does not follow that it is unlawful either to prevent any and every species of competition or to restrain trade in any and every degree. The only competition prevented or sought to be prevented by defendant's acts is that of Cream of Wheat against itself; the only trade restrained is the commercial warfare of a large buyer against small ones, or that of a merchant who for advertising purposes may sell an article at a loss, in order to get customers at his shop, and then to persuade them to buy other things at a compensating profit. That competition, as encouraged by statutes and decisions, does not include practices, has been sufficiently shown (with ample citations) in *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 649, 137 Pac. 144, 51 L. R. A. (N. S.) 522.

8. "It is further obvious that, when plaintiff premises that preventing competition is restraining trade, it is assumed that the resultant restraint is *unreasonable;* for there is nothing in the Clayton Act to compel or induce courts to hold that the trade restraint referred to by this statute differs in kind, quality, or degree from that now held to be meant by the Sherman Act."

ANNOTATIONS, Sec. 2—Continued.

WORDS AND PHRASES—"RESTRAINT OF TRADE"—Continued.

9. "Section 2 plainly identifies the lessening of competition with restraint of trade. (Cf. the body of the section with the last exception.) But price discrimination is only forbidden when it 'substantially' lessens competition. Construing the whole section together, the last exception reads in effect that a 'vendor may select his own bona fide customers providing the effect of such selection is not to *substantially* and *unreasonably* restrain trade.' How it can be called substantial and unreasonable restraint of trade to refuse to deal with a man who avowedly is to use his dealing to injure the vendor, when said vendor makes and sells only such an advertisement begotten article as Cream of Wheat, whose fancy name needs the nursing of carefully handled sales to maintain an output of trifling moment in the food market, is beyond my comprehension." *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, July 20, 1915, 224 Fed. 566, 573, 574.

Section referred to in passing. *United States* v. *American Can Co.*, Feb. 23,1916, 230 Fed. 859, 885.

Sec. 3. TYING OR EXCLUSIVE LEASES, SALES OR CONTRACTS.

Unlawful where effect may be to substantially lessen competition.

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

APPLICABILITY TO AGENCY.

See also *post*, pars. 15–17.

10. "* * * there can be no question in view of the payment in advance and the other elements of the transaction, that title to the magazines which these wholesale agents receive passes to them. They are no mere factors or agents. Nevertheless they are clearly much more than purchasers * * *.

11. "If nothing but a sale were involved, I might support com-

plainant's contention that defendant has violated the Clayton Act by preventing its wholesale dealers from selling the Pictorial Review through dealers and boys; * * *."

12. "* * * looking behind the form of the contract which the defendant makes with its agents to the inherent features of the transaction, I think it may be said that the selling arrangement more nearly resembles an agency conducted by district agents in cooperation with the Curtis boys than it does an outright sale to the district agents and nothing more * * *." Hand, J., denying motion for temporary injunction in *Pictorial Review Co.* v. *Curtis Publishing Co.*, June 23, 1917, 255 Fed. 206, 208, 210, on the ground that it had not been established with sufficient clearness that defendant's contract caused an unreasonable restraint of trade or otherwise came within the prohibitions of the Clayton Act.

13. "If an agency only were created by the contract in question it is clear that the provisions of this act would not apply, because by its terms it is made applicable only to leases, sales or contracts for sale." *Standard Fashion Co.* v. *Magrane-Houston Co.*, March 9, 1918, 254 Fed. 493, 495.

ASSIGNMENT OF EXCLUSIVE TERRITORY.

14. Where the owner of a product sold under a trade-mark name, which, through wide advertising, had become well known to the purchasing public, adopted a system of licensing dealers for certain territories, to whom it sold exclusively, in order that it might thereby be enabled through its inspection department to maintain the quality of its product, *Held*, that a refusal to sell to an unlicensed dealer in an assigned territory did not violate the section in question, "in view of the possibility of adulteration and the hardship to the manufacturer of maintaining such supervision over the bottling as it deemed necessary, if required to sell every intending purchaser." (Quotation from syllabus.) *Coca-Cola Co.* v. *J. G. Butler & Sons*, Feb. 7, 1916, 229 Fed. 224.

CONSTRUCTION OF LEASES, SALES OR CONTRACTS.

See also *ante*, pars. 10–13.

15. "If I thought that the system of marketing defendant's magazines was a cover to avoid the provisions of the Clayton Act, or obtain a monopoly, I might reach a very different conclusion, but I am satisfied that the system is genuine, and not in any respect other than what it represents itself to be * * *." Hand, J., in *Pictorial Review Co.* v. *Curtis Publishing Co.*, June 23, 1917, 255 Fed. 206, 209.

16. "If an agency only were created by the contract in question it is clear that the provisions of this act would not apply, because by its terms it is made applicable to leases, sales or contracts for sale. Although the plaintiff, by the terms of the contract, grants to the defendant an agency for the sale of Standard patterns, the Court will search beneath the language employed to discover the real nature of the contract and will place its own construction upon it wit out reference to its characterization by the parties themselves." *Standard Fashion Co.* v. *Magrane-Houston Co.*, March 9, 1918, 254 Fed. 493, 495.

17. *Held*, that a contract in substance one of sale, though called one of agency, containing a provision that the covenantee under-

ANNOTATIONS, Sec. 3—Continued.

CONSTRUCTION OF LEASES, SALES OR CONTRACTS—Continued.

takes not to sell any of the products involved other than those of the vendor, during the term of the contract, under the circumstances concerned, violates the above section. *Standard Fashion Co.* v. *Magrane Houston Co.*, June 28, 1919, Circuit Court of Appeals, 259 Fed. 793.

CONSTITUTIONALITY—PATENTS PREVIOUSLY GRANTED.

18. "* * * the court can conceive of no reason why Congress can not restrict the rights of patentees, if in its opinion they are used in a manner resulting in oppressing the public. A patent is merely a privilege granted to inventors by Congress, and whenever that privilege is abused or is found to be exercised in a manner contrary to the public policy of the Government, Congress certainly has the power to enact laws which will prevent such an abuse. * * *" *United States* v. *United Shoe Machinery Co.*, June 6, 1916, 234 Fed. 127–151.

19. "The contention on behalf of defendants is that, prior to and at the time of the enactment of the Clayton Act, it was the law * * * that terms and restrictions such as are contained in the leases and attacked in this action 'were not offensive to the letter or policy of the law' * * *."

20. "There is nothing in the laws relating to patents which in anywise affects contracts for license, use, sale, or lease of patented articles. They are subject to the same governmental and legislative control as other contracts. * * *"

21. "In short, individual rights, whether claimed under patents or otherwise, must be subordinated to the public good, and, unless clearly arbitrary and unreasonable, courts will respect the acts of the legislative department. There are but few public regulations which do not deprive persons of rights theretofore enjoyed. As abuses, harmful to the public, are found to exist, new laws are enacted to prevent them, and they necessarily deprive those who practiced them of any right to continue them.

22. "If the business is subject to regulation, the contracts made in its conduct are subject to reguation. * * *"

23. "Conceding that the courts had previously sustained the right to make such leases and contracts as are attacked in this cause, it does not follow that the patentee has a vested right in them of which the legislature may not deprive him, if, in its opinion, they are detrimental to the public welfare. While it is true, as claimed by counsel, that by the Tenth Amendment to the Constitution the police power is reserved to the States, it is now well settled that, as the Constitution vested in Congress the exclusive power to regulate commerce among the States and grant patents, it possesses what is akin to the police power of the States, the right to regulate acts relating to them, including licenses, sales, contracts, and leases of patented articles, especially when employed in commerce among the States or foreign States. * * *."

24. "So, even if [conceding?] the claim that the former decisions relied on constitute a vested right in the patentee, it would still be subject to regulation by Congress, under the commerce as well as the

patent clauses of the Constitution, and in some matters, to the police power of the States. * * *"

25. "Besides, decisions of courts do not create rights which become vested to the extent that they may not be impaired by subsequent legislation, except as they become *res judicata* between the parties to the act and their privies. They are rules of property which will not, for slight reasons, be changed by later decisions, but even such decisions may have been overruled frequently. * * *"

26. "Of course, this does not apply to vested rights under a statute or contract based on a valuable consideration, and not subject to the police power. * * *"

27. "* * * A statute addressed to no particular person does not constitute a contract, and therefore creates no vested right, and may be repealed at any time. * * * The patent laws of the United States are addressed to no one in particular, but dictated by public policy, restrained only by the Constitution, that the patent 'secure for a limited time to inventors the exclusive right to their discovery.'"

28. "Besides, there is nothing in the national Constitution which prohibits Congress or a State from nullifying existing contracts, if, in the opinion of the legislative department, based on substantial grounds, they are injurious to the public. All contracts for a definite period must be taken to have been made subject to a possible change by law, under the police power, if the public welfare demands it, and this is to be determined by the law makers. * * *"

29. "The conclusion reached is that, while Congress can not deprive a patentee of the exclusive use of the patent, or reduce the time for which it is granted by existing law, without violating the Fifth Amendment, a patentee has no vested right in conditions of contracts for use, license, or lease of his patented invention, which Congress may not prohibit, if, in its judgment, they are injurious to the public welfare, though he may have possessed that right under the common or municipal law, as theretofore construed by the courts. * * *" *United States* v. *United Shoe Machinery Co.*, March 21, 1920, 264 Fed. 138, 147–152, 154.

CONSTITUTIONALITY—RETROACTIVE EFFECT ON EXISTING CONTRACTS.

30. "Counsel for defendant earnestly insists that, even if Congress so intended, the statute can not be so construed as to apply to preexisting contracts without violating fundamental and constitutional rights. * * *

31. "Congress derived its power to enact such legislation from the commerce clause of the Constitution, and the power so conferred is broad, comprehensive, and all-embracing. All persons entering into contracts involving interstate commerce must do so subject to the right of Congress thereafter to control, regulate, or prohibit the performance thereof. 'Every owner of property holds the same subject to such action as the sovereign power of the State may, in the exercise of its legitimate sovereignty, adopt in relation to it.' It is now too well settled to admit of controversy that a contract to do a thing, lawful when made, may be avoided by subsequent legislation making it unlawful, and that an act of Congress may lawfully affect rights which had their inception before its passage [citing

ANNOTATIONS, Sec. 3—Continued.

CONSTITUTIONALITY—RETROACTIVE EFFECT ON EXISTING CONTRACTS—Continued.

cases]." *Elliott Machine Co.* v. *Center*, Feb. 20, 1915, 227 Fed. 124, 126.

INTERSTATE COMMERCE—LEASES.

32. "It may be conceded that every lease is not commerce, but that is not conclusive that none may be. Each case must be determined from the peculiar facts shown to exist in that case. When a corporation with millions of capital, doing an annual business amounting to millions of dollars, sees proper to conduct its business by only leasing its chattels, instead of selling them, why is it not as much engaged in commerce as if it sold them outright?" *United States* v. *United Shoe Machinery Co.*, June 6, 1916, 234 Fed. 127, 143, 144.

INTERSTATE COMMERCE—LEASES—PLACE OF EXECUTION.

33. Where the contention was made that certain leases were not in the course of interstate trade upon the ground that they "were only presented to the lessee for signature and executed by him after the machines had been set up and were in operation, regardless of the fact from what State the defendants shipped them" and it appeared that "the custom then prevailing was: The shoe manufacturer would notify the local representative of the defendants that he desired to lease certain machines, whereupon a blank printed order would be handed to him. He would then insert in a blank left for that purpose the kind of machine or machines he desired and sign the application. The order is: 'Please deliver to the undersigned, upon the terms and conditions hereinafter stated, for use in the factory of the undersigned at (insert St. Louis, Mo., or wherever the factory is located) the machines,' etc.

34. "It also contains an obligation that he will hold the machines at his sole risk from injury, loss, or destruction by fire or otherwise, pay all taxes assessed and levied on them, will render full and accurate reports of the machines, pay the rental and royalties established by the defendants, and pay all shipping and transportation charges, both to and from the factory of the machinery company. An order would then be sent to the home office of the defendant Maine company in the State of Massachusetts, and, if accepted the machines would be shipped from Massachusetts, consigned to itself. Upon their arrival at the destination, they would be taken from the carrier by defendants' agent and installed in the shoe factory, and, when set up and put in operation, the lease would be executed." *Held*, that such contention can not be sustained. *United States* v. *United Shoe Machinery Co.*, Mar. 31, 1920, 264 Fed. 138, 158.

INTERSTATE COMMERCE—PLACE OF ACT OF INFRINGEMENT.

35. "If the contract involved and restrained interstate commerce, it makes no difference that the particular act of infringement occurred within the State of New York, and the prohibitions of the Clayton Act apply [citing cases]." *Motion Picture Patents Co.* v. *Universal Film Co.*, Circuit Court of Appeals, 1916, 235 Fed. 398, 401. Affirmed (1917) in 243 U. S. 502.

TYING OR EXCLUSIVE CONTRACTS OR LEASES—ABSENCE OF EXPRESS ASSENT ON PART OF LESSEE, OR COVENANTEE.

36. "But it is claimed that there is nothing in the leases whereby

the lessees covenant or bind themselves not to use any machines manufactured by other parties, or purchase materials which are dealt in by the defendants, from others. This is true, but as the lessors retained the right, in case any other machines are used in the manufacture of shoes than those manufactured by the defendants, of canceling the leases and removing the leased machines, and further provide for a rebate to those who comply with these terms, which those using other machines or material do not receive, there is an implied promise on the part of the lessees not to violate these conditions of the leases, or suffer the penalties set out in the leases.

37. "* * * The right to impose a heavy penalty for doing certain things is just as effective to prevent them as a covenant not to do them. It is therefore unnecessary that the lessees should bind themselves to these conditions or agreements by covenants. It is sufficient if the natural and inevitable effect of the leases, accepted by them, leads to the same result as if they had in express terms bound themselves not to use any other machines or materials than those manufactured or dealt in by the defendants. But, to remove any doubt upon the subject, Congress, out of abundant caution, added the words 'or understanding' after the words 'contracts or agreements.' The word 'understanding,' as defined by lexicographers, includes 'mental discernment, comprehension, clear knowledge.'" *United States* v. *United Shoe Machinery Co.*, June 6, 1916, 234 Fed. 127, 147, 148.

TYING OR EXCLUSIVE CONTRACTS OR LEASES—PRESUMPTION OF LEGALITY.

38. "* * * the statute does not create a presumption that such contracts are inherently vicious, nor does it impose upon the plaintiff the burden of proving that the contracts are not illegal. The presumption is of legality, and the burden is upon him who assumes illegality. The application of the statute should be made only upon full proofs. The consequences of applying it otherwise are too serious to be disregarded * * *." Brown, district judge, concurring in denying relief sought but dissenting as to holding contract involved unlawful under Clayton Act in *Standard Fashion Co.* v. *Magrane-Houston Co.*, June 28, 1919, 259 Fed. 793, 802.

TYING OR EXCLUSIVE CONTRACTS OR LEASES—IN PARTICULAR CASES.

See also *post*, par. 77.

39. *Held*, that a provision by which a trading stamp concern required its so-called "subscribers," who obtain under contract the right to give out these coupons (exchangeable for various premiums) by paying a consideration therefor and by agreeing to distribute the stamps only to customers does not violate the section in question. "This statute forbids the converse of the acts complained of in the present action, and we have nothing to do with what might happen if the Green Trading Stamp people were seeking to forbid the use by its subscribers of any other kind of trading stamps. This might or might not be a restriction upon competition or tend to effect a monopoly." *Sperry & Hutchinson Co.* v. *Fenster*, Jan. 16, 1915, 219 Fed. 755, 756.

40. Where the bill stated, among other things, that nearly all the shoes made in the United States are machine made; that defendants make and control 98 per cent of the shoe machinery in the United States; that defendants have business relations with nearly

ANNOTATIONS, Sec. 3—Continued.

TYING OR EXCLUSIVE CONTRACTS OR LEASES—IN PARTICULAR CASES—Continued.

all shoe manufacturers in the United States; that "some of the machines made by the defendants are designated by them as 'principal,' while others are designated 'auxiliary'"; that "The 'principal' machines can not be operated profitably without the use of some, if not all of the 'auxiliary' machines, and the latter are of no practical value, except as they are used in connection with the 'principal' machines"; that the terms under which defendants lease their machinery include the following, to wit; that the lessee

"(1) Shall not use the machine in the manufacture or preparation of footwear *which has not had* certain essential operations performed upon it by other machines leased from the lessor;

"(2) Shall use the leased machine to its fullest capacity;

"(3) Shall use *exclusively* the leased machine for the class of work for which it is designed;

"(4) Shall obtain from the lessor *exclusively*, at such price as *it* may establish, all duplicate parts and mechanisms needed in operating the leased machines, and *all supplies* in connection with them;

"(5) Shall use patented insoles made on *defendant's machinery only* in connection with certain footwear manufactured by machinery leased from the lessor;

"(6) Shall lease from the lessor any additional machinery which he may need for work in the same department as that of the machine leased;

"(7) Shall permit the *lessor to determine* whether the lessee has in his factory more machinery adapted for doing the same work than he needs, and, if so, *to remove such machines* as, *in the opinion of the lessor*, are unnecessary;

"(8) Shall, at the *election of the lessor*, suffer a termination of all leases which he may have and the removal of all machines leased by him from the defendants, in the event of the violation of any term of any one of the leases." *Held*, that reading the "act of Congress and the cases complained of together, there can be but one conclusion, and that is that all of the clauses (with the possible exception of No. 2) complained of in the bill are clearly violative of the plain words of the statute.

41. "If the court were in doubt as to the meaning of the act and of the intention of Congress in enacting it, that doubt will be readily removed by reading and considering the proceedings in both houses of Congress touching the purpose of the law." Dyer, J., granting preliminary injunction, *United States* v. *United Shoe Machinery Co.* Nov. 9, 1915, 227 Fed. 507, 508, 509.

42. Where a corporation enjoying a dominating position in the manufacture and sale or lease of shoe machines, through ownership of patents, and through contracts made by it with its lessees, leased its machinery with tying clauses providing among other things that by using no machines other than those of defendants, the lessee should be relieved of certain royalties otherwise exacted; that "if the lessees use the defendants' lasting machinery for shoes welted on machines made by other manufacturers, or fail to use exclusively defendants' machines for lasting shoes, or fail to purchase from the defendants exclusively all duplicate parts, extras, and devices of every kind, needed or used in operating, repairing, or renewing the lasting machinery, or fail to use exclusively the auxiliary machin-

ery of the lessor in the manufacture or preparation of insoles licensed under letters patent No. 849,-245, or fail to buy any additional machines needed in their shoe factory, which can be leased from the lessor," that all the leases could be canceled and the lessees be deprived of the use of them, and be compelled to pay certain royalties, which otherwise they would not have to pay. *Held*, that such leases constituted a violation of section 3.

The court stated:

43. "Can it be doubted that these provisions are not only within the spirit but the letter of the statute? What is the natural, direct, and necessary effect of these conditions? There can be but one answer to this: To compel the lessees to use defendants' machinery and material, regardless of whether the terms granted by the defendants are as favorable as can be obtained from other manufacturers of some of the machines, or dealers in some of the materials.

44. "In addition, it is charged that by reason of these leases there is no market for anyone inclined to manufacture these or some of these machines, and therefore all are deterred from engaging in their manufacture, as, there being no market for them, financial failure is bound to result from the attempt. Such a condition of affairs clearly tends to substantially lessen competition, and create, in favor of the defendants, a monopoly in that line of commerce." Trieber, J., overruling motion to dismiss in *United States* v. *United Shoe Machinery Co.*, June 6, 1916, 234 Fed. 127, 148, 149.

45. "On this record we are constrained to find that this restriction may substantially lessen competition and may tend to create a monopoly. It already appears that, out of some 52,000 pattern agencies in this country, the plaintiff or a holding company controlling it and two other pattern companies control approximately two-fifths. The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities, amount to giving such single pattern manufacturer a monopoly of the business in such community. * * *

46. "We must consider this restriction in the light of the facts peculiar to the business to which the restraint is applied, to the conditions already achieved under such restraint, as well as the nature of the restraint and its effect, actual or probable. Viewing it thus, in the light of the surrounding circumstances, we are constrained to agree with the District Court that the negative covenant in this contract may lessen competition, or may tend to create a monopoly, or both, and is therefore obnoxious to the Clayton Act [citing Chicago Board of Trade *v.* United States, 246 U. S. 231, 238]." Anderson, Circuit Judge, in *Standard Fashion Co.* v. *Magrane Houston Co.*, June 28, 1919, 259 Fed. 793, 798.

47. "To predict the consequences of the defendant's agreement not to sell or permit to be sold on its premises, during the term of the contract, any other make of patterns, it is necessary to consider the pecularities of the particular business to which the contract relates * * *."

48. "In the present case there is no evidence that any competitor of the plaintiff had ever been excluded from competition in the city of Boston or elsewhere because of inability to procure cus-

ANNOTATIONS, Sec. 3—Continued.

TYING OR EXCLUSIVE CONTRACTS OR LEASES—IN PARTICULAR CASES—Continued.

tomers or a store in which he might market his goods * * *." "* * * in the present case there is evidence that the largest competitor of the plaintiff is rapidly extending its business by affirmative contracts without restricted conditions, and has a much more dominant position in the field than the present plaintiff. I can see no ground in the record for apprehension that anybody is likely to acquire a monopoly in the dress pattern business, in which, as the evidence shows, competition is very active.

49. "I am unable to agree that this bill should be dismissed because the contract in question is unlawful under the Clayton Act * * *." Brown, District Judge, concurring in denying relief sought, but dissenting as to reasons in above case. (Pp. 800, 801, 803.)

50. *Held*, that provisions in leases made by a manufacturer of shoe machinery to the effect (1) that the lessee should use the leased machinery to its full capacity; (2) that the lessee should purchase all repair parts or mechanisms from the lessor at the lessor's regular prices; (3) that the leases should continue for 17 years unless sooner terminated by the lessor; do not, under the circumstances involved, violate any provisions of the section in question.

51. That provisions in said leases to the effect that the lessee must purchase all supplies used by it in connection with said leased machinery, exclusively from the lessor at prices established by the lessor; that the lessee must not use said leased machinery in connection with those of the lessor's competitors, or on shoes or other footwear manufactured in part on competitors' machines; violate the provisions of the section in question, notwithstanding the fact that the lessees have the choice of unrestricted leases, it appearing that the consideration for said unrestricted leases was prohibitive, notwithstanding the fact that leases executed since the enactment of the Clayton Act do not contain the objectionable clauses, it appearing that said leases are only "temporary leases," with the right reserved to the lessor to substitute or add different terms, the intention appearing to avoid the prohibitions of the section in question pending the litigation affecting the legality of the leases containing the objectionable clauses, and notwithstanding the fact that the right to declare a lease forfeited for a breach of any of the clauses involved had not up to that time been exercised.

52. That provisions to the effect that the lessor might terminate the lease for breach of any condition contained therein does not violate the section in question in so far as lawful conditions are involved, and that the provisions as to royalty are not objectionable except that which allows a discount or rebate on condition of the lessees not using competitors' machines. *United States* v. *United Shoe Machinery Co.*, Mar. 31, 1920, 264 Fed. 138, 165–169.

"WHERE THE EFFECT OF SUCH LEASE, SALE, OR CONTRACT FOR SALE, OR SUCH CONDITION, AGREEMENT, OR UNDERSTANDING MAY BE TO SUBSTANTIALLY LESSEN COMPETITION OR TEND TO CREATE A MONOPOLY IN ANY LINE OF COMMERCE."

53. "I am satisfied with the reasoning of Judge Trieber [*United States* v. *United Shoe Machinery Co.*, 234 Fed. 127, 150] that Congress, with the full knowledge of the

construction which had been placed upon the Sherman Act by the Supreme Court, did not intend that the same construction should be placed upon the specific terms of the Clayton Act; for it chose to define the lessening of competition which it declared to be unlawful, and to do this used the word 'substantially' to make it apparent that a real, as opposed to an imaginary or fanciful lessening of competition, was intended.

54. "Doubtless a substantial lessening of competition would amount to an unreasonable restraint of trade; but I do not think it is the duty of the Court to find this before it can pronounce a contract unfair, the effect of which it has found may be to 'substantially lessen competition.'" The reports of the committees of both Houses of Congress, as well as the legislative history of the bill, show the intent of Congress to protect the public from practices which it believed to be inimical to the public good by preventing these practices from being put in operation.

55. "I think, therefore, it is the duty of the Court to determine whether or not the contract has provided means for a real or substantial lessening of competition, irrespective of what use has been or is being made of these means.

56. "By the use of the word 'may' the intent is manifest to deal with the potential evil which a contract may contain, and to make the attempt to substantially lessen competition unlawfully." Johnson, Circuit Judge, in *Standard Fashion Co.* v. *Magrane Houston Co.*, Mar. 9, 1918, 254 Fed. 493, 499. (District Court.)

57. "The mere fact that Congress enacted the Clayton Act after numerous courts had held similar or analogous restrictions [i. e., agreements on the part of the covenantee not to deal in products other than those of the seller during the term of the contract] not obnoxious to the Sherman Act, July 2, 1890, C. 647, 26 Stat. 209 (Comp. St. pars. 8820–8823, 8827–8830), or invalid at common law, or under State antitrust statutes, justifies the inference that the Legislature intended in the line of actual experience to change the law. [Citing numerous cases.]

58. "There is no answer to the suggestion of Judge Trieber in *U. S.* v. *United Shoe Machinery Co.* (D. C.), 234 Fed. 127, 150, that the presumption is, not that Congress intended that the construction of the Sherman Act should control, but on the contrary that it should not control." And again quoting from Judge Trieber: 'Evidently Congress was not satisfied to only prohibit actual lessening of competition or monopolizing, but to make it unlawful for any person to do these acts, which may put it in his power to do so.'

59. "The very title of this act is significant—'An act to *supplement* existing laws against unlawful restraint and monopolies, and for other purposes.'" *Standard Fashion Co.* v. *Magrane Houston Co.*, June 28, 1919, 259 Fed. 793, 795, 796.

60. "In order to condemn the negative covenant it is not necessary that the Court should find that it *will* lessen competition or *will* tend to create a monopoly; it is enough to find that it *may* lessen competition or *may* tend to create a monopoly."

61. "On this record we are constrained to find that this restriction may substantially lessen competition and may tend to create a monopoly. It already ap-

ANNOTATIONS, Sec. 3—Continued.

"WHERE THE EFFECT OF SUCH LEASE, SALE, OR CONTRACT FOR SALE, OR SUCH CONDITION, AGREEMENT, OR UNDERSTANDING MAY BE TO SUBSTANTIALLY LESSEN COMPETITION OR TEND TO CREATE A MONOPOLY IN ANY LINE OF COMMERCE"—Continued.

pears that, out of some 52,000 pattern agencies in this country, the plaintiff or a holding company controlling it and two other pattern companies control approximately two-fifths. The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. * * *." Anderson, Circuit Judge in *Standard Fashion Co.* v. *Magrane Houston Co.*, June 28, 1919, 259 Fed. 793, 798.

Brown, District Judge, concurring in denying relief asked, but not in holding the contract involved unlawful under the Clayton Act.

62. "Full weight must be given to the final clause of section 3 of the Clayton Act [quoting above clause, namely, "Where the effect of such lease," etc.].

63. "In determining the effect we must consider the thing upon which the effect is to be produced. This clause seems to require that the interpretation and application of section 3, of the Clayton Act should be according to the principles stated in the opinion of Mr. Justice Brandeis in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238, 38 Sup. Ct. 242, 244 (62 L. Ed. 683).

64. "'But the legality of an agreement or regulation can not be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, and all relevant facts. This is not because a good intention will serve an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the Court to interpret facts and to predict consequences.'"

65. "In applying the statute it must be judicially determined what the effect may be. This judgment must be more than a mere feeling of 'possibility' arising in ignorance of facts which, if known, would destroy that feeling. It must be based on knowledge and upon a reasonable belief that, in view of existing facts, there is a 'dangerous probability'" (pps. 799, 800, 801).

66. "There is nothing in the Sherman Act, or any other act of Congress, making the acts enumerated in section 3 of the Clayton Act unlawful, 'where the effect' of them 'may be to substantially lessen competition or tend to create a monopoly in any line of commerce.' Section 1 of the Sherman Act (Comp. St. sec. 8820) makes unlawful 'contract * * * in restraint of trade or commerce,'

and as construed by the Supreme Court in the above cited cases, they mean 'contracts which unduly restrain trade and commerce.' This languge differs materially from the languge used in section 3 of the Clayton Act. That contracts or leases may substantially lessen competition was not sufficient to make them unlawful under the Sherman Act, if not unduly or oppressively enforced as was held in clauses hereinbefore cited."

67. "The Clayton Act as the court construes it, is intended as a preventive act, to arrest the creation of trusts etc., in their incipiency and before consummation * * *."

68. "It is therefore unnecessary to determine whether the defendants, by the tying clauses and the discounts and rebates, have succeeded in unduly monopolizing or attempted to monopolize unduly, any part of the trade or commerce among the several States, or to unduly restrain competition in that part of commerce. The question to be decided is: Do the clauses complained of, or any of them, put it in their power, or have the effect, or tend, if enforced, as the defendants would have the right to do, if they are not unfair under the Clayton Act—and that is their intention [contention?]—'to substantially lessen competition' or 'establish a monopoly in trade'?

69. "In the opinion of the court there can be no doubt that the enforcement of some of the provisions hereinafter mentioned will have that effect. If shoe manufacturers are not permitted to use machines manufactured by competitors without being penalized, such prohibition tends to lessen competition, and eventually will result in giving the defendants a monopoly in that part of trade or commerce. Who will invest the millions necessary to establish such manufacturing plants, and the evidence convinces that it would require these large sums to establish them, when the product can not be sold, or at best can find but a very limited market? * * *" *United States* v. *United Shoe Machinery Co.*, Mar. 31, 1920, 264 Fed. 138, 161–163.

WHETHER LIMITED BY SECTION 2.

70. "In the opinion of the Court section 2 of the Act is limited to sales and not leases, and therefore does not apply to any of the acts prohibited by section 3." *United States* v. *United Shoe Machinery Co.*, Mar. 31, 1920, 264 Fed. 138, 165.

WHETHER RETROACTIVE.

71. "Counsel for defendant earnestly insists that, even if Congress so intended, the statute can not be construed to apply to preexisting contracts and to prohibit their performance and enforcement, without violating fundamental and constitutional rights. The statute does not in terms except from its operation any agreements or contracts, past, present, or future, and, in the absence of such exceptions, it is to be presumed that Congress intended to prohibit, not only the making of future contracts, but also any further performance of past contracts of the kind specified. [Continuing contracts of lease.]" *Elliott Machine Co.* v. *Center*, Feb. 20, 1915, 227 Fed. 124, 126; *United States* v. *United Shoe Machinery Co.*, Nov. 9, 1915, 227 Fed. 507, 510.

72. "Section 3 of the Clayton Act does not declare 'any contracts and leases [prohibited by that section] to be void,' but that 'it shall be unlawful for any person,' etc., 'to make such contracts,' etc. Ordinarily the word

ANNOTATIONS, Sec. 3—Continued.

WHETHER RETROACTIVE—Continued.

'shall' indicates that the act is to be prospective, and not retrospective. * * *."

73. "If there is room for doubt as to the intention of Congress, it is removed by reference to the proceedings in Congress when the bill was pending in the Senate * * *."

74. "The conclusion of the Court is that the act should not be given a retroactive construction declaring these clauses, made before its enactment, void." *United States* v. *United Shoe Machinery Co.*, Mar. 31, 1920, 264 Fed. 138, 171, 174, 175.

WORDS AND PHRASES—"UNDERSTANDING."

75. "The word 'understanding,' as defined by lexicographers, includes mental discernment, comprehension, clear knowledge * * *.

76. "Counsel contend that 'understanding' is equivalent to 'agreement,' except that it imputes that it is oral. The Court can not adopt this definition. In its opinion it means something more. It means an implied agreement, resulting from the expressed terms of the agreement, whether written or oral, or where the law from certain acts of the parties implies an agreement to do a certain act * * *." *United States* v. *United Shoe Machinery Co.*, June 6, 1916, 234 Fed. 127, 148.

IN GENERAL.

77. Provisions of this section held to strengthen conclusion that owner of a patent moving-picture projecting machine, enjoying a monopoly in the sale of motion-picture projecting machinery, by reason of such patent, can not sell the same with the condition attached that only a certain kind of films, not a part of the machine and not patented, shall be used in connection therewith. *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 1916, Circuit Court of Appeals, 235 Fed. 398. Affirmed (1917) in 243 U. S. 502, 517.

Sec. 4. VIOLATION OF ANTITRUST LAWS—DAMAGES TO PERSON INJURED.

May sue in any United States district court, and recover threefold damages, including cost of suit.

SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

DECISIONS.

Frey & Son, Inc., v. *Cudahy Packing Co.*, Dec. 9, 1915, 228 Fed. 209.

American Sea Green Slate Co. v. *O'Halloran*, Dec. 14, 1915, 229 Fed. 77, 79.

Dowd v. *United Mine Workers of America*, Circuit Court of Appeals, July 21, 1916, 235 Fed. 1, 4, 6.

Vemmer v. *Pennsylvania Steel Co.*, April 18, 1918, 250 Fed. 292.

Sec. 5. PROCEEDINGS BY OR IN BEHALF OF UNITED STATES UNDER ANTITRUST LAWS. FINAL JUDGMENTS OR DECREES THEREIN AS EVIDENCE IN PRIVATE LITIGATION. INSTITUTION THEREOF AS SUSPENDING STATUTE OF LIMITATIONS.

Prima facie evidence against same defendant in private litigation.

SEC. 5. That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of 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 suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimany has been taken: *Provided further*, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

Consent judgments or decrees excepted.

Running of statute of limitations with respect to private rights suspended pending proceeding by the United States under antitrust laws.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

DECISIONS.

Buckeye Powder Co. v. *Du Pont Powder Co.*, Dec. 9, 1918, 248 U. S., 55, 63, affirming *Buckeye Powder Co.* v. *E. I. Du Pont de Nemours Powder Co.*, July 2, 1915, 223 Fed. 881, 884.

Sec. 6. LABOR OF HUMAN BEINGS NOT A COMMODITY OR ARTICLE OF COMMERCE.

Labor, agricultural, or horticultural organizations and their members, organized for mutual help and without capital stock, not affected by antitrust laws with respect to their legitimate objects.

SEC. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individiual members of such organi-

Sec. 6. LABOR OF HUMAN BEINGS NOT A COMMODITY OR ARTICLE OF COMMERCE—Continued.

zations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

DECISIONS.

United States v. *King*, April 25, 1916, 250 Fed. 908, 909, 910.

Dowd v. *United Mine Workers of America*, Circuit Court of Appeals, July 21, 1916, 235 Fed. 1, 5.

Stephens v. *Ohio State Telephone Co.*, February 14, 1917, 240 Fed. 759, 777.

Duplex Printing Press Co. v. *Deering*, April 23, 1917, 247 Fed. 192, 195.

Paine Lumber Co. v. *Neal*, June 11, 1917, 244 U. S. 459, 483, 487.

Duplex Printing Press Co. v. *Deering*, May 25, 1918, Circuit Court of Appeals, 252 Fed. 722, 743, 747.

Montgomery v. *Pacific Electric Railway Co.*, May 26, 1919, Circuit Court of Appeals, 258 Fed. 382, 389.

Dail Overland Co. v. *Willys Overland*, December 27, 1919, 263 Fed. 171, 185, 186.

Sec. 7. ACQUISITION BY CORPORATION OF STOCK OR OTHER SHARE CAPITAL OF OTHER CORPORATION OR CORPORATIONS.

Of other corporation. Prohibited where effect may be to substantially lessen competition, restrain commerce, or tend to create a monopoly.

SEC. 7. 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.

Of two or more other corporations. Prohibited where effect may be to substantially lessen competition, restrain commerce, or tend to create a monopoly.

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.

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.

Purchase solely for investment excepted.

Formation of subsidiary corporations for immediate lawful business also excepted.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Common carriers excepted with reference to branch or tap lines where no substantial competition.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Existing rights heretofore lawfully acquired not affected.

ACQUISITION OF STOCK, ETC., IN PARTICULAR CASES.

78. "The evidence discloses that the Boston Fish Pier Co. in 1916, acquired the stock of 25 of the corporations doing business in interstate commerce as independent wholesale fresh fish dealers on the Fish Pier, and the assets and business of Ernest F. Rich, doing business under the name of A. F. Rich & Co., and the partnerships

ANNOTATIONS, Sec. 7—Continued.

ACQUISITION OF STOCK, ETC., IN PARTICULAR CASES—Continued.

of Lombard & Curtis and Fulham & Herbert, the three latter concerns being wholesale fresh fish dealers engaged in interstate trade on the pier, and that it thereafter conducted the businesses of these dealers, and all competition between them ceased. We think the acquisition of these corporations was plainly in violation of the Clayton Act, and that their combination in the Boston Fish Pier Co. must be dissolved.

79. "We also are of the opinion that the acquisition by the Bay State Fishing Co. of the stock in the 8 corporations in its combination is likewise in violation of the Clayton Act. The fact that 5 out of 8 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." *United States* v. *New England Fish Exchange*, July 11, 1919, 258 Fed. 732, 746.

80. "Nor does the ownership by the plaintiff of a majority of the defendant company's stock substantially or otherwise lessen competition between them (if they can at all be said to compete), or restrain commerce, or create a monopoly in any line thereof. As heretofore stated the *Tool Company* is in effect, if not in fact, a subsidiary company, engaged largely, if not wholly, in performing contracts sublet to it by the plaintiff. The case is not within the provisions of section 7 of the Clayton Act. * * *." *Niles-Bement-Pond Co.* v. *Iron Moulders' Union*, Oct. 9, 1917, 246 Fed. 851, 863, 864. (Reversed on ground of *jurisdiction* in 258 Fed. 408. Reversal affirmed on same ground by Supreme Court in opinion handed down Nov. 8, 1920.)

81. Section referred to but not passed on in *Venner* v. *Pennsylvania Steel Co.*, Circuit Court of Appeals, June 30, 1916, 233 Fed. 407, involving proposed acquisition of assets of one corporation by another corporation, alleged to violate the act; (supplementary bill) Apr. 18, 1918, 250 Fed. 292.

WHETHER RETROACTIVE.

82. Section assumed not intended to be. *Hyams* v. *Calumet & Hecla Mining Co.*, Jan. 6, 1915, Circuit Court of Appeals, 221 Fed. 529, 537.

Sec. 8. DIRECTORS, OFFICERS, OR EMPLOYEES OF BANKS, BANKING ASSOCIATIONS, OR TRUST COMPANIES OPERATING UNDER LAWS OF UNITED STATES AND DIRECTORS OF OTHER CORPORATIONS.

SEC. 8. That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than $5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than $5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director, officer, or employee under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank, banking association, or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director, officer, or employee has been elected or selected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter under said election or employment.

Not to serve more than one bank, banking association, or trust company if deposits, capital, surplus, and undivided profits aggregate over $5,000,000.

How eligibility determined.

No bank, banking association or trust company, organized or operating under the laws of the United States, in any city or incorporated town or village of more than two hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place: *Provided*, That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares: *Provided further*, That a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United

Not to serve more than one bank, banking association, or trust company located in city or incorporated town or village of more than 200,000 inhabitants.

Savings banks without capital (share) stock excepted.

Where entire stock of one bank, etc., owned by stockholders of other, also excepted.

Sec. 8. DIRECTORS, OFFICERS, OR EMPLOYEES OF BANKS, BANKING ASSOCIATIONS, OR TRUST COMPANIES OPERATING UNDER LAWS OF UNITED STATES AND DIRECTORS OF OTHER CORPORATIONS—Contd.

States or any State where the entire capital stock of one is owned by stockholders in the other: *And provided further*, That nothing contained in this section shall forbid a director of class A of a Federal reserve bank, as defined in the Federal Reserve Act from being an officer or director or both an officer and director in one member bank: *And provided further*, That nothing in this Act shall prohibit any private banker or any officer, director, or employee of any member bank or class A director of a Federal reserve bank, who shall first procure the consent of the Federal Reserve Board, which board is hereby authorized, at its discretion, to grant, withhold, or revoke such consent, from being an officer, director, or employee of not more than two other banks, banking associations, or trust companies, whether organized under the laws of the United States or any State, if such other bank, banking association, or trust company is not in substantial competition with such banker or member bank.

Class A director of Federal reserve bank excepted, and

Private banker or officer, etc., of member bank, or Class A director may serve, with consent of Federal Reserve Board, not more than two other banks, etc., where no substantial competition.

The consent of the Federal Reserve Board may be procured before the person applying therefor has been elected as a class A director of a Federal reserve bank or as a director of any member bank.[1]

Consent may be secured before applicant elected director.

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits,

Not to serve two or more presently or previously competing corporations if capital, surplus, and undivided profits aggregate more than $1,000,000, and elimination of competition by agreement would violate antitrust laws.

How eligibility determined.

[1] The part of the section immediately preceding beginning with, "*And provided further*, That nothing in this Act" to this point, amendments made by act May 5, 1916, C. 120, and act May 26, 1920, C. 206.

exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

Eligibility at time of election or selection not changed for one year.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

INTERLOCKING DIRECTORATES—ABSENCE OF COMPETITIVE FEATURES.

83. "Furthermore, it is to be observed that the Delaware Co.'s holdings are not in naturally competing companies. The companies named in the present record are widely separated and operate in distinct municipalities, and the gas plant here in question is the only one in the city of Holland, and is entirely within the State of Michigan. The case, therefore, does not fall within any principal opposed to the suppression of competition, as, for instance, the underlying principal of the *Northern Securities case*, 193 U. S. 197, 24 Supreme Court 436, 48 L. Ed. 679, nor within any statutory inhibition against interlocking directorates similar to that of the Clayton Act (Act Oct. 15, 1914, C. 323, 38 Stat. L. 732, sec. 8 [Comp. Stat. Sec. 8835H]) * * *." *City of Holland* v. *Holland City Gas Co.*, Circuit Court of Appeals, Feb. 13, 1919, 257 Fed. 679, 685.

IN GENERAL.

84. Provisions of section disregarded as not then operative. *Hyams* v. *Calumet & Hecla Mining Co.*, Circuit Court of Appeals, Jan. 6, 1915, 221 Fed. 529, 537.

Sec. 9. WILLFUL MISAPPLICATION, EMBEZZLEMENT, ETC., OF MONEYS, FUNDS, ETC., OF COMMON CARRIER A FELONY.

SEC. 9. Every president, director, officer or manager of any firm, association or corporation engaged in commerce as a common carrier, who embezzles, steals, abstracts or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property or assets of such firm, association or corporation, arising or accruing from, or used in, such commerce, in

Sec. 9. WILLFUL MISAPPLICATION, EMBEZZLEMENT, ETC., OF MONEYS, FUNDS, ETC., OF COMMON CARRIER A FELONY—Continued.

whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be deemed guilty of a felony and upon conviction shall be fined not less than $500 or confined in the penitentiary not less than one year nor more than ten years, or both, in the discretion of the court.

Penalty, fine, or imprisonment, or both.

Prosecutions hereunder may be in the district court of the United States for the district wherein the offense may have been committed.

May prosecute in District Court of United States for district where offense committed.

That nothing in this section shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts.

Jurisdiction of State courts not affected. Their judgments a bar to prosecution hereunder.

Sec. 10. LIMITATIONS UPON DEALINGS AND CONTRACTS OF COMMON CARRIERS.

SEC. 10. That after two years from the approval of this Act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership or association when the said common carrier shall have upon its board of directors or as its president, manager or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors and general managers thereof, if the bidder be a corporation, or of

Dealings in securities, etc., and contracts for construction or maintenance, aggregating more than $50,000 a year to be by bid in case director, etc., of common carrier, also director, etc., of other party or has a substantial interest therein.

Bidding to be competitive under regulations prescribed by Interstate Commerce Commission, and to show names and addresses of bidder, officers, etc.

the members, if it be a partnership or firm, be given with the bid.

Penalty for preventing or attempting to prevent free and fair competition in bidding.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Carrier to report transactions hereunder to Interstate Commerce Commission.

Every such common carrier having any such transactions or making any such purchases shall within thirty days after making the same file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

Commission to report violations, and its own findings to Attorney General.

Misdemeanor for director, etc., to knowingly vote for, direct, aid, etc., in violation of this section.

Penalty.

If any common carrier shall violate this section it shall be fined not exceeding $25,000; and every such director, agent, manager or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000, or confined in jail not exceeding one year, or both, in the discretion of the court.

Effective date extended to Jan. 1, 1919.

But Jan. 8, 1918, as to "corporations hereafter organized."

The effective date on and after which the provisions of section 10 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October fifteenth, nineeen hundred and fourteen, shall become and be effective is hereby deferred and extended to January first, nineteen hundred and nineteen: *Provided*, That said section shall become effective on January eighth, nineteen hundred and eighteen, as to any corporations hereafter organized.[1]

[1] Above paragraph resolution Jan. 12, 1918. C. 8, 40 Stat. 431.

Sec. 11. JURISDICTION TO ENFORCE COMPLIANCE. COMPLAINTS, FINDINGS, AND ORDERS. APPEALS. SERVICE.

Jurisdiction as respectively applicable vested in—

Interstate Commerce Commission;

Federal Reserve Board; and

Federal Trade Commission.

SEC. 11. That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Commission or board to issue complaint if believes secs. 2, 3, 7, *or 8 violated*, and serve same with notice of hearing on respondent or defendant.

Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any *there be, in the manner and within the time fixed by said* order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in

Respondent to have right to appear and show cause, etc.

Intervention may be permitted for good cause.

Transcript of testimony to be filed.

In case of violation commission or board to make written report stating findings, and to issue and serve order to cease and desist on respondent.

Commission or board may modify or set aside its order until transcript of record filed in Circuit Court of Appeals.

whole or in part, any report or any order made or issued by it under this section.

In case of disobedience of its order, commission or board may apply to Circuit Court of Appeals for enforcement of its order, and file transcript of record.

If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Court to cause notice thereof to be served on respondent and to have power to enter decree affirming, modifying, or setting aside order of commission or board.

Findings of commission or board conclusive if supported by testimony.

Introduction of additional evidence may be permitted on application, and showing of reasonable ground for failure to adduce theretofore.

Commission or board may make new or modified findings by reason thereof.

Judgment and decree subject to review upon certiorari, but otherwise final.

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of ap-

Petition by respondent to review order to cease and desist.

Sec. 11. JURISDICTION TO ENFORCE COMPLIANCE. COMPLAINTS, FINDINGS, AND ORDERS. APPEALS. SERVICE—Continued.

peals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

To be served on commission or board which thereupon to file transcript of record in the court.

Jurisdiction of Court of Appeals same as on application by commission or board and commission's or board's findings similarly conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

Jurisdiction of Court of Appeals exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust Acts.

Proceedings to have precedence over other cases, and to be expedited.

Liability under antitrust acts not affected.

Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

Service of commission's or board's complaints, orders, and other processes.

Personal;

At office or place of business; or

By registered mail.

Verified return of person serving, and return post-office receipt, proof of service.

Sec. 12. PLACE OF PROCEEDINGS UNDER ANTITRUST LAWS. SERVICE OF PROCESS.

SEC. 12. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

Proceeding may be instituted or process served in district of which corporation an inhabitant or wherever it may be found.

DECISIONS.

Frey & Son, Inc., v. *Cudahy Packing Co.*, Dec. 9, 1915, 228 Fed. 209.

Thorburn v. *Gates*, July 17, 1915, 225 Fed. 613, 615.

Frey & Son, Inc., v. *Cudahy Packing Co.*, Apr. 27, 1916, 232 Fed. 640.

Southern Photo Material Co. v. *Eastman Kodak Co.*, July 20, 1916, 234 Fed. 955–957.

Venner v. *Pennsylvania Steel Co.*, Apr. 18, 1918, 250 Fed. 292, 297.

Wainwright v. *Pennsylvania R. Co.*, Oct. 22 1918, 253 Fed. 459, 463.

Sec. 13. SUBPŒNAS FOR WITNESSES IN PROCEEDINGS BY OR ON BEHALF OF THE UNITED STATES UNDER ANTITRUST LAWS.

SEC. 13. That in any suit, action, or proceeding brought by or on behalf of the United States subpœnas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district: *Provided*, That in civil cases no writ of subpœna shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown.

May run into any district, but permission of trial court necessary in civil cases if witness lives out of district and more than 100 miles distant.

Sec. 14. VIOLATION BY CORPORATION OF PENAL PROVISIONS OF ANTITRUST LAWS.

SEC. 14. That whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts consti-

Deemed also that of individual directors, officers, etc.

Sec. 14. VIOLATION BY CORPORATION OF PENAL PROVISIONS OF ANTITRUST LAWS—Continued.

tuting in whole or in part such violation, and such viola-
A misdemeanor. tion shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be
Penalty, fine or imprisonment, or both. punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

Sec. 15. JURISDICTION OF UNITED STATES DISTRICT COURTS TO PREVENT AND RESTRAIN VIOLATIONS OF THIS ACT.

SEC. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent
District attorneys, under direction of Attorney General, to institute proceedings. and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to pre-
Proceedings may be by way of petition setting forth the case, etc. vent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise pro-
After due notice, Court to proceed to hearing and determination as soon as may be. hibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the
Pending petition instituting proceeding Court may make temporary restraining order or prohibition. case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought be-
Court may summon other parties. fore the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpœnas to that end may be served in any district by the marshal thereof.

DECISIONS.

Wainwright v. *Pennsylvania R. Co.*, Oct. 22, 1918, 253 Fed. 459, 463.

Sec. 16. INJUNCTIVE RELIEF AGAINST THREATENED LOSS BY VIOLATION OF ANTITRUST LAWS.

Open to any person, firm, etc., on same conditions and principles as other injunctive relief by courts of equity against SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a

violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

threatened conduct that will cause loss or damage.

Temporary injunction may issue upon proper bond and showing.

But United States *alone* may sue for injunctive relief against common carrier subject to Act to Regulate Commerce.

DECISIONS.

Union Pacific Railway Co. v. *Frank*, Circuit Court of Appeals, July 9, 1915, 226 Fed. 906, 911.

Great Atlantic & Pacific Tea Co. v. *Cream of Wheat Co.*, July 20, 1915, 224 Fed. 566, 571.

Flirtman v. *Welsbach Co.*, Jan. 24, 1916, 240 U. S. 27, 29.

Paine Lumber Co. v. *Neal*, June 11, 1917, 244 U. S. 459, 471, 480.

Venner v. *Pennsylvania Steel Co.*, Apr. 18, 1918, 250 Fed. 292.

Duplex Printing Press Co. v. *Deering*, Circuit Court of Appeals, May 25, 1918, 252 Fed. 722, 743.

Sec. 17. PRELIMINARY INJUNCTIONS. TEMPORARY RESTRAINING ORDERS.

SEC. 17. That no preliminary injunction shall be issued without notice to the opposite party.

No preliminary injunction without notice.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire

No temporary restraining order in absence of a showing of immediate and irreparable injury or loss.

Temporary restraining order, to show date and hour of issue, define injury, etc.

Sec. 17. PRELIMINARY INJUNCTIONS. TEMPORARY RESTRAINING ORDERS—Continued.

within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

If without notice, issuance of preliminary injunction to be disposed of at earliest possible moment.

Opposite party may move dissolution or modification on two days' notice.

Sec. 263 of Judicial Code repealed.

Section two hundred and sixty-three of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

Sec. 266 not affected.

Nothing in this section contained shall be deemed to alter, repeal, or amend section two hundred and sixty-six of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

DECISIONS.

Supreme Council of Royal Arcanum v. *Hobart*, Circuit Court of Appeals, June 15, 1917, 244 Fed. 385, 390.

Mississippi Valley Trust Co. v. *Railway Steel Co.*, Circuit Court of Appeals, Apr. 19, 1919, 258 Fed. 346, 349.

Dail Overland Co. v. *Willys Overland*, Dec. 27, 1919, 263 Fed. 171, 186.

Sec. 18. NO RESTRAINING ORDER OR INTERLOCUTORY ORDER OF INJUNCTION WITHOUT GIVING SECURITY.

Except as provided in sec. 16 of this act.

SEC. 18. That, except as otherwise provided in section 16 of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of secur-

ity by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

DECISIONS.

Western Union Tel. Co. v. *United States & M. T. Co.*, Circuit Court of Appeals, May 16, 1915, 221 Fed. 545, 555.

Swift v. *Black Panther Oil & Gas Co.*, Circuit Court of Appeals, May 30, 1917, 244 Fed. 20, 29, 30.

SEC. 19. ORDERS OF INJUNCTION OR RESTRAINING ORDERS—REQUIREMENTS.

SEC. 19. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

Must set forth reasons, be specific, and describe acts to be restrained.

Binding only on parties to suit, their officers, etc.

DECISIONS.

Lion Tractor Co. v. *Bull Tractor Co.*, Circuit Court of Appeals, Feb. 12, 1916, 231 Fed. 156, 162.

Davis v. *Hayden*, Nov. 9, 1916, 238 Fed. 734.

Stephens v. *Ohio State Telephone Co.*, Feb. 14, 1917, 240 Fed. 759, 765, 776.

SEC. 20. RESTRAINING ORDERS OR INJUNCTIONS BETWEEN AN EMPLOYER AND EMPLOYEES, EMPLOYERS AND EMPLOYEES, ETC., INVOLVING OR GROWING OUT OF TERMS OR CONDITIONS OF EMPLOYMENT.

SEC. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the

Not to issue unless necessary to prevent irreparable injury.

Sec. 20. RESTRAINING ORDERS OR INJJUNCTIONS BETWEEN AN EMPLOYER AND EMPLOYEES, EMPLOYERS AND EMPLOYEES, ETC., INVOLVING OR GROWING OUT OF TERMS OR CONDITIONS OF EMPLOYMENT— Continued.

application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

Threatened property or property rights must be described with particularity.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Not to prohibit any person or persons from terminating any relation of employment, recommending others by peaceful means so to do, etc.

Acts specified in this paragraph not to be considered violations of any law of the United States.

DECISIONS.

Alaska S. S. Co. v. *International Longshoremen's Assn.*, Sept. 5, 1916, 236 Fed. 964, 970–972.

Stephens v. *Ohio State Telephone Co.*, Feb. 14, 1917, 240 Fed. 759, 765, 769, 778.

Duplex Printing Co. v. *Deering*, Apr. 23, 1917, 247 Fed. 192, 195.

Paine Lumber Co. v. *Neal*, June 11, 1917, 244 U. S. 459, 484, 485.

Puget Sound Traction, Light & Power Co., v. *Whitley*, July 25, 1917, 243 Fed. 945–952.

Kroger Grocery & Baking Co. v. *Retail Clerks' I. P. Assn.*, Mar. 22, 1918, 250 Fed. 890, 892, 893.

Duplex Printing Press Co. v. *Deering*, Circuit Court of Appeals, May 25, 1918, 252 Fed. 722, 744, 747, 748.

United States v. *Norris*, Dec. 16, 1918, 255 Fed. 423, 424.

Montgomery v. *Pacific Electric Railway Co.*, May 26, 1919, Circuit Court of Appeals, 258 Fed. 382, 390.

Dail Overland Co. v. *Willys Overland Co.*, Dec. 27, 1919, 263 Fed. 171, 185, 186, 187.

Vonnigut Machinery Co. v. *Toledo Machine & Tool Co.*, Feb. 7, 1920, 263 Fed. 192, 197, 200–202.

Kinloch Telephone Co. v. *Local Union No. 2*, May 6, 1920, 265 Fed. 312, 315–320.

Sec. 21. DISOBEDIENCE OF ANY LAWFUL WRIT, PROCESS, ETC., OF ANY UNITED STATES DISTRICT COURT, OR ANY DISTRICT OF COLUMBIA COURT.

SEC. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United Sates or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

If act done also a criminal offense under laws of United States or of State in which committed, person to be proceeded against as hereinafter provided.

DECISIONS.

Couts v. *United States*, Circuit Court of Appeals, March 4, 1918, 249 Fed. 595, 597.

Swepston v. *United States*, Circuit Court of Appeals, May 7, 1918, 251 Fed. 205, 210.

Sec. 22. RULE TO SHOW CAUSE OR ARREST. TRIAL. PENALTIES.

SEC. 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such re-

Court or judge may issue rule to show cause why person charged should not be punished.

Sec. 22. RULE TO SHOW CAUSE OR ARREST. TRIAL. PENALTIES—Continued.

Trial if alleged contempt not sufficiently purged by return.

turn, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however,*

Failure of natural person to make return. Attachment against person.

That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body

If body corporate, attachment for sequestration of its property.

corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

Trial may be by court or, upon demand of accused, by jury.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for

Trial to conform to practice in criminal cases prosecuted by indictment or upon information.

misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be en-

Penalty, fine or imprisonment, or both.

tered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the

Fine paid to United States or complainant or other party injured. If accused natural person, fine to United States not to exceed $1,000.

court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months: *Provided*, That in

Court or judge may dispense with rule and issue attachment for arrest.

any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in

which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance.

Accused to be brought before judge promptly and admitted to bail. Proceedings thereafter same as if rule had issued.

DECISIONS.

In re Heyman, Mar. 22, 1915, 225 Fed. 1000, 1003.

Stephens v. *Ohio State Telephone*, Feb. 14, 1917, 240 Fed. 759, 764.

Couts v. *United States*, Circuit Court of Appeals, Mar. 4, 1918, 249 Fed. 595–7.

Swepston v. *United States*, Circuit Court of Appeals, May 7, 1918, 251 Fed. 205, 210.

Toledo Newspaper Co. v. *United States*, June 10, 1918, 247 U. S. 402, 423.

Toshet v. *West Kentucky Coal Co.*, Circuit Court of Appeals, June 14, 1918, 252 Fed. 44, 45.

Sec. 23. EVIDENCE. APPEALS.

SEC. 23. That the evidence taken upon the trial of any persons so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge of any district court of the United States or any court of the District of Columbia.

Evidence may be preserved by bill of exceptions.

Judgment reviewable upon writ of error.

Granting of writ to stay execution, and

Accused to be admitted to bail.

DECISIONS.

Couts v. *United* States, Circuit Court of Appeals, Mar. 4, 1918, 249 Fed. 595–7.

Swepston v. *United States*, Circuit Court of Appeals, May 7, 1918, 251 Fed. 205, 210.

Toledo Newspaper Co. v. *United States*, June 10, 1918, 247 U. S. 402, 423.

Sec. 24. CASES OF CONTEMPT NOT SPECIFICALLY EMBRACED IN SEC. 21 NOT AFFECTED.

SEC. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

Committed in or near presence of court, or

In disobedience of any lawful writ or process in suit or action by or in behalf of United States,

And other cases not in sec. 21,

Punished in conformity with prevailing usages at law and in equity.

Sec. 25. PROCEEDINGS FOR CONTEMPT. LIMITATIONS.

SEC. 25. That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act.

Must be instituted within one year.

Not a bar to criminal prosecution.

Pending proceedings not affected.

Sec. 26. INVALIDITY OF ANY CLAUSE, SENTENCE, ETC., NOT TO IMPAIR REMAINDER OF ACT.

SEC. 26. If any clause, sentence, paragraph, or part of this Act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

But to be confined to clause, sentence, etc., directly involved.

Approved, October 15, 1914.

IN GENERAL.

RESALE PRICE MAINTENANCE.[1]

See also *ante*, par. 2.

85. Nothing found in either the Clayton or Federal Trade Commission Acts validates price restrictions by a vendor on resale of property sold absolutely by him. *Ford Motor Co.* v. *Union Motor Sales Co.*, August 1, 1917, Circuit Court of Appeals, 244 Fed. 156, 160.

RIGHT TO REFUSE TO SELL

See also *ante*, par. 2.

86. "* * *. Numerous individuals and corporations have been enjoined from restraining the

[1] See also in this general connection cases, among others, of *Straus* v. *Victor Talking Machine Co.*, Apr. 9, 1917, 243 U. S. 490, and *Boston Store* v. *American Graphophone Co.*, Mar. 4, 1918, 246 U. S. 8.

trade of other people, no matter how flourishing the offenders' trade might be, nor how greatly the general volume of trade had increased during the period of restraint. But never before has it been urged that, if J. S. made enough of anything to supply both Doe and Roe, and sold it all to Doe, refusing even to bargain with Roe, for any reason or no reason, such conduct gave Roe a cause of action. If Congress has sought to give him one, the gift is invalid, because the statute takes from one person for the private use of another the first person's private property." *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, July 20, 1915, 224 Fed. 566, 574.

87. "Before the Sherman Act it was the law that a dealer might reject the offer of a proposing buyer, for any reason that appeared to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. We have not yet reached the stage where the selection of a trader's customers is made for him by the Government." *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, November 10, 1915, Circuit Court of Appeals, 227 Fed. 46, 49, affirming decision in 224 Fed. 566.

88. "It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different States which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers and there is no contract or combination which imposes any limitation on the purchaser. In the second the parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the States." *United States* v. *Schrader's Son, Inc.*, March 1, 1920, 252 U. S. 85, 99, reaffirming decision in *Dr. Miles Medical Co.* v. *Park & Son's Co.*, 220 U. S. 373, distinguishing the same from *United States* v. *Colgate & Co.*, 250 U. S. 300, and reversing 264 Fed. 175.

WHAT NECESSARY TO STATE CAUSE OF ACTION.

89. "It will be noticed that in this Act [the Clayton Act] there is nothing said of combinations or conspiracies, nor that the parties complained of are monopolizing or attempting to monopolize any part of the commerce among the several States, as was required in the Sherman Act. * * * Evidently Congress was not satisfied to only prohibit actual lessening of competition, or monopolizing, but to make it unlawful for any person to do those acts, which may put it in his power to do so.

90. "For these reasons, in the opinion of the Court, all that is necessary to state a cause of action under the Clayton Act is to charge that the defendants committed the acts prohibited by the statute and that they tend to substantially lessen competition or create a

ANNOTATIONS, IN GENERAL—Continued.

WHAT NECESSARY TO STATE CAUSE OF ACTION—Continued.

monopoly in interstate commerce." *United States* v. *United Shoe Machinery Co.*, June 6, 1916, 234 Fed. 127, 150.

IN GENERAL.

91. Judgments of Federal courts in determining questions under Act, independent of decisions of State courts. *Skaggs et al.* v. *Kansas City Terminal Ry. Co. et al.*, May 12, 1916, 233 Fed. 827.

92. No change has been wrought in the law of conspiracy as applicable to the case in question. *Lamar* v. *United States*, Circuit Court of Appeals, June 4, 1919, 260 Fed. 561, 563.

Act cited. *United States* v. *Rintelen et al.*, June 29, 1916, 233 Fed. 793, 799.

Section referred to in passing. *United States* v. *Colgate & Co.*, Oct. 29, 1918, 253 Fed. 522, 525.

WEBB ACT.[1]

[Approved April 10, 1918.]

[PUBLIC—No. 126—65TH CONGRESS.]
[H. R. 2316.]

AN ACT To promote export trade, and for other purposes.

Sec. 1. DEFINITIONS.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the words "export trade" wherever used in this Act mean solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words "export trade" shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale.

"Export trade."

That the words "trade within the United States" wherever used in this Act mean trade or commerce among the several States or in any Territory of the United States, or in the District of Columbia, or between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or between the District of Columbia and any State or States.

"Trade within the United States."

[1] Annotations cover cases through 265 Fed. 464 (Part 2, Advance Sheets, issued as of Aug. 26, 1920), and 40 Sup. Ct. Reporter, which disposes of all cases decided at the October term, 1919 (last decisions handed down on June 7, 1920).

That the word "Association" wherever used in this Act means any corporation or combination, by contract or otherwise, of two or more persons, partnerships, or corporations. "Association."

"TRADE WITHIN THE UNITED STATES."

On interstate commerce, see annotations to Federal Trade Commission Act, pars. 25, 26 (p. 482), 33-44 (pp. 484-486), and annotations to Clayton Act, pars. 32-35 (p. 500).

Sec. 2. ASSOCIATION FOR OR AGREEMENT OR ACT MADE OR DONE IN COURSE OF EXPORT TRADE—STATUS UNDER SHERMAN ANTITRUST LAW.

SEC. 2. That nothing contained in the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: *And provided further*, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

Association not illegal if organized for and engaged in export trade solely.

Nor agreement nor act, if not in restraint of trade within the United States, or of the export trade of any domestic competitor, and

If such association does not artificially or intentionally enhance or depress prices of, or substantially lessen competition, or restrain trade in commodities of class exported.

Sec. 3. ACQUISITION BY EXPORT TRADE CORPORATION OF STOCK OR CAPITAL OF OTHER CORPORATION.

SEC. 3. That nothing contained in section seven of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October fifteenth, nineteen hundred and fourteen, shall be construed to forbid the acquisition or ownership by any corporation of the whole or any part of the stock or other capital of any corporation organized solely for the purpose of engaging in export trade, and actually engaged solely in such export trade, unless the effect of such acquisition or ownership may be to restrain trade or substantially lessen competition within the United States.

Lawful under Clayton Act unless effect may be to restrain trade or substantially lessen competition within United States.

Sec. 4. FEDERAL TRADE COMMISSION ACT EXTENDED TO EXPORT TRADE COMPETITORS.

SEC. 4. That the prohibition against "unfair methods of competition" and the remedies provided for enforcing said prohibition contained in the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September twenty-sixth, nineteen hundred and fourteen, shall be construed as extending to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States.

Even though acts involved done without territorial jurisdiction of United States.

Sec. 5. OBLIGATIONS OF EXPORT TRADE ASSOCIATIONS UNDER THIS ACT. PENALTIES FOR FAILURE TO COMPLY. DUTIES AND POWERS OF COMMISSION.

Export trade associations or corporations to file statement with Federal Trade Commission showing location of offices, names, and addresses of officers, etc., and also articles of incorporation or contract of association, etc.

SEC. 5. That every association now engaged solely in export trade, within sixty days after the passage of this Act, and every association entered into hereafter which engages solely in export trade, within thirty days after its creation, shall file with the Federal Trade Commission a verified written statement setting forth the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members, and if a corporation, a copy of its certificate or articles of incorporation and by-laws, and if unincorporated, a copy of its articles or contract of association, and on the first day of January of each year thereafter it shall make a like statement of the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificate of incorporation or in its articles or contract of association. It shall also furnish to the commission such information as the commission may require as to its organization, business, conduct, practices, management, and relation to other associations, corporations, partnerships, and individuals. Any association which shall fail so to do shall not have the benefit of the provisions of section two and section three of this Act, and it shall also forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district

To furnish also information as to organization, business, etc.

Penalties, loss of benefit of secs. 2 and 3, and fine.

where the association has its principal office, or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of the forfeiture. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

District attorneys to prosecute for recovery of forfeiture.

Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein, it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

Federal Trade Commission to investigate restraint of trade, artificial or intentional enhancement or depression of prices or substantial lessening of competition by association.

May recommend readjustment in case of violation.

To refer findings and recommendations to Attorney General if association fails to comply with recommendation.

For the purpose of enforcing these provisions the Federal Trade Commission shall have all the powers, so far as applicable, given it in "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

Commission given same powers as under Federal Trade Commission Act so far as applicable.

Approved, April 10, 1918.

IN GENERAL.

Act referred to in opinion in *United States* v. *United States Steel Corporation*, March 1, 1920, 251 U. S. 417, 453, 64 L. Ed. 222, 229, 40 Sup. Ct. 293, 300, in deciding suit to dissolve United States Steel Corporation as involved in an inconsistency in the decree proposed by the Governme t in said suit.

APPENDIX II.

DECISIONS ON PETITIONS TO REVIEW THE ORDERS OF THE COMMISSION.

SEARS, ROEBUCK & CO. v. FEDERAL TRADE COMMISSION.[1]

(Circuit Court of Appeals, Seventh Circuit. April 29, 1919. No. 2659.)

1. TRADE-MARKS AND TRADE NAMES, Key No. 80½, New, Vol. 8A, Key No. Series—UNFAIR COMPETITION.

A finding by the Federal Trade Commission that a mail-order house doing an interstate business was guilty of unfair competition in selling sugars, teas, and coffees under representations that it had obtained special price concessions because of the magnitude of its purchases, and that it purchased selected brands from abroad, held warranted.

2. TRADE-MARKS AND TRADE NAMES, Key No. 80½, New, Vol. 8A, Key No. Series—PROCEEDINGS BEFORE FEDERAL TRADE COMMISSION—INJUNCTIONAL ORDER.

An injunctional order issued by the Federal Trade Commission restraining a mail-order house doing an interstate business from certain unfair practices in connection with the sale of sugar and other staple commodities held not to have been improvidently issued because the mail-order house had discontinued such methods, where it was contending that act September 26, 1914, § 5 (Comp. St. § 8836e), creating the Federal Trade Commission, was unconstitutional, or, if valid, had not been infringed, and the Government's control of sugar sales and consumption had temporarily put an end to the objectionable practices in any event.

3. EVIDENCE, Key No. 23 (1)—JUDICIAL NOTICE—GOVERNMENT CONTROL OF TRADE.

On petition to have an injunctional order issued by the Federal Trade Commission vacated on the ground that the unfair practices of petitioner which related to sales of sugar, etc., had

[1] Reviewing order of Commission in Federal Trade Commission v. Sears, Roebuck & Co., 1 F. T. C. 163.

ceased, the court will take judicial notice of the Government's control of the sale and consumption of sugar during the war, which temporarily at least put an end to the objectionable practice.

4. TRADE-MARKS AND TRADE-NAMES, Key No. 80½, New, Vol. 8A, Key No. Series—UNFAIR COMPETITION—FEDERAL TRADE COMMISSION.

Act September 26, 1914, § 5 (Comp. St. § 8836e), giving the Federal Trade Commission authority over unfair methods of competition and declaring the same unlawful, is not void for indefiniteness because the words "unfair methods of competition" were not defined, the trader being entitled to his day in court, where common-law principles would control.

5. CONSTITUTIONAL LAW, Key No. 62, 80(2)—UNLAWFUL DELEGATION OF LEGISLATIVE AND JUDICIAL POWER.

Act September 26, 1914, § 5 (Comp. St. § 8836e), giving the Federal Trade Commission power to stop unfair methods of competition in commerce and declaring the same unlawful, is not an unlawful delegation of legislative and judicial power, Congress having by the act declared the public policy applicable to the situation.

6. TRADE-MARKS AND TRADE-NAMES, Key No. 80½, New, Vol. 8A, Key No. Series—POWERS OF FEDERAL TRADE COMMISSION—UNFAIR COMPETITION.

The Federal Trade Commission, under its authority to stop unfair methods of competition, can not prevent a trader from selling a staple article as sugar below cost, although it may prevent such sales accompanied by representations which would injure other traders.

(The syllabus is taken from 258 Fed. Rep. 307.)

Alschuler, circuit judge, dissenting in part.

Original petition to review order of Federal Trade Commission.

Original petition by Sears, Roebuck & Co. against the Federal Trade Commission, to review an order commanding petitioner to desist from certain unfair methods of competition in commerce. Commission directed to modify its orders, and petition in other respects denied.

Sidney Adler, of Chicago, Ill., for petitioner.

John Walsh, of Chicago, Ill., for respondent.

Before Baker and Alschuler, circuit judges, and Carpenter, district judge.

Baker, circuit judge, delivered the opinion of the court:

This is an original petition to review an order entered by the respondent, the Federal Trade Commission, against the petitioner, Sears, Roebuck & Co., a corporation, commanding the petitioner to desist from certain

unfair methods of competition in commerce. Respondent's order was based on its complaint, filed on February 26, 1918, on the petitioner's answer, and on a written stipulation of facts. Procedure before the Commission and also before this court on review is prescribed in section 5 of the act to create a Federal Trade Commission, approved on September 26, 1914. Respondent's authority over the subject matter of its order is derived from the following provision in the same section: "Unfair methods of competition in commerce are hereby declared unlawful." Section 4 is a dictionary of terms used in the act. "Commerce" means interstate or foreign commerce; but the general term, "unfair methods of competition," is nowhere defined specifically, nor is there a schedule of methods that shall be deemed unfair.

In its complaint respondent averred that petitioner is engaged in interstate and foreign commerce, conducting a "mail-order" business; that petitioner for more than two years last past has practiced unfair methods of competition in commerce by false and misleading advertisements and acts, designed to injure and discredit its competitors and to deceive the general public, in the following ways:

1. By advertising that petitioner, because of large purchases of sugar and quick disposal of stock, is able to sell sugar at a price lower than others offering sugar for sale;

2. By advertising that petitioner is selling its sugar at a price much lower than that of its competitors and thereby imputing to its competitors the purpose of charging more than a fair price for their sugar;

3. By selling certain of its merchandise at less than cost on the condition that the customer simultaneously purchase other merchandise at prices which give petitioner a profit on the transaction, without letting the customer know the facts;

4. By advertising that the quality of merchandise sold by its competitors is inferior to that of similar merchandise sold by petitioner, and that petitioner buys certain of its merchandise in markets not accessible to its competitors and is therefore able to give better advantages in quality and price than those offered by its competitors.

Petitioner extensively circulated the following advertisements, among others:

We can afford to give this guarantee of a "less than wholesale price" because we are among the largest distributors of sugar, wholesale or retail, in the world. We sell every year thirty-five million pounds of sugar. And, buying in such vast quantities, and buying directly from the refiners, we naturally get our sugar for less money than other dealers.

For instance, every grocer carries granulated sugar in stock, but does he tell you which kind? There are two kinds—granulated cane sugar and granulated beet sugar—and they look exactly alike. Some people prefer the one and some the other. But beet sugar usually costs less than cane sugar, so if you are getting beet sugar you should pay less for it. Do you know which kind you are getting and which you are paying for?

Our teas have a pronounced, yet delicate, tea flavor with an appealing fragrance, because we spare neither time nor expense to get the very best the greatest tea gardens of the world can produce.

First, because of the difficulty of getting in this country the exact character and flavor of certain teas, we do our own importing and critically test every tea. Our representative goes to the various tea-growing countries and makes the selection in person. Then, the greatest care is taken to get only first-crop pickings from upland soil.

Also, by buying direct from the tea gardens, while the crops are being harvested, we are able to have them always perfectly fresh.

It would be natural for you to conclude that all this care in buying and selecting would make our teas very high in price, but in reality, our prices are unusually low for such high quality. Here is a reason: By buying direct from the tea gardens we cut out the middleman's profit.

Over land and sea, from the greatest coffee regions in the world we bring you the choicest of the crop, and make it possible for you to have that fresh, savory, and fragrantly tempting cup of coffee for your breakfast. You see, we buy direct from the best plantations in the world. We get the pick of the crop—upland coffees from rich, healthy soil and growers of unquestioned experience and skill. We buy enormous quantities and pay cash, thus making it possible to offer our customers the very best coffees at very low prices.

Petitioner's sales of sugar during the second half of 1915 amounted to $780,000 on which it lost $196,000. Petitioner used sugar as a "leader" ("You save 2 to 4 cents on every pound"), offering a limited amount at the losing price in connection with a required purchase of other commodities at prices high enough to afford petitioner a satisfactory profit on the transaction as a whole, without letting the customer know that the sugar was being sold on any other basis than that of the other commodities. Petitioner obtained its sugar in the open market from refiners and wholesalers. Competitors got their sugar from the same sources, of the same quality, and at the same price. Sugar is a staple in the market. Price concessions upon large purchases are unobtainable. From the facts respecting petitioner's methods of advertising and buying and selling sugar respondent found, and properly so, in our judgment, that petitioner intentionally injured and discredited its competitors by falsely leading the public to believe that the competitors were unfair dealers in sugar and the other commodities which petitioner was offering in connection with sugar.

Petitioner purchased 75 per cent of its teas from wholesalers and importers in the United States. The remainder it purchased through its representative Peterson in Japan; but there was no proof that Peterson made or was qualified to make "selections in person" or "first-crop pickings from upland soil." All of petitioner's coffees were purchased from wholesalers and importers in the United States. Respondent found that petitioner's advertisements of teas and coffees were false and designed to deceive the public and injure competitors.

By the order, issued on June 24, 1918, petitioner was commanded to desist from—

(1) Circulating throughout the States and Territories of the United States and the District of Columbia, catalogues containing advertisements offering for sale sugar, wherein it is falsely represented to its customers or prospective customers of said defendant or to customers of competitors, or to the public generally or leads them to believe, that because of large purchasing power and quick-moving stock, defendant is able to sell sugar at a price lower than its competitors;

(2) Selling, or offering to sell, sugar below cost through catalogues circulated throughout the States and Territories of the United States and the District of Columbia among its customers, prospective customers, and customers of its competitors;

(3) Circulating throughout the various States and Territories of the United States and the District of Columbia, among customers, prospective customers, and customers of its competitors, catalogues containing advertisements representing that defendant's competitors do not deal justly, fairly, and honestly with their customers;

(4) Circulating throughout the various States and Territories of the United States and the District of Columbia, among customers, prospective customers, or customers of its competitors, catalogues containing advertisements offering for sale its teas, in which said advertisements it falsely stated that the defendant sends a special representative to Japan, who personally goes into the tea gardens of said country and personally supervises the picking of such teas;

(5) Circulating through the various States and Territories of the United States and the District of Columbia, among customers, prospective customers, or customers of its competitors, catalogues containing advertisements offering for sale its coffees, in which it falsely stated, that the defendant purchases all of its coffees direct from the best plantations in the world.

I. Petitioner insists that the injunctional order was improvidently issued because, before the complaint was filed and the hearing had, petitioner had discontinued the methods in question and, as stated in its answer, had no intention of resuming them. For example, no sugar offers of the character assailed were made after August, 1917. But respondent was required to find from all the evidence before it what was the real nature of petitioner's attitude. It was permissible for respondent to take judicial notice of the Government's wartime control of sugar sales and consumption. It was also proper to note that petitioner was contending (and still contends) that the act is void for indefiniteness, that the act is unconstitutional, and that the act, even if valid, under any proper construction has not been infringed by petitioner's practices. In Goshen Mfg. Co. *v.* Myers Mfg. Co. (242 U. S., 202), which was a suit for infringement of a patent, the defendant company averred and introduced evidence to prove that six months before the bill was filed and with notice to complainant it had sold its factory, wound up its business, and had no intention of resuming. But throughout the intervening period and also in the answer to the bill the defendant company was attacking the validity of the patent and the right of the complainant

to compel desistance. This conduct was held to be such a continuing menace as to justify the maintenance of the bill. So here, no assurance is in sight that petitioner, if it could shake respondent's hand from its shoulder, would not continue its former course.

II. Petitioner urges that the declaration of section 5 must be held void for indefiniteness unless the words "unfair methods of competition" be construed to embrace no more than acts which on September 26, 1914, when Congress spoke, were identifiable as acts of unfair trade then condemned by the common law as expressed in prior cases. But the phrase is no more indefinite than "due process of law." The general idea of that phrase as it appears in constitutions and statutes is quite well known; but we have never encountered what purported to be an all-embracing schedule or found a specific definition that would bar the continuing processes of judicial inclusion and exclusion based upon accumulating experience. If the expression "unfair methods of competition" is too uncertain for use, then under the same condemnation would fall the innumerable statutes which predicate rights and prohibitions upon "unsound mind," "undue influence," "unfaithfulness," "unfair use," "unfit for cultivation," "unreasonable rate," "unjust discrimination," and the like. This statute is remedial, and orders to desist are civil; but even in criminal law convictions are upheld on statutory prohibitions of "rebates or concessions" or of "schemes to defraud," without any schedule of acts or specific definition of forbidden conduct, thus leaving the courts free to condemn new and ingenious ways that were unknown when the statutes were enacted. Why? Because the general ideas of "dishonesty" and "fraud" are so well, widely, and uniformly understood that the general term "rebates or concessions" and "schemes to defraud" are sufficiently accurate measures of conduct.

On the face of this statute the legislative intent is apparent. The Commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The Commissioners, representing the Government as parens patriae, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases. But the restraining order of the Commissioners is merely provisional. The trader is entitled to his day in court, and there the same principles and tests that have been applied under the common law or under statutes of the kinds hereinbefore recited are expected by

Congress to control. This prima facie reading of legislative intent is confirmed by reference to committee reports and debates in Congress, wherein is disclosed a refusal to limit the Commission and the courts to a prescribed list of specific acts (Cong. Rec., 63d Cong., 2d sess., pp. 13, 18, 533, 12246). And this interpretation is not affected by the subsequent adoption of the Clayton Act, October 15, 1914, condemning certain specific acts.

III. But such a construction of section 5, according to petitioner's urge, brings about an unconstitutional delegation of legislative and judicial power to the Commission. Grants of similar authority to administrative officers and bodies have not been found repugnant to the Constitution. Buttfield *v.* Stranahan, 192 U. S. 470; Union Bridge Co. *v.* United States, 204 U. S. 365; Penn. Rd. Co. *v.* International Coal Co., 230 U. S. 184; National Pole Co. *v.* Chicago & N. W. Ry. Co., 211 Fed. 65.

With the increasing complexity of human activities many situations arise where governmental control can be secured only by the "board" or "commission" form of legislation. In such instances Congress declares the public policy, fixes the general principles that are to control, and charges an administrative body with the duty of ascertaining within particular fields from time to time the facts which bring into play the principles established by Congress. Though the action of the Commission in finding the facts and declaring them to be specific offenses of the character embraced within the general definition by Congress may be deemed to be quasi legislative, it is so only in the sense that it converts the actual legislation from a static into a dynamic condition. But the converter is not the electricity. And though the action of the Commission in ordering desistance may be counted quasi judicial on account of its form, with respect to power it is not judicial, because a judicial determination is only that which is embodied in a judgment or decree of a court and enforceable by execution or other writ of the court.

IV. In the second paragraph of the order petitioner is commanded to cease selling sugar below cost. We find in the statute no intent on the part of Congress, even if it has the power, to restrain an owner of property from selling it at any price that is acceptable to him or from giving it away. But manifestly in making such a sale or gift the owner may put forward representations and commit acts which have a capacity or a tendency to injure or to discredit competitors and to deceive purchasers as to the real character of the transaction. That paragraph should therefore be modified by adding to it "by means of or in connection with the representations prohibited in the first paragraph of this order, or similar representation."

Sufficient appears in this record and in the presentation of the case to warrant us in expressing the belief that petitioner's business standards were at least as high as those generally prevailing in the commercial world at the time in question, and that the action of the Commission is to be taken rather as a general illustration of the better methods required for the future than a specific selection of petitioner for reproof on account of its conduct in the past.

Respondent is directed to modify its order as above stated; and in other respects the petition is

Denied.

By ALSCHULER, *Circuit Judge.*

In my judgment the order of the Commission should be further modified by striking out the third paragraph, which relates to alleged representation that petitioner's competitors do not deal fairly and honestly with their customers. In so far as the sugar, coffee, and tea advertisements ascribe petitioner's asserted lower prices and superior qualities to quantity purchases and special facilities and advantages for inspection, selection, and purchasing, they would tend to negative any imputation upon competitors of unfair dealing with their patrons. I believe the charge of imputing to competitors unfair dealing with their patrons rests wholly on petitioner's so-called "Caveat emptor" advertisement in its catalogue of March and April, 1916, wherein the public is cautioned in regard to white sugar, stating that some is cane and some beet sugar, alike in appearance, but the former usually higher in price; that petitioner plainly designates which of the two it offers, and the query is suggested, where else are goods so plainly described, and whether the customer gets elsewhere what he thinks he is buying. It seems to me that this does not amount to more than a statement or boast that petitioner, without being asked, describes the white sugars it proposes to sell, and the intimation is carried that competitors do not volunteer such description, but it is not suggested that they actually misrepresent the truth.

The facts before the Commission appear by stipulation, and those concerning this advertisement, aside from the advertisement itself, are as follows:

When Mr. A. M. Daly, the attorney in charge of the investigation in these proceedings was in Chicago, in March, 1916, he submitted to Mr. A. V. H. Mory, chief chemist of Sears, Roebuck & Co., and Mr. Joseph Scott, manager of the grocery department, a copy of the advertisement entitled "Caveat emptor" hereinbefore mentioned, and hereto attached, and requested them to state their views as to this particular advertisement and what it meant. They stated that this advertisement was for the purpose of calling attention to the distinction between beet sugar and cane sugar and laying stress upon the point of the facilities that Sears, Roebuck & Co. have for marking everything plainly so that the customer would know better from description the exact nature of

what he was buying. After this explanation Mr. Daly went to his hotel. In a short time Mr. Mory called on him there and stated in substance that he had submitted the above-mentioned advertisement to Mr. A. H. Loeb, the vice president of Sears, Roebuck & Co., and that Mr. Loeb said that this course of advertising was unfair and unjust and declared that it must be discontinued, and further that it was against the policy of the house to send out such advertisements. Thereupon, on March 28, 1916, Mr. A. V. H. Mory, chief chemist, wrote to the Commission in part as follows: "The young man who wrote this was in to-day, and I pointed out to him wherein he had made a mistake and acted against house policy. He promised to use the soft pedal on all references to the dealer in the future. He tells me that this is an angle that had not occurred to him. He had not thought of the write-up in the light of a criticism of the dealer, so intent was he in pointing out that with our system of marking everything plainly and our facilities for knowing what we are selling, the customer would know better from our description the exact nature of what he was buying, in the case of those things difficult to judge, than if he had them placed before him, which of course is true."

But, assuming, as did petitioner's vice president, that this advertisement does carry the imputation that competitors deal unfairly with their customers, under the circumstances indicated by the quotation ought this advertisement to be the basis of a finding and order? The publication was in the catalogue for March and April, 1916. The complaint was filed nearly two years afterwards. The act authorizes the Commission to proceed when it shall have reason to believe that unfair methods of competition are or have been used, "and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." In a monitory proceeding such as this seems to be, it could hardly be said that it would be "of interest to the public" to predicate action on a transgression for which due amends had long before been made, without remotest cause to believe there would be a repetition. To revive a stale advertisement of this nature which the advertiser immediately after the publication distinctly disavowed as having been unintentionally and inadvertently unfair to competitors, and ordered discontinued, without directly or indirectly repeating or renewing it for so long an interval, far from subserving the public interest, might, in my judgment, have the contrary tendency of raising an imputation of oppressive or at least uncalled-for action, in predicating any proceeding or order on this advertisement.

Nor am I impressed with the authoritative relevancy here of decisions respecting injunctions. In a proceeding such as this, neither remedial nor punitive decisions of courts respecting injunctional relief in equity are not more analogous than are common-law decisions defining

unfair trade practices, arising out of controversies between individuals, as fixing thereby the limitation of the Commission's authority or scope.

The suggested modification would necessitate corresponding modification of the Commission's findings of facts, eliminating paragraphs numbered 4 and 5 thereof. Paragraphs 2, 6, and 7 (as well as pars. 4 and 5) of the findings state the circulation of the several advertisements to have been in each case for "more than two years last past," indicating thereby the two years next before the date of the findings, which is June 24, 1918. This is in contravention of the stipulated fact that none of the advertisements were more recent than August, 1917—some of them even antedating the passage, September 26, 1914, of the Trade Commission act itself. These findings should, in my judgment, be modified to comply with the stipulated fact.

FEDERAL TRADE COMMISSION v. GRATZ ET AL.[1]

(Circuit Court of Appeals, Second Circuit. May 14, 1919. No. 236.)

TRADE-MARKS AND TRADE-NAMES, Key No. 80½ New, Vol. 8A, Key No. Series—UNFAIR COMPETITION—POWERS OF FEDERAL TRADE COMMISSION.

Act September 26, 1914, § 5 (Comp. St. § 8836e), giving the Federal Trade Commission power to investigate unfair methods of competition, does not contemplate the prohibition of unfair methods of competition between individuals, there being no authority given to individuals to present grievances, hence where defendants, who engaged in selling ties and bagging for cotton bales, refused to sell to persons with whom they had had previous unsatisfactory relations, and refused to sell ties without bagging when there was fear that, owing to the scarcity of ties and the prospect of large crops, the marketing of the cotton crop might be endangered by creating corners in ties, the Commission is not authorized to make any order compelling such sales. The unfair methods contemplated by the act are such as affect the public generally.

(The syllabus is taken from 258 Fed. Rep. 314.)

[1] Reviewing order of Commission in Federal Trade Commission *v.* Gratz et al., 1 F. T. C. 249. See same case in Supreme Court, 253 U. S. 421 and *infra*, at pp. 564–579.

Petition to revise order of the Federal Trade Commission.

Petition of Warren, Jones & Gratz, by Anderson Gratz, for an order for the review of the findings and order of the Federal Trade Commission, and for an order setting the same aside, in a proceeding against Anderson Gratz and Benjamin Gratz, copartners doing business under the firm name and style of Warren, Jones & Gratz, and others. Order reversed.

T. F. Magner, of Brooklyn, N. Y., for petitioner.

John Walsh, of Washington, D. C., for respondent.

Before Ward, Hough, and Manton, circuit judges.

WARD, *Circuit Judge:*

This is a petition of Anderson Gratz, a member of the firm of Warren, Jones & Gratz, under section 5 of the act of September 26, 1914, 38 Stat. L. 730, creating the Federal Trade Commission, to review the following order of the Commission:

> Therefore, it is ordered, that the respondents, Anderson Gratz and Benjamin Gratz, copartners, doing business under the firm name and style of Warren, Jones & Gratz; P. P. Williams, W. H. Fitzhugh, and Alexander Fitzhugh, copartners, doing business under the firm name and style of P. P. Williams & Co., and C. O. Elmer, their officers and agents, cease and desist from requiring purchasers of cotton ties to also buy or agree to buy a proportionate amount of American Manufacturing Co.'s bagging; and further that the respondents cease and desist from refusing to sell cotton ties unless the purchasers buy or agree to buy from them corresponding amounts of American Manufacturing Co.'s bagging, or any amount of cotton bagging of any kind.
>
> By the Commission:
>
> [SEAL.] L. L. BRACKEN, *Secretary.*

If Anderson Gratz has not sufficient standing to file this petition, counsel for the Commission has very fairly waived the objection and invited the court to dispose of the questions raised.

The first count of the complaint served on the respondents, which is the only one involved, is as follows:

> PARAGRAPH 1. That the respondents, Anderson Gratz and Benjamin Gratz, are copartners, doing business under the firm name and style of Warren, Jones & Gratz, having their principal office and place of business in the city of St. Louis, and State of Missouri, and are engaged in the business of selling, in interstate commerce, either directly to the trade, or through the respondents hereinafter named, steel ties made and used for binding bales of cotton, and which steel ties are manufactured by the Carnegie Steel Co., of Pittsburgh, Pa., and also selling, in the same manner, jute bagging, used to wrap bales of cotton, and which jute bagging is manufactured by the American Manufacturing Co., of St. Louis, Mo.
>
> PAR. 2. That the respondents, P. P. Williams, W. H. Fitzhugh, and Alex. Fitzhugh, are copartners, doing business under the firm name and style of P. P. Williams & Co., having their principal office and place of business in the city of Vicksburg, and State

of Mississippi, and the said last-named respondents and the said respondent Charles O. Elmer, who is located and doing business at the city of New Orleans, and State of Louisiana, are the selling and distributing agents of the said firm of Warren, Jones & Gratz, and sell and distribute the ties and bagging, manufactured as aforesaid, in interstate commerce, principally to jobbers and dealers, who resell the same to retailers, cotton ginners, and farmers.

PAR. 3. That with the purpose, intent, and effect of discouraging and stifling competition in interstate commerce in the sale of such bagging, all of the respondents do now refuse, and for more than a year last past have refused, to sell any of such ties unless the prospective purchaser thereof would also buy from them bagging to be used with the number of ties proposed to be bought; that is to say, for each six of such ties proposed to be bought from the respondents the prospective purchaser is required to buy six yards of such bagging.

The respondents filed an answer admitting the facts stated in paragraphs 1 and 2, but denying the facts stated and the conclusion therefrom contained in paragraph 3. They appeared and offered testimony before the Commission.

The Commission's material findings of fact and its conclusions of law are as follows:

PAR. 2. That within three years last past respondents, Anderson Gratz and Benjamin Gratz, copartners, doing business under the firm name and style of Warren, Jones & Gratz; P. P. Williams, W. H. Fitzhugh, and Alexander Fitzhugh, copartners, doing business under the firm name and style of P. P. Williams & Co., and C. O. Elmer, adopted and practiced the policy of refusing to sell steel ties to those merchants and dealers who wished to buy them from them unless such merchants and dealers would also buy from them a corresponding amount of jute bagging. * * *

PAR. 4. * * * The dominating and controlling position occupied by said respondents in the sale and distribution of ties made it possible for them to force would-be purchasers of ties to also buy from them bagging manufactured by the American Manufacturing Co., and in many instances, said respondents refused to sell ties unless the purchaser would also buy from them a corresponding amount of bagging and such purchasers were oftentimes compelled to buy bagging manufactured by the American Manufacturing Co., from said respondents, in order to procure a sufficient supply of steel ties used for the purpose aforesaid.

CONCLUSIONS OF LAW.

That the methods of competition set forth in the foregoing findings as to the facts, in paragraphs 1, 2, 3, and 4, and each and all of them are, under the circumstances therein set forth, unfair methods of competition in interstate commerce, against other manufacturers, dealers, and distributors of jute bagging, and against other dealers and distributors in the material known as sugar-bag cloth, and against manufacturers, dealers, and distributors of the bagging known as rewoven bagging and second-hand bagging, in violation of the provisions of section 5 of an act of Congress, approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and that there is not sufficient proof submitted in the hearings to sustain the paragraph in the complaint charging a violation of section 3 of an act of Congress known as the Clayton Act. (Act Oct. 15, 1914, C. 323, 38 Stat. 731 [Comp. St. ¶ 8835 c].)

By agreement between the parties the Commission filed a transcript of the entire record in the proceeding before it. This court is given power by the act to affirm, modify, or set aside such an order, the Commission's findings of fact to be conclusive if supported by testimony. There is testimony to support the findings of fact and therefore the question before us is whether they do support the Commission's conclusion of law that the method of competition forbidden is unfair within the meaning of section 5 of the act of September 26, 1914.

It seems to us that unfair methods of competition between individuals are not contemplated by the act. Congress could not have intended to submit to the determination of the Commission such questions as whether a person, partnership, or corporation had treated or bribed the employees of a competitor for the purpose of inducing them to betray their employer. We think the unfair methods, though not restricted to such as violate the antitrust acts, must be at least such as are unfair to the public generally. It seems to us that section 5 is intended to provide a method of preventing practices unfair to the general public and very particularly such as if not prevented will grow so large as to lessen competition and create monopolies in violation of the antitrust acts. Such a preliminary inquiry and determination constitutes a most important supplement in carrying out the public policy which those acts are intended to vindicate. This view is confirmed by the language of the section:

> Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint.

No authority is given to any individual to present his grievances, and the Commission is to interpose only in the interest of the public.

That the Commission did not find sufficient proof to sustain the second count in the complaint, viz. that the method of the respondents found to be unfair violated section 3 of the act of October 15, 1914, known as the Clayton Act, which makes unlawful any condition, agreement, or understanding that may lessen competition or tend to create a monopoly, shows that the method found to be unfair must have been unfair in certain individual transactions. And we discover no evidence to support

the finding in paragraph 2 that the respondents "adopted and practiced the policy of refusing to sell steel ties to those merchants and dealers who wished to buy them from them unless such merchants and dealers would also buy from them a corresponding amount of jute bagging." It is the natural and prevailing custom in the trade to sell ties and bagging together, just as one witness testified it is to sell cups and saucers together. Such evidence as there is of a refusal to sell is a refusal to sell at all to certain persons with whom the respondents had previous unsatisfactory relations and a refusal to sell ties without bagging at the opening of the market in 1916 and 1917, when there was fear that, owing to scarcity of ties and the prospect of large crops, the marketing of the cotton crop might be endangered by speculators creating a corner in ties. The evidence is that with these exceptions the respondents sold ties without any restrictions to all who wanted to buy, and indeed made extraordinary efforts to induce the manufacturers of ties to increase their output so that all legitimate dealers and all cotton raisers should get enough ties and bagging at reasonable rates to market their cotton. It is only these exceptional and individual cases, which established no general practice affecting the public that can sustain the findings in paragraph 4.

Counsel for the Commission calls our attention to the opinion of the Circuit Court of Appeals for the Seventh Circuit, Sears, Roebuck & Co., Petitioners, *v.* Federal Trade Commission, Respondent, 258 Fed. Rep. 307. The practice there prohibited as unfair was extensive advertising containing false and misleading statements calculated to deceive all purchasers and to discredit all competitors. It was clearly a method unfair to the public generally.

As we think there is no evidence to support any general practice of the respondents to refuse to sell ties unless the purchaser bought at the same time the necessary amount of the American Manufacturing Co.'s bagging, and that the Commission has no jurisdiction to determine the merits of specific individual grievances, the order is reversed.

WARD BAKING CO. v. FEDERAL TRADE COMMISSION.[1]

(Circuit Court of Appeals, Second Circuit. February 26, 1920.)

No. 90.

COMMERCE. KEY NO. 40—(1) SALES BY AGENTS FROM WAGONS SENT ACROSS STATE LINE NOT INTERSTATE COMMERCE.

Where a baking company sends its wagons across a state line in charge of its drivers, who call on retail dealers and then and there sell and deliver bread to them, the sales do not constitute interstate commerce, subject to regulation by the Federal Trade Commission.

(The syllabus is taken from 264 Fed. Rep. 330.)

Petition to Review Order of Federal Trade Commission.

Proceeding before the Federal Trade Commission against the Ward Baking Co. On petition to review an order of the Federal Trade Commission. Order reversed.

Eugene H. Hickok, for petitioner.

Edward L. Smith (Claude R. Porter and W. T. Roberts, both of Washington, D. C., of counsel) for respondent.

Before Ward, Rogers, and Manton, circuit judges.

WARD, *Circuit Judge:*

November 26, 1917, the Federal Trade Commission filed a complaint under section 5 of the act of September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties and for other purposes," against the Ward Baking Co. on the ground that the company had at periods of several consecutive days in the year 1917 given gratis to each purchaser of its bread in certain places a quantity of bread equal to the amount of the purchase with the intent of suppressing competition in the manufacture and sale of bread in interstate commerce and that a proceeding by the Commission in respect thereof would be to the interest of the public.

The company filed an answer, denying this charge, appeared and offered testimony at the hearing. The Com-

[1] Reviewing order of Commission in Federal Trade Commission v. Ward Baking Co., 1 F. T. C. 388.

mission made a report and findings of which the material finding for the purposes of this opinion is:

PARAGRAPH THREE. That respondent during the said month of May, in the year 1917, for a period of about four weeks, in the cities of New Bedford and Fall River, in the State of Massachusetts, and other towns and cities in said State, and also in the towns of North Tiverton and Stone Bridge, in the State of Rhode Island, did give to all who purchased bread from it an amount of bread equal to the amount so purchased with the intent and purpose of suppressing and stifling competition in the sale of bread in the towns and cities named in the State of Massachusetts and the State of Rhode Island, and that all the bread so sold and given away in the State of Rhode Island, during said period when said free bread campaign was being so conducted, was manufactured at the city of Cambridge, in the State of Massachusetts, and shipped by the said respondent from the city of Cambridge to the city of Fall River, both in the State of Massachusetts, and from said city of Fall River was distributed by wagons, trucks, and other conveyances across the State line and into the State of Rhode Island, in the vicinity of North Tiverton and Stone Bridge, and there given away to purchasers of bread from said respondent in the manner and form aforesaid, and that said bread so given away and distributed in the State of Rhode Island was transported and sold in interstate commerce across the state line dividing the State of Massachusetts and the State of Rhode Island, for the purpose and with the effect of stifling and suppressing competition in interstate commerce as aforesaid.

This method of competition the Commission held to be unfair. September 2, 1919, the Commission entered an amended order requiring respondent to desist from the practice:

Now, therefore, it is ordered that the respondent, Ward Baking Company, its officers, directors, agents, servants, and employees, cease and desist from directly or indirectly initiating or carrying on, in the course of interstate commerce, any so-called free-bread campaign, or any practice of supplying bread free of cost to retail dealers in quantities equal to those purchased from respondent by such dealers, or in any other quantities, where such practice is calculated to or does stifle or suppress competition in the manufacture and sales of bread.

It appeared from the testimony that the respondent transported the bread in question in its own wagons from Fall River, Mass., to Tiverton and Stone Bridge, R. I.; their wagons calling at the retail stores in those places and their drivers then and there selling the respondent's bread to such storekeepers as wanted to buy, and then and there delivering additional bread gratis to the purchaser.

Doubtless bread sold in Massachusetts to be delivered to the purchaser in Rhode Island would be interstate commerce, but that is not this case. Moreover, the Commission is not finding the act of transportation from Massachusetts to Rhode Island unfair, but the method of local sales made in Rhode Island. If the respondent had its own stores in Rhode Island, and carried to them from Massachusetts bread to be there sold, this method of selling could not be considered interstate commerce.

The question arose in respect of the right of the city of Covington, a municipality of Kentucky, to impose a license tax upon the business of an Ohio corporation making sales in exactly this way in Kentucky. The Supreme Court held that such sales were subject to the tax, and not invalid as a regulation of interstate commerce. Wagner *v.* The City of Covington, 251 U. S. 95 (Dec. 8, 1919). Mr. Justice Pitney said at pp. 99 and 103:

> Plaintiffs were and are manufacturers of such drinks, having their factory and bottling works in the City of Cincinnati, in the State of Ohio, on the opposite side of the Ohio River from Covington. They have carried on and do carry on the business of selling in Covington soft drinks, the product of their manufacture, in the following manner: They have a list of retail dealers in Covington to whom they have been and are in the habit of making sales. Two or three times a week a wagon or other vehicle owned by plaintiffs is loaded at the factory in Cincinnati and sent across the river to Covington, and calls upon the retail dealers mentioned, many of whom have been for years on plaintiff's list and have purchased their goods under a general understanding that plaintiffs' vehicle would call occasionally and furnish them with such soft drinks as they might need or desire to purchase from plaintiff. When a customer's place of business is reached by the vehicle the driver goes into the storeroom and either asks or looks to see what amount of drinks is needed or wanted. He then goes out to the vehicle and brings from it the necessary quantity, which he carries into the store and delivers to the customer. Upon his trips to Covington he always carries sufficient drinks to meet the probable demands of the customers, based on past experience; but, with the exception of occasional small amounts carried for delivery in response to particular orders previously received at plaintiffs' place of business in Cincinnati, all sales in Covington are made from the vehicle by the driver in the manner mentioned. * * *
>
> Of course the transportation of plaintiffs' goods across the state line is of itself interstate commerce; but it is not this that is taxed by the city of Covington, nor is such commerce a part of the business that is taxed, or anything more than a preparation for it. So far as the itinerant vending is concerned the goods might just as well have been manufactured within the State of Kentucky; to the extent that plaintiffs dispose of their goods in that kind of sales, they make them the subject of local commerce; and, this being so they can claim no immunity from local regulations, whether the goods remain in original packages or not.

As interstate commerce is not involved, the order is reversed.

NEW JERSEY ASBESTOS CO. v. FEDERAL TRADE COMMISSION.[1]

(Circuit Court of Appeals, Second Circuit. February 26, 1920.)

No. 91.

1. EVIDENCE KEY NO. 21.—JUDICIAL NOTICE TAKEN OF BUSINESS PRACTICE TO ENTERTAIN CUSTOMERS AND THEIR EMPLOYEES.

The court takes judicial notice that the practice of entertaining customers and employees of customers by furnishing them liquor, cigars, meals, theater tickets, etc., found by the Federal Trade Commission to be unfair, has been an incident of business from time immemorial, especially as expenditures for such purposes are recognized as a proper deduction by the income tax regulations.

2. MASTER AND SERVANT KEY NO. 30 (4)—GIFTS TO EMPLOYEE TO INDUCE CONTRACT IS FRAUD, JUSTIFYING DISCHARGE.

The payment of money or the giving of valuable presents to an employee to induce him to influence his employer to make a contract of purchase is a fraud, justifying the employee's discharge within his contract term of service.

3. TRADE-MARKS AND TRADE NAMES KEY NO. 80½ NEW, VOL. 8A KEY-NO. SERIES—FEDERAL TRADE COMMISSION WITHOUT JURISDICTION TO REGULATE ENTERTAINMENT OF CUSTOMER'S EMPLOYEES.

The practice of a company engaged in interstate commerce in entertaining employees of its customers with liquor, cigars, meals, theater tickets, etc., is not a matter so affecting the public as to be within the jurisdiction of the Federal Trade Commission.

(The syllabus is taken from 264 Fed. 509.)

Petition to Review Order of Federal Trade Commission.

Petition by the New Jersey Asbestos Company for review of an order of the Federal Trade Commission. Order reversed.

Robert W. Crawford, of New York City, for petitioner.

Edward L. Smith, of Washington, D. C. (Claude R. Porter and Charles S. Moore, both of Washington, D. C., of counsel), for respondent.

Before Ward, Rogers, and Manton, circuit judges.

[1] Reviewing order of Commission in Federal Trade Commission *v.* The New Jersey Asbestos Co., 1 F. T. C. 472.

WARD, *Circuit Judge:*

January 6, 1919, the Federal Trade Commission issued a complaint against the New Jersey Asbestos Company, under Section 5 of the Act of September 26, 1914 (Comp. St. ¶ 8836e), entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," alleging that the company had during the year 1918 been giving to employees of its customers and prospective customers liquors, cigars, meals, theater tickets, valuable presents, and sums of money and entertainments to induce them to influence their employers to purchase the company's products and that a proceeding by the Commission in respect thereof would be to the interest of the public.

The company filed an answer, admitting that it is engaged in interstate as well as intrastate business and that it had paid reasonable amounts in furnishing entertainment to employees of customers and as incidental to such entertainment had supplied liquors, cigars, meals, and theater tickets, but denying that this was done for the purpose of inducing them to influence their employers to buy its goods, and especially denying that it ever gave them valuable presents or sums of money.

The charge of giving valuable presents and sums of money has been abandoned by the Commission. May 27, 1919, the Commission filed its report, and two findings of fact, and its conclusion of law as follows:

First. That the respondent, the New Jersey Asbestos Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, having its principal office and place of business at the city of New York, in the State of New York, and is now, and for more than one year last past has been, engaged in manufacturing and selling engine packings composed of asbestos, metal and asbestos, flax, wood fiber and kindred products throughout the States and Territories of the United States, and that at all times hereinafter mentioned, the respondent has carried on and conducted such business in direct competition with other persons, firms, copartnerships, and corporations manufacturing and selling like products.

Second. That said respondent, the New Jersey Asbestos Co., in the course of its business of manufacturing and selling engine packings composed of asbestos, metal and asbestos, flax, wood fiber and kindred products throughout the States and Territories of the United States, for more than one year last past has been lavishly giving gratuities, such as liquor, cigars, meals, theater tickets, and entertainment to employees of customers as an inducement to influence their employers to purchase or to contract to purchase from the said respondent, the New Jersey Asbestos Co., engine packings composed of asbestos, metal and asbestos, flax, wood fiber and kindred products without other consideration therefor.

CONCLUSION.

That the methods set forth in the foregoing findings of fact, under all the circumstances therein set forth, are unfair methods of competition in violation of the provisions of section 5 of the act

of Congress, approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

The findings of fact being mere conclusions, it is necessary to examine the evidence to see whether they are supported by any testimony or not. It shows that the officers of the company in the year 1918 did entertain at the company's expense both customers and employees of customers, and that the salesmen down to May 1 were employed on a salary or on a salary and commission basis, and were allowed to charge in their monthly accounts reasonable lump sums for entertainment. After May 1 they were on a commission basis only, and any entertainment given by them was given at their own expense.

We have held in Federal Trade Commission *v.* Gratz, 258 Fed. Rep. 314, that only unfair practices which affect the public as distinguished from individuals, are within the jurisdiction of the Commission. We take judicial notice of the fact that the method of entertainment found to be unfair has been an incident of business from time immemorial. It is recognized by article 133 of the regulations covering the assessment of income tax promulgated January 2, 1918, as follows:

Spending money. So-called spending or treating money, if actually advanced by corporations to their traveling salesmen to be used by them as a part of the expenses incident to selling the product of such corporations, is an allowable deduction in a return of income by such corporations. The deduction of such expenditures is conditioned upon a satisfactory showing that all the allowance claimed as a deduction was actually expended for and was an ordinary and usual expense incurred in selling the product or merchandise of the corporation.

The payment of money or the giving of valuable presents to an employee to induce him to influence his employer to make a contract of purchase is a fraud justifying the discharge of the employee within his contract term of service, and perhaps the recovery by the purchaser of the amount or value of such inducement from the seller, upon the theory that it must have been included in the price. But even in such a case we think it would be a matter between individuals, and not one so affecting the public as to be within the jurisdiction of the Commission, under our decision in the Gratz case. However, it stretches theory to the breaking point to suppose that the entertainment expenses found unfair in this case constitute fraud practiced by the respondent and by the employees on the purchasers of the respondent's goods. It is difficult to conceive that the purchaser would have a right to recover the amount of such entertainment as a part of the price paid for the goods bought, or that he would have a right to discharge the employee within the term

of his service on this ground. So broad a construction of the statute would bring within the disposition of the Commission a vast number of subjects and controversies which in their nature belong to the legislative and judicial departments of the Government. For instance, advertising is a method of selling goods which, without increasing their merits, increases their cost; and so does securing servants of competitors by paying them higher wages, though we suppose no one would say the act gives the Commission a right to regulate these matters.

The order is reversed.

BEECH-NUT PACKING CO. v. FEDERAL TRADE COMMISSION.[1]

(Circuit Court of Appeals, Second Circuit. February 26, 1920.)

No. 92.

TRADE-MARKS AND TRADE-NAMES KEY 80½, NEW, VOL. 8A KEY-NO. SERIES—MANUFACTURER HELD NOT SUBJECT TO ORDER OF FEDERAL TRADE COMMISSION; "UNFAIR METHOD OF COMPETITION."

That a manufacturer of products sold in interstate commerce to jobbers and wholesale dealers, who in turn sell to other jobbers and wholesale and retail dealers, issues circulars to its trade suggesting prices for resale, both at wholesale and retail, and refuses to continue to sell to any dealer who fails to maintain such prices, or who sells to another dealer failing to maintain them, in the absence of contracts requiring adherence to such prices, *Held* not to constitute an "unfair method of competition," in violation of Federal Trade Commission Act Sept. 26, 1914 (Comp. St. Par. 8836e).

(The syllabus is taken from 264 Fed. 885.)

Petition to Review Order of Federal Trade Commission.

Petition by the Beech-Nut Packing Co. to review an order of the Federal Trade Commission. Order reversed.

Charles Wesley Dunn, of New York City (Charles E. Hughes, of New York City, of counsel), for petitioner.

Edward L. Smith, of Washington, D. C. (Claude R. Porter and Marshal B. Clarke, both of Washington,

[1] Reviewing order of Commission in Federal Trade Commission v. Beech-Nut Packing Co., 1 F. T. C. 516. Petition for certiorari filed by the Commission in the United States Supreme Court May 10, 1920, and granted June 1, 1920.

D. C., and Joseph A. Burdeau, of New York City, of counsel), for respondent.

Before Ward, Hough, and Manton, circuit judges.

WARD, *Circuit Judge:*

April 15, 1918, the Federal Trade Commission issued a complaint against the Beech-Nut Packing Co. under section 5 of the act of Congress of September 26, 1914 (Comp. St. ¶ 8836e), entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," charging the company with using an unfair method of competition in interstate commerce, viz. in selling its products to such purchasers, principally wholesalers and jobbers, as do not resell at a price lower than that fixed by the company and in refusing to sell to such as do, with the purpose of eliminating competition in the sale of the company's products and that a proceeding by the Commission in respect to this method would be to the interest of the public.

The company appeared and answered, admitting these facts, but denying that it had entered into any agreement with purchasers requiring them to maintain its prices, or in any way qualifying their title to the articles purchased, or restricting their freedom to sell to anyone and charge any price they chose.

An agreed statement of facts was filed. June 30, 1919, the Commission filed its report and findings.

The respondent is engaged in interstate commerce in selling divers food products, such as sliced bacon, sliced beef, peanut butter, candies, chewing gum, etc., under the trade name "Beech-Nut Brand." The Commission's findings of fact are very long, and it will be sufficient for the purposes of our decision to state the following:

PARAGRAPH FOUR. That respondent customarily markets its products principally through jobbers and wholesalers in the grocery, drug, candy, and tobacco lines, who in turn resell to retailers in these lines, all of which wholesale and retail dealers are selected as desirable customers for the reason that they are known or believed to be (*a*) of good credit standing; (*b*) willing to resell at the resale prices suggested by respondent and who do resell at such prices, as hereinafter set forth; (*c*) willing to refuse to sell and who do refuse to sell to jobbers, wholesalers and retailers who do not resell at the resale prices suggested by respondent, and who do not sell to such jobbers, wholesalers and retailers as also hereinafter set forth; (*d*) good and satisfactory merchandisers in other respects. Such jobbers, wholesalers, and retailers are designated by the respondent as "selected" or "desirable" dealers. Respondent also sells "direct" in a few instances to certain large retailers who are selected on the same basis as the aforesaid jobbers, wholesalers, and retailers. The total number of such dealers handling the products of respondent includes the greater proportion of the jobbers, wholesalers, and retailers, respectively, in the grocery trades, and a large proportion of the jobbers, wholesalers, and retailers in the drug, candy, and tobacco trades, respectively, throughout the United States.

PARAGRAPH FIVE. That respondent, in the sale and distribution of its products has adopted and maintained, and still maintains, policy known as the "Beech-Nut Policy," and requests the cooperation therein of all dealers selling the products manufactured by it, dealing with each customer separately.

PARAGRAPH SEVEN. In order to carry out said Beech-Nut policy and to secure such cooperation, respondent

(*a*) Issues circulars, price lists and letters to the trade generally showing suggested uniform resale prices, both wholesale and retail, to be charged for Beech-Nut products.

(*b*) Requests and insists that the aforesaid selected jobbers, wholesalers, and retailers resell only at the suggested resale prices.

(*c*) Requests and insists that the aforesaid selected jobbers, wholesalers, and retailers sell only to such other jobbers, wholesalers, and retailers as have been and are willing to resell and do resell at the prices so suggested by the respondent; and requests and insists that such jobbers, wholesalers, and retailers discontinue selling to other jobbers, wholesalers, and retailers who fail to resell at the prices so suggested by respondent.

(*d*) Makes it known broadcast to such selected jobbers, wholesalers and retailers, whether sold "direct" or not, that if they, or any of them, fail to sell at the resale prices suggested by the respondent as aforesaid, respondent will absolutely refuse to sell further supplies of its products to them, or any of them, and will also absolutely refuse to sell any jobbers, wholesalers, and retailers whatsoever who sell to other jobbers, wholesalers, or retailers failing to resell at the prices suggested by respondent.

PARAGRAPH EIGHT. That respondent, in the carrying out of said policy

(*a*) Has within the time aforementioned refused and does refuse to sell its products to practically all such jobbers, wholesalers, and retailers as do not resell at the prices so suggested by the respondent.

(*b*) Has within the time aforementioned refused and does refuse to sell to practically all such jobbers, wholesalers and retailers reselling to other jobbers, wholesalers, and retailers who have failed to resell at the prices so suggested by the respondent.

(*c*) Has within the time aforementioned refused and does refuse to sell to practically all so-called mail-order houses engaged in interstate commerce, on the ground that such mail-order houses frequently sell at cut prices, and has within the time aforementioned refused and does refuse to sell to practically all jobbers, wholesalers, and retailers who sell its products to such mail-order houses.

(*d*) Has within the time aforementioned refused and does refuse to sell to practically all so-called price-cutters.

(*e*) Has maintained within the time aforementioned and does maintain a large force of so-called specialty salesmen or representatives who call upon the retail trade and solicit orders therefrom to be filled through jobbers and wholesalers, which orders are commonly known in the trade as "turnover orders"; that respondent's salesmen, under its instructions, have within the time aforementioned refused and do refuse to accept any such turnover orders to be filled through jobbers and wholesalers who themselves sell or have sold at less than the suggested resale prices or sell or have sold to jobbers, wholesalers, and retailers who sell or have sold at less than such suggested resale prices; and in such cases have requested such retailers to name other jobbers.

(*f*) Has within the time aforementioned reinstated and does reinstate as distributors of its products, jobbers, wholesalers, and retailers previously cut off or withdrawn from the list of selected jobbers, wholesalers, and retailers for failure to resell at the prices suggested by the respondent and/or for selling to distributors who do not maintain such suggested resale prices, upon the basis of

declarations, assurances, statements, promises, and similar expressions, as the case may be, by said distributors, respectively, which satisfy the respondent that such distributors will thereafter resell at the prices suggested by the respondent and/or will refuse to sell to distributors who do not maintain such suggested resale prices.

(*g*) Has within the time aforementioned added and does add to its list of new distributors, concerns reported by its representatives as declaring that they intend to and will resell at the prices suggested by the respondent, and/or will refuse to sell to distributors who do not maintain such suggested resale prices.

(*h*) Has within the time aforementioned utilized a system of key numbers or symbols stamped or marked upon the cases containing "Beech-Nut Brand" products, thus enabling the respondent, for any purpose whatsoever, to ascertain the identity of the distributors from whom such products were purchased; and that repeatedly, within the time aforementioned, when instances of price cutting have been reported to respondent by the selected wholesalers and retailers, or ascertained in other ways, its salesmen and representatives have been instructed by respondent to investigate, and that in pursuance of these instructions salesmen and representatives of respondent have by means of these key numbers or symbols traced the price cutters from whom the goods have been obtained and have thus ascertained the identity of such price cutters, and have also thus traced and ascertained the identity of distributors from whom price cutters have purchased "Beech-Nut Brand" products; and have thereafter refused to supply all such dealers with its products, whether such dealers were themselves cutting the suggested resale prices or were selling to dealers cutting the suggested resale prices.

(*i*) Has within the time aforementioned maintained and does maintain card records containing the names of thousands of jobbing, wholesale, and retail distributors, including the aforesaid selected distributors, and in furtherance of its refusals to sell goods either to distributors selling at less than the suggested resale price, or to distributors selling to other distributors selling at less than the suggested resale prices, has listed upon those cards bearing the names of such distributors the words "Undesirable—Price cutters," "Do not sell," or "D. N. S.," the abbrevation for "Do not sell" or expressions of a like character, to indicate that the particular distributor was not, in the future, to be supplied with respondent's goods on account of failure to maintain the aforesaid suggested resale prices or on account of failure to discontinue selling to dealers failing to maintain such suggested resale prices. When respondent has received declarations, assurances, statements, promises, and similar expressions, as the case may be, by said distributors, respectively, which satisfy the respondent that such distributors will resell at the prices suggested by the respondent, and/or discontinue selling to distributors failing to maintain the resale prices suggested by respondent, said respondent has issued instructions to "Clear the record," or directions of similar import, notation of which is made on the cards, and has thereafter permitted shipments of its products to be made to such distributors; and such distributors to whom shipments are thus allowed to go forward constitute the respondent's list of so-called "selected" jobbers, wholesalers, and retailers, and no distributor is thus listed on such card records as one to whom goods are allowed to go forward who fails to maintain the resale prices suggested by respondent or sells to distributors failing to resell at such suggested prices; and when a jobber, wholesaler, or retailer is reported as failing to maintain the suggested resale prices, and/or as selling to distributors who fail to maintain such suggested resale prices, and has been entered in the card records as one to whom shipments should not go forward, respondent notifies those jobbers, wholesalers, and retailers who

supply said distributor of this fact, and also notifies its specialty salesmen, and gives similar notices to said jobbers, wholesalers, and retailers and to its specialty salesmen when reinstatements are made in its said list of "selected" jobbers, wholesalers, and retailers.

The Commission's conclusion of law is:

That the methods of competition set forth in the foregoing findings are, under the circumstances therein set forth, unfair methods of competition in interstate commerce in violation of the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

June 30, 1919, the order under review issued as follows:

Now, therefore, it is ordered that respondent, Beech-Nut Packing Co., its officers, directors, agents, servants, and employees cease and desist from, directly or indirectly, recommending, requiring, or by any means bringing about the resale of Beech-Nut products by distributors, whether at wholesale or retail, according to any system of prices fixed or established by respondent, and more particularly by any or all of the following means:

1. Refusing to sell to any such distributors because of their failure to adhere to any such system of resale prices.

2. Refusing to sell to any such distributors because of their having resold respondent's said products to other distributors who have failed to adhere to any such system of resale prices.

3. Securing or seeking to secure the cooperation of its distributors in maintaining or enforcing any such system of resale prices.

4. Carrying out or causing others to carry out a resale price maintenance policy by any other means.

The subject is one affecting the public generally and plainly within the jurisdiction of the Commission. The ground upon which the conclusion of law rests is that the method is unfair, because its stifles competition and so restrains trade. The obvious purpose of the respondent is to prevent any competition as to the resale price between purchasers of its products. Such a method founded upon an agreement between a manufacturer and purchasers severally, was held to be a violation of the Sherman Act (Comp Sts. ¶s 8820–8823, 8827–8830) in Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 370. It is difficult to say why a different conclusion should be reached, if the same result is attained by acquiescence and cooperation without express agreement between the manufacturer and his purchasers severally. Eastern States Retail Lumber Association *v.* United States, 234 U. S. 600. But we understand the Supreme Court to hold in United States *v.* Colgate & Co., 250 U. S. 300, that a similar but less drastic method of sale constitutes merely the exercise of a man's right to do what he will with his own and is not obnoxious to the Sherman Act.

The facts as found by the Commission, being supported by testimony, are conclusive; but the effect of them is a question of law, to be expressed in a conclusion of law, and the Commission so describes it. We do not see how this

conclusion can be sustained in face of the decision in the Colgate case.

The order is reversed.

MANTON, *Circuit Judge* (concurring):

I concur in the result here announced and will state my reasons:

In considering the cases which arise under the jurisdiction of the Federal Trade Commission, the distinction between the Sherman Act (July 2, 1890, chap. 647, 26 Stat. 209) and the act which creates and defines the jurisdiction and duties of the Federal Trade Commission (Act of Congress, Sept. 26, 1914, chap. 315, sec. 5, 38 Stat. 719) must be kept in mind. The purposes of the Sherman Act and of the Federal Trade Commission act are different. The Sherman Act is intended for the prohibition of contracts and combinations in restraint of trade which are of sufficient force of oppression or coercion as amount to a monopoly or trust. In order for the Government to succeed in an equity or criminal action, or for a private litigant to succeed, where he seeks damages as a result of such alleged trust or combination, each must successfully bear the burden of establishing a combination which restrains trade. No such obligation is imposed upon the Federal Trade Commission before its order may issue requiring an individual, partnership, or corporation engaged in commerce, to desist from a practice which might lead eventually to an unlawful trust or combination which would be in restraint of trade. Section 5 of the Federal Trade act prohibits unfair methods of competition in commerce, declaring them unlawful. This act forbids all unfair methods of competition. It does not define what is unfair competition, but leaves that to the Commission for determination. Section 5 provides that the Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks and common carriers subject to the acts to regulate commerce, by [from?] using methods of unfair competition in commerce. It will thus be observed that there is no restriction or qualification to the powers thus conferred, but the method of commerce must be unfair.

This legislation appears to be analogous to that provided for in the creation of the Interstate Commerce Commission. The Interstate Commerce Act conferred the powers upon the commission to enforce any order or orders provided in the act that it might issue, and it gives to the Interstate Commerce Commission the power to issue an order to cease and desist a violation. B. & O. R. Co. *v.* Pitcairn Coal Co., 215 U. S. 481. The Interstate Commerce Commission was created for the purpose of receiving and correcting any abuse or injustice perpetrated

upon shippers by railroads or injustice to the railroads. What were reasonable rates was to be determined by the commission. It was held by the Supreme Court, with respect to enjoining or setting aside the orders of the commission by the Federal courts, that authority of the courts, in reviewing their determination, was confined to whether there had been violations of the Constitution or of the power conferred by statute or any exercise of power so arbitrary as to virtually transcend the authority conferred. Kansas City Ry. Co. *v.* United States, 231 U. S. 423; Interstate Commerce Commission *v.* L. & N. Ry. Co., 227 U. S. 88. The Federal Trade Commission Act provides that when an order is made and it is based upon a finding of unfair competition supported by evidence, it is conclusive upon the courts, and this court so held in Federal Trade Commission *v.* Gratz, 258 Fed. Rep. 314.

In my opinion, Congress had in mind in this legislation the prevention of acts which amount to unfair competition at their very inception. In this manner, the antitrust law was supplemented. To make successful either a criminal prosecution or other liability under the Sherman Act, it is necessary to find that a trust or monopoly is created which restrains trade. One act which may be an act of unfair competition may, of itself, restrain trade and may do damage to a complainant. The Federal Trade Commission Act was intended to reach such an unfair business method where the antitrust law could not do so. Of course, if all unfair acts were dealt with by the Federal Trade Commission, there would be no monopoly or trust created. It was intended by section 5 of the act to prevent practices or methods of business unfair to the public which, if not prevented, would grow and create monopolies, and thus restrain trade and lessen competition. In the case of Dr. Miles Medical Co. *v.* Park & Son, 220 U. S. 373, the Supreme Court held that where the defendant successfully prevented competition by fixing resale prices between purchasers of the products of the defendant, this amounted to a restraint of trade, and was a violation of the Sherman Anti-trust Act of July 2, 1890. The only difference between the price fixing of the Dr. Miles case and the price fixing in the "Beech-Nut merchandizing policy," which the Federal Trade Commission in the case at bar has found offensive as an unfair method of competition, is that in the former case there was an agreement in writing provided for, while in the latter the success or failure of the plan depended upon a tacit understanding with the purchasers and prospective purchasers. It is difficult to see any difference between a written agreement and a tacit understanding. In each case, if the agreement, written or unwritten, is not lived up to, it means that the prospec-

tive purchaser could not buy or obtain the goods he wished. This may of itself create a restraint of trade. In the case of Boston Store *v.* American Graphophone Co., 246 U. S. 8, speaking of the Dr. Miles case, the court said:

> It was decided that under the general law the owner of movables (in that case, proprietary medicines compounded by a secret formula) could not sell the movables and lawfully, by contract, fix a price at which the product should afterwards be sold, because to do so would be at one and the same time to sell and retain, to part with and yet to hold, to project the will of the seller, so as to cause it to control the movable parted with when it was not subject to his will, because owned by another, and thus to make the will of the seller unwarrantedly take the place of the law of the land as to such movables. It was decided that the power to make the limitation as to price for the future could not be exerted consistently with the prohibitions against restraint of trade and monopoly contained in the antitrust law.

In the plan of the petitioner herein called a "suggestion," which in truth is a tacit understanding, to do precisely what was done in the Dr. Miles case, disobedience of the "suggestion" would result in a failure to be able to buy further from the petitioner. It has been held that the trader or manufacturer who carries on an entirely private business may sell to whom he pleases. U. S. *v.* Trans-Missouri Freight Assn., 166 U. S. 290. And this case was approved in United States *v.* Colgate, 250 U. S. 300. However, in the Colgate case the court dealt solely with the purpose of the antitrust act in its prohibition of monopolies, contracts, and combinations which interfere with the free exercise of the rights of a merchant to engage in trade and commerce. The court said that in the absence of any purpose to create or maintain a monopoly, the act does not restrict the right of a trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal. It distinguishes the Dr. Miles case for the reason that it was found in this case there existed an unlawful combination which was effected through contracts which undertook to prevent dealers from freely exercising the right to sell. Referring to the facts in the Colgate case, the court said:

> Considering all said in the opinion[1] (notwithstanding some serious doubts), we are unable to accept the construction placed upon it by the Government. We can not, e. g., wholly disregard the statement that "The retailer, after buying, could, if he chose, give away his purchase or sell it at any price he saw fit, or not sell it at all; his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer who could refuse to make further sales to him, as he had the undoubted right to do." And we must conclude that, as interpreted below, the indictment does not charge Colgate & Co. with selling its products to dealers under agreements which obligated the latter not to resell except at prices fixed by the company.

[1] In the court below.

In view of this recent pronouncement in the Colgate case and even accepting the finding of facts of the Commission, I think we are forced to the conclusion that the acts found and charged in the method of doing business under the "Beech-Nut merchandizing policy" are not unfair methods of competition and that therefore this court must hold, as a matter of law, that the Commission exceeded its power in making the order appealed from.

FEDERAL TRADE COMMISSION v. GRATZ ET AL.[1]

(Argued April 20 and 21, 1920. Decided June 7, 1920.)

No. 492.

1. TRADE-MARKS AND TRADE-NAMES, KEY NO. 80½, NEW, VOL. 8A, KEY-NO. SERIES—FEDERAL TRADE COMMISSION'S ORDER TO DESIST FROM UNFAIR COMPETITION MUST BE BASED ON SUFFICIENT COMPLAINT.

Under act September 26, 1914, paragraph 5 (Comp. St. par. 8836e), providing that, when the Federal Trade Commission has reason to believe that a person, etc., has used an unfair method of competition, it shall formulate and serve a complaint, stating the charges, and after a hearing, if it deems the method of competition in question prohibited thereby, shall issue an order requiring the accused to cease and desist from using such method, if the complaint is plainly insufficient to show unfair competition, there is no foundation for an order to desist.

2. TRADE-MARKS AND TRADE-NAMES, KEY NO. 80½, NEW, VOL. 8A, KEY-NO. SERIES—FEDERAL TRADE COMMISSION'S ORDER MUST FOLLOW COMPLAINT.

An order of the Federal Trade Commission to cease and desist from using a specified method of competition, under act September 26, 1914, paragraph 5 (Comp. St. par. 8836e), should follow the complaint; otherwise it is improvident, and, when challenged, will be annulled by the court.

3. TRADE-MARKS AND TRADE-NAMES, KEY NO. 80½, NEW, VOL. 8A, KEY-NO. SERIES—WHAT CONSTITUTES UNFAIR METHODS OF COMPETITION A QUESTION FOR THE COURT.

Under act September 26, 1914, paragraph 5 (Comp. St. par. 8836e), declaring unfair methods of competition in commerce unlawful, it is for the courts, and not for the Federal Trade Commission, ultimately to determine as matter of law what constitutes unfair methods of competition.

4. TRADE-MARKS AND TRADE-NAMES, KEY NO. 68—"UNFAIR METHODS OF COMPETITION" DO NOT INCLUDE PRACTICES NOT HERETOFORE CONDEMNED.

Act September 26, 1914, paragraph 5 (Comp. St. par. 8836e), declaring "unfair methods of competition" unlawful, does not

[1] 253 U. S. 421. See case in court below, at pp. 545–549 (this volume).

apply to practices never heretofore regarded as opposed to good morals, because characterized by deception, bad faith, fraud, or oppression, or as against public policy, because of their dangerous tendency unduly to hinder competition or create monopoly.

[ED. NOTE.—For other definitions, see Words and Phrases, First and Second Series, Unfair Competition.]

5. TRADE-MARKS AND TRADE-NAMES, KEY NO. 80½, NEW, VOL. 8A, KEY-NO. SERIES—COMPLAINT FILED BY FEDERAL TRADE COMMISSION INSUFFICIENT TO SHOW UNFAIR METHODS OF COMPETITION.

A complaint filed by the Federal Trade Commission under act September 26, 1914, paragraph 5 (Comp. St., par. 8836e), charging that sellers of cotton ties and bagging and their selling and distributing agents, with the purpose and effect of discouraging and stifling competition in the sale of such bagging, had refused to sell ties, unless the purchaser would buy from them a corresponding amount of bagging, was insufficient to support an order to desist from such practice, where it did not intimate that they did not properly obtain their ties and bagging, or state the amount controlled by them, or allege that they held a monopoly of either ties or bagging, or had ability, purpose, or intent to acquire one, or allege anything justifying the conclusion that the public suffered injury, or that competitors had reasonable ground for complaint.

6. TRADE-MARKS AND TRADE-NAMES, KEY NO. 68.—MERCHANT MAY REFUSE TO SELL COTTON TIES AND BAGGING, EXCEPT IN CONJUNCTION.

All questions of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell, except in conjunction, such closely associated articles as steel ties used for binding bales of cotton and jute bagging used to wrap such bales.

(The syllabus is taken from 40 Sup. Ct. 572.)

Mr. Justice Brandeis and Mr. Justice Clarke dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Proceeding by Anderson Gratz and another, doing business as Warren, Jones & Gratz, and others, against the Federal Trade Commission, to set aside an order of the Commission. The order was annulled by the Circuit Court of Appeals for the Second Circuit (258 Fed. 314, 169 C. C. A. 330), and the Commission brings certiorari. Affirmed.

(See also 250 U. S. 657, 40 Sup. Ct. 13, 64 L. Ed. 51.)

Messrs Huston Thompson, of Washington, D. C., Alexander C. King, of Atlanta, Ga., and Claude R. Porter, of Washington, D. C., for petitioner.

Mr. Thomas F. Wagner, of Brooklyn, N. Y., for respondents.

Mr. Justice McREYNOLDS delivered the opinion of the court.

By an act approved September 26, 1914 (c. 311, 38 Stat. 717 [Comp. St. ¶s 8836a–8836k]), Congress made provision for the Federal Trade Commission and declared its powers.

Section 4 defines commerce as: "Commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation."

SECTION 5. That unfair methods of competition in commerce are hereby declared unlawful. The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce. Whenever the commission shall have reason to believe that any such person, partnership, or corporation, has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least 30 days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. * * * If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition.

Section 5 further provides that the Commission may apply to the designated Circuit Court of Appeals to enforce an order, "And shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission. The findings of the Commission as to the facts, if supported by testimony, shall be conclusive.

* * * The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided by section 240 of the Judicial Code. Any party required by such order of the Commission to cease and desist from using such method of competition may obtain a review of such order in said Circuit Court of Appeals by filing in the court a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission as in the case of an application by the Commission for an enforcement of its order, and the findings of the Commission as to the facts, if supported by testimony, shall in like manner be conclusive."

Sections 6 and 7 empower the Commission to require reports and compile information concerning corporations; to inquire concerning execution of decrees restraining violations of the antitrust acts; to investigate alleged violations of such acts; to recommend readjustments of corporate business; to publish information and make reports to Congress; to classify corporations and make rules and regulations; to investigate trade conditions; to act, under orders of the court, as a master in chancery in certain designated circumstances, etc.

Undertaking to proceed under section 5, June 4, 1917, the Commission issued a complaint containing two counts against respondents. The first related to unfair methods of competition, and the second charged violation of section 3 of the Clayton Act, approved October 15, 1914 (c. 323, 38 Stat. 730, Comp. St. ¶ 8835c). Respondents denied both charges. After taking much testimony the Commission held there was no evidence to support the second count; but it ruled that respondents had practiced unfair competition and ordered that they—"their officers and agents, cease and desist from requiring purchasers of cotton ties to also buy or agree to buy, a proportionate amount of American Manufacturing Co.'s bagging, and further that the respondents cease and desist from refusing to sell cotton ties unless the purchasers buy or agree to buy from them corresponding amounts of American Manufacturing Co.'s bagging, or any amount of cotton bagging of any kind."

Upon respondents' petition the Circuit Court of Appeals, Second Circuit, annulled the Commission's order, 258 Fed. 314. It said, "We think there is no evidence to support any general practice of the respondents to refuse to sell ties unless the purchaser bought at the same

time the necessary amount of the American Manufacturing Co.'s bagging, and that the Commission has no jurisdiction to determine the merits of specific individual grievances."

The challenged order is based solely upon the first count of the complaint, which follows:

Federal Trade Commission *v.* Anderson Gratz and Benjamin Gratz, copartners, doing business under the firm name and style of Warren, Jones & Gratz; P. P. Williams, W. H. Fitzhugh and Alex. Fitzhugh, copartners, doing business under the firm name and style of P. P. Williams & Co., and Charles O. Elmer.

The Federal Trade Commission having reason to believe, from a preliminary investigation made by it that Anderson Gratz and Benjamin Gratz, copartners, doing business under the firm name and style of Warren, Jones & Gratz; P. P. Williams, W. H. Fitzhugh, and Alex. Fitzhugh, copartners, doing business under the firm name and style of P. P. Williams & Co., and Charles O. Elmer, all of whom are hereinafter referred to as respondents, have been, and are, using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect, on information and belief, as follows:

I.

PARAGRAPH ONE.—That the respondents, Anderson Gratz and Benjamin Gratz, are copartners, doing business under the firm name and style of Warren, Jones & Gratz, having their principal office and place of business in the city of St. Louis and State of Missouri, and are engaged in the business of selling in interstate commerce, either directly to the trade or through the respondents hereinafter named, steel ties made and used for binding bales of cotton, and which steel ties are manufactured by the Carnegie Steel Co., of Pittsburgh, Pa., and also selling, in the same manner, jute bagging, used to wrap bales of cotton, and which jute bagging is manufactured by the American Manufacturing Co., of St. Louis, Mo.

PARAGRAPH TWO.—That the respondents, P. P. Williams, W. H. Fitzhugh, and Alex. Fitzhugh, are copartners, doing business under the firm name and style of P. P. Williams & Co., having their principal office and place of business in the city of Vicksburg and State of Mississippi, and the said last-named respondents and the said respondent Charles O. Elmer, who is located and doing business at the city of New Orleans and State of Louisiana, are the selling and distributing agents of the said firm of Warren, Jones & Gratz, and sell and distribute the ties and bagging, manufactured as aforesaid, in interstate commerce, principally to jobbers and dealers, who resell the same to retailers, cotton ginners, and farmers.

PARAGRAPH THREE.—That with the purpose, intent, and effect of discouraging and stifling competition in interstate commerce in the sale of such bagging, all of the respondents do now refuse, and for more than a year last past have refused, to sell any of such ties unless the prospective purchaser thereof would also buy from them bagging to be used with the number of ties proposed to be bought; that is to say, for each six of such ties proposed to be bought from the respondents the prospective purchaser is required to buy six yards of such bagging.

It is unnecessary now to discuss conflicting views concerning validity and meaning of the act creating the Commission and effect of the evidence presented. The judgment below must be affirmed, since, in our opinion, the first count of the complaint is wholly insufficient to charge respondents with practicing "unfair methods of competition in commerce" within the fair intendment of those words. We go no further and confine this opinion to the point specified.

When proceeding under section 5, it is essential, first, that, having reason to believe a person, partnership, or corporation has used an unfair method of competition in commerce, the Commission shall conclude a proceeding "in respect thereof would be to the interest of the public"; next, that it formulate and serve a complaint stating the charges "in that respect" and give opportunity to the accused to show why an order should not issue directing him to "cease and desist from the violation of the law so charged in said complaint." If after a hearing the Commission shall deem "the method of competition in question is prohibited by this act," it shall issue an order requiring the accused "to cease and desist from using such method of competition."

If, when liberally construed, the complaint is plainly insufficient to show unfair competition within the proper meaning of these words there is no foundation for an order to desist; the thing which may be prohibited is the method of competition specified in the complaint. Such an order should follow the complaint; otherwise it is improvident and, when challenged, will be annulled by the court.

The words "unfair method of competition" are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.

Count one alleges, in effect: that Warren, Jones & Gratz are engaged in selling, either directly to the trade or through their corespondents, cotton ties produced by the Carnegie Steel Co., and also jute bagging manufactured by the American Manufacturing Co. That P. P. Williams & Co., of Vicksburg, and C. O. Elmer, of New Orleans, are the selling and distributing agents of Warren, Jones & Gratz, and as such sell and distribute their ties and bagging to jobbers and dealers, who resell them to re-

tailers, ginners, and farmers. That with the purpose and effect of discouraging and stifling competition in the sale of such bagging all the respondents for more than a year have refused to sell any of such ties unless the purchaser would buy from them a corresponding amount of bagging—6 yards with as many ties.

The complaint contains no intimation that Warren, Jones & Gratz did not properly obtain their ties and bagging as merchants usually do; the amount controlled by them is not stated; nor is it alleged that they held a monopoly of either ties or bagging or had ability, purpose, or intent to acquire one. So far as appears, acting independently, they undertook to sell their lawfully acquired property in the ordinary course, without deception, misrepresentation, or oppression, and at fair prices, to purchasers willing to take it upon terms openly announced.

Nothing is alleged which would justify the conclusion that the public suffered injury or that competitors had reasonable ground for complaint. All question of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell, except in conjunction, such closely associated articles as ties and bagging. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved. United States *v.* Colgate, 250 U. S. 300; United States *v.* A. Schrader's Son, Inc. (Mar. 1, 1920), 252 U. S. 85.

The first count of the complaint fails to show any unfair method of competition practiced by respondents and the order based thereon was improvident.

The judgment of the court below is

Affirmed.

Mr. Justice PITNEY concurs in the result.

Mr. Justice BRANDEIS dissenting, with whom Mr. Justice CLARKE concurs.

First. The court disposes of the case on a question of pleading. This, under the circumstances, is contrary to established practice. The circumstances are these:

The pleading held defective is not one in this suit. It is the pleading by which was originated the proceeding before the Federal Trade Commission, an administrative tribunal, whose order this suit was brought to set aside. No suggestion was made in the proceeding before the Commission that the complaint was defective. No such objection was raised in this suit in the court below. It was not made here by counsel. The objection is taken now for the first time and by the court.

This suit, begun in the Circuit Court of Appeals for the Second Circuit, was brought to set aside an order of

the Federal Trade Commission. Before the latter the matter involved was thoroughly tried on the merits. There was a complaint and answers. Thirty-five witnesses were examined and cross-examined. A report of proposed findings as to facts was submitted by the examiner and exceptions were filed thereto. Then, the case was heard before the Commission, which made a finding of facts, stated its conclusions as to the law, and ultimately issued the order in question. The proceedings occupied more than 16 months. The report of them fills 400 pages of the printed record. In my opinion, it is our duty to determine whether the facts found by the Commission are sufficient in law to support the order; and also, if it is questioned, whether the evidence was sufficient to support the findings of fact.

Second. If the sufficiency of the complaint is held to be open for consideration here, we should, in my opinion, hold it to be sufficient. The complaint was filed under section 5 of the Federal Trade Commission Act, which declares unlawful "unfair methods of competition in commerce"; empowers the Commission to prevent their use; and directs it to issue and serve "a complaint stating its charges in that respect" whenever it has reason to believe that a concern "has been or is using" such methods. The function of the complaint is solely to advise the respondent of the charges made so that he may have due notice and full opportunity for a hearing thereon. It does not purport to set out the elements of a crime like an indictment or information, nor the elements of a cause of action like a declaration at law or a bill in equity. All that is requisite in a complaint before the Commission is that there be a plain statement of the thing claimed to be wrong so that the respondent may be put upon his defense. The practice of the Federal Trade Commission in this respect, as in many others, is modeled on that which has been pursued by the Interstate Commerce Commission for a generation and has been sanctioned by this as well as the lower Federal courts. United States Leather Co. *v.* Southern Ry. Co., 21 I. C. C. 323, 324; Clinton Sugar Refining Co. *v.* C. & N. W. Ry. Co., 28 I. C. C. 364, 367; Stuarts Draft Milling Co. *v.* Southern Ry. Co., 31 I. C. C. 623, 624; New York Central, etc., R. R. Co. *v.* Interstate Commerce Commission, 168 Fed. 131, 138–139; Dickerson *v.* Louisville & Nashville R. R. Co., 187 Fed. 874, 878; Texas & Pacific Ry. *v.* Interstate Commerce Commission, 162 U. S. 197, 215; Cincinnati, Hamilton & Dayton Ry. Co. *v.* Interstate Commerce Commission, 206 U. S. 142, 149.

The complaint here under consideration stated clearly that an unfair method of competition had been used by respondents, and specified what it was, namely, refusing to sell cotton ties unless the customer would purchase

with each six ties also six yards of bagging. The complaint did not set out the circumstances which rendered this tying of bagging to ties an unfair practice. But this was not necessary. The complaint was similar in form to those filed with the Interstate Commerce Commission on complaints to enforce the prohibition of "unjust and unreasonable charges" or of "undue or unreasonable preference or advantage" which the act to regulate commerce imposes. It is unnecessary to set forth why the rate specified was unjust or why the preference specified is undue or unreasonable, because these are matters not of law but of fact to be established by the evidence. Pennsylvania Co. *v.* United States, 236 U. S. 351, 361. So far as appears neither this nor any other court has ever held that an order entered by the Interstate Commerce Commission may be set aside as void, because the complaint by which the proceeding was initiated, failed to set forth the reasons why the rate or the practice complained of was unjust or unreasonable; and I can not see why a different rule should be applied to orders of the Federal Trade Commission issued under section 5.[1]

In considering whether the complaint is sufficient, it is necessary to bear in mind the nature of the proceeding under review. The proceeding is not punitive. The complaint is not made with a view to subjecting the respondents to any form of punishment. It is not remedial. The complaint is not filed with a view to affording compensation for any injury alleged to have resulted from the matter charged, nor with a view to protecting individuals from any such injury in the future. The proceeding is strictly a preventive measure taken in the interest of the general public. And what it is brought to prevent is not the commission of *acts* of unfair competition, but the pursuit of *unfair methods*. Furthermore, the order is not self-executory. Standing alone it is only informative and advisory. The Commission can not enforce it. If not acquiesced in by the respondents, the Commission may apply to the Circuit Court of Appeals to enforce it. But the Commission need not take such action; and it did not do so in respect to the order here in question. Respondents may, if they see fit, become the actors and ask to have the order set aside. That is what was done in the case at bar.

The proceeding is thus a novelty. It is a new device in administrative machinery, introduced by Congress in the year 1914, in the hope thereby of remedying condi-

[1] See Report Senate Committee on Interstate Commerce, June 13, 1914, 63d Cong., 2d sess., No. 597, p. 13: "It is believed that the term 'unfair competition' has a legal significance which can be enforced by the Commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition."

tions in business which a great majority of the American people regarded as menacing the general welfare, and which for more than a generation they had vainly attempted to remedy by the ordinary processes of law. It was believed that widespread and growing concentration in industry and commerce restrained trade, and that monopolies were acquiring increasing control of business. Legislation designed to arrest the movement and to secure disintegration of existing combinations had been enacted by some of the States as early as 1889. In 1890 Congress passed the Sherman law. It was followed by much legislation in the States [1] and many official investigations. Between 1906 and 1913 reports were made by the Federal Bureau of Corporations of its investigations into the petroleum industry, the tobacco industry, the steel industry, and the farm implement industry. A special committee of Congress investigated the affairs of the United States Steel Corporation. And in 1911 this court rendered its decision in Standard Oil Co. *v.* United States, 221 U. S. 1, and in American Tobacco Co. *v.* United States, 221 U. S. 106. The conviction became general in America, that the legislation of the past had been largely ineffective. There was general agreement that further legislation was desirable. But there was a clear division of opinion as to what its character should be. Many believed that concentration (called by its opponents monopoly) was inevitable and desirable; and these desired that concentration should be recognized by law and be regulated. Others believed that concentration was a source of evil; that existing combinations could be disintegrated, if only the judicial machinery were perfected; and that further concentration could be averted by providing additional remedies, and particularly through regulating competition. The latter view prevailed in the Sixty-third Congress.[2] The Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 730) was framed largely with a view to making more effective the remedies given by the Sherman law. The Federal Trade Commission Act (Act Sept. 26, 1914, c. 311, 38 Stat. 717) created an administrative tribunal, largely with a view to regulating competition.

[1] See Laws on Trusts and Monopolies, compiled under direction of the Clerk of the House Committee on the Judiciary, 63d Cong., by Nathan B. Williams, revised Jan. 10, 1914; also Trust Laws and Unfair Competition (Federal) Bureau of Corporations. Mar. 15, 1915.

[2] See Report of Senate Committee on Interstate Commerce, June 13, 1914, 63d Cong., 2d sess., No. 597, p. 10, reporting the bill:

"Some would found such a commission upon the theory that monopolistic industry is the ultimate result of economic evolution and that it should be so recognized and declared to be vested with a public interest and as such regulated by a commission. This contemplates even the regulation of prices. Others hold that private monopoly is intolerable, unscientific, and abnormal, but recognize that a commission is a necessary adjunct to the preservation of competition and to the practical enforcement of the law. * * *

"The commission which is proposed by your committee in the Bill submitted is founded upon the latter purpose and idea."

Many of the duties imposed upon the Trade Commission had been theretofore performed by the Bureau of Corporations. That which was in essence new legislation was the power conferred by section 5. The belief was widespread that the great trusts had acquired their power, in the main, through destroying or overreaching their weaker rivals by resort to unfair practices.[1] As Standard Oil rebates led to the creation of the Interstate Commerce Commission,[2] other unfair methods of competition, which the investigations of the trusts had laid bare, led to the creation of the Federal Trade Commission. It was hoped that, as the former had substantially eliminated rebates, the latter might put an end to all other unfair trade practices, and that it might prove possible thereby to preserve the competitive system. It was a new experiment on old lines, and the machinery employed was substantially similar.

In undertaking to regulate competition through the Trade Commission, Congress (besides resorting to administrative as distinguished from judicial machinery) departed in two important respects from the methods and measures theretofore applied in dealing with trusts and restraints of trade:

(1) Instead of attempting to inflict punishment for having done prohibited acts, instead of enjoining the continuance of prohibited combinations and compelling disintegration of those formed in violation of law, the act undertook to preserve competition through supervisory action of the Commission. The potency of accomplished facts had already been demonstrated. The task of the Commission was to protect competitive business from *further* inroads by monopoly. It was to be ever vigilant. If it discovered that any business concern had used any practice which would be likely to result in public injury—because in its nature it would tend to aid or develop into a restraint of trade—the Commission was directed to intervene, before any act should be done or condition arise violative of the antitrust act. And it should do this by filing a complaint with a view to a thorough investigation; and, if need be, the issue of an order. Its action was to be prophylactic. Its purpose in respect to restraints of trade was prevention of diseased business conditions, not cure.[3]

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[1] See "Unfair Competition," by William S. Stevens, Political Science Quarterly (1914), p. 283; "The Morals of Monopoly and Competition" (1916), by H. B. Reed.

[2] See Railway Problems, by William Z. Ripley (1907), p. X.

[3] Senator Cummins, chairman of the committee which reported the bill, said (Cong. Rec., vol. 51, p. 11455):

"Unfair competition must usually proceed to great lengths and be destructive of competition before it can be seized and denounced by the antitrust law. In other cases it must be associated with, coupled with, other vicious and unlawful practices in order to bring the person or the corporation guilty of the practice within the scope of the antitrust law. The purpose of this bill in this section and in other sections which I hope will be added to it, is to seize the offender before his ravages have gone

(2) Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the act left the determination to the Commission.[1] Experience with existing laws had taught that definition, being necessarily rigid, would prove embarrassing and, if rigorously applied, might involve great hardship. Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another industry, or even in the same industry under different circumstances, be entirely unobjectionable.[2] Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition must necessarily soon prove incomplete, as with new conditions constantly arising novel unfair methods would be devised and developed. In leaving to the Commission the determination of the question whether the method of competition pursued in a particular case was unfair, Congress followed the precedent which it had set a quarter of century earlier, when by the act to regulate commerce it conferred upon the Interstate Commerce Commission power to determine whether a preference or advantage given to a shipper or locality fell within the prohibition of an undue or unreasonable preference or advantage.[3] See Pennsylvania Co. *v.* United States, *supra*, 236 U. S. 361; Texas & Pacific Railway *v.* Interstate Commerce

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to the length necessary in order to bring him within the law that we already have.

"We knew little of these things in 1890. The commerce of the United States has largely developed in the last 25 years. The modern methods of carrying on business have been discovered and put into operation in the last quarter of a century; and as we have gone on under the antitrust law and under the decisions of the court in their effort to enforce that law, we have observed certain forms of industrial activity which ought to be prohibited whether in and of themselves they restrain trade or commerce or not. We have discovered that their tendency is evil; we have discovered that the end which is inevitably reached through these methods is an end which is destructive of fair commerce between the States. It is these considerations which, in my judgment, have made it wise if not necessary to supplement the antitrust law by additional legislation, not in antagonism to the antitrust law, but in harmony with the antitrust law, to more effectively put into the industrial life of America the principle of the antitrust law, which is fair, reasonable competition, independence to the individual, and disassociation among the corporations. * * *"

[1] See Report Senate Committee on Interstate Commerce, June 13, 1914, 63d Cong., 2d sess., No. 597, p. 13: "The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better. * * *" See also "Unfair Competition," by W. H. S. Stevens (University of Chicago Press, 1916), pp. 1, 2. For laws prohibiting specific acts of unfair competition, see "Trust Laws and Unfair Competition," (Federal) Bureau of Corporations (Mar. 15, 1915), pp. 184, 199.

[2] Report of (Federal) Bureau of Corporations on the International Harvester Co., Mar. 3, 1913, p. 30: "In discussing the competitive methods of the company it should be recognized that some practices which might be regarded with indifference if there were a number of competitors of substantially equal size and power may become objectionable when one competitor far outranks not only its nearest rival, but practically all rivals combined, as is true of the International Harvester Co., so far as several of its most important lines are concerned."

The Australian Industries Preservation Act, 1908–1910, expressly declares that "unfair competition means competition which is unfair in the circumstances." "Trust Laws and Unfair Competition" (Federal) Bureau of Corporations (Mar. 15, 1915), pp. 552, 747.

[3] See note 1, *supra* [footnote on p. 572].

Commission, 162 U. S. 197, 219, 220. Recognizing that the question whether a method of competitive practice was unfair would ordinarily depend upon special facts, Congress imposed upon the Commission the duty of finding the facts; and it declared that findings of fact so made (if duly supported by evidence) were to be taken as final. The question whether the method of competition pursued could, on those facts, reasonably be held by the Commission to constitute an unfair method of competition, being a question of law, was necessarily left open to review by the court. Compare Interstate Commerce Commission *v.* Diffenbaugh, 222 U. S. 42; Interstate Commerce Commission *v.* Baltimore & Ohio R. R., 145 U. S. 263.

Third. Such a question of law is presented to us for decision; and it is this: Can the refusal by a manufacturer to sell his product to a jobber or retailer, except upon condition that the purchaser will buy from him also his trade requirements in another article or articles, reasonably be found by the Commission to be an unfair method of competition under the circumstances set forth in the findings of fact? If we were called upon to consider the sufficiency of the complaint, and that merely, the question for our decision would be, whether the particular practice could, under any circumstances, reasonably be deemed an unfair method of competition. But as this suit to set aside the order of the Commission brings before us its findings of fact, we must determine whether these are sufficient to support their conclusion of law that the practice constituted—

"Under the circumstances therein set forth, unfair methods of competition in interstate commerce against other manufacturers, dealers, and distributors in the material known as sugar-bag cloth, and against manufacturers, dealers, and distributors of the bagging known as rewoven bagging and second-hand bagging in violation of" the statute.

It is obvious that the imposition of such a condition is not necessarily and universally an unfair method; but that it may be such under some circumstances seems equally clear. Under the usual conditions of competitive trade the practice might be wholly unobjectionable. But the history of combinations has shown that what one may do with impunity, may have intolerable results when done by several in cooperation. Similarly what approximately equal individual traders may do in honorable rivalry may result in grave injustice and public injury, if done by a great corporation in a particular field of business which it is able to dominate. In other words, a method of competition fair among equals may be very unfair if applied where this is inequality of resources.[1] Without

[1] See "The Morals of Conopoly and Competition" by H. B. Reed (1916), pp. 120–122.

providing for those cases where the method of competition here involved would be unobjectionable, Massachusetts legislated against the practice, as early as 1901, by a statute (c. 478) of general application. Its highest court, in applying the law which it held to be constitutional, described the prohibited method as "unfair competition." Commonwealth *v.* Strauss, 188 Mass. 229; 191 Mass. 545. Compare People *v.* Duke, 44 N. Y. Suppl. 336. The (Federal) Bureau of Corporations held the practice, which it described as "full-line forcing," to be highly reprehensible.[1] Congress, by section 3 of the Clayton Act, specifically prohibited the practice in a limited field under certain circumstances. An injunction against the practice has been included in several decrees in favor of the Government entered in cases under the Sherman law.[2] In the decree by which the American Tobacco Co. was disintegrated pursuant to the mandate of this court, each of the 14 companies was enjoined from "refusing to sell to any jobber any brand of any tobacco product manufactured by it, except upon condition that such jobber shall purchase from the vendor some other brand or product also manufactured and sold by it. * * *" United States *v.* American Tobacco Co., 191 Fed. 371, 429. The practice here in question is merely one form of the so-called "tying clauses" or "conditional requirements" which have been declared in a discerning study of the whole subject to be "perhaps the most interesting of any of the methods of unfair competition."[3]

The following facts found by the Commission, and which the Circuit Court of Appeals held were supported by sufficient evidence, show that the conditions in the cotton-tie and bagging trade were in 1918 such that the Federal Trade Commission could reasonably find that the tying clause here in question was an unfair method of competition: Cotton, America's chief staple, is marketed in bales. To bale cotton, steel ties and jute bagging are essential. The Carnegie Steel Co., a subsidiary of the United States Steel Corporation, manufactures so large a proportion of all such steel ties that it dominates the cotton-tie situation in the United States and is able to fix and control the price of such ties throughout the country. The American Manufacturing Co. manufactures about 45 per cent of all bagging used for cotton baling; one other company about 20 per cent; and the remaining 35 per cent is made up of second-hand bagging and a material called sugar-bag cloth. Warren, Jones & Gratz, of St. Louis, are the Carnegie Co.'s sole agents

[1] Report of the (Federal) Bureau of Corporations on the International Harvester Co. (Mar. 3, 1913), p. 308.
[2] See "Unfair Methods of Competition and Their Prevention" by W. H. S. Stevens, Annals, American Academy of Political and Social Science (1916), pp. 42, 48. "Trust Laws and Unfair Competition," (Federal) Bureau of Corporations (Mar. 15, 1915), pp. 484–486, 493.
[3] "Unfair Competition," by W. H. S. Stevens (1916), p. 54.

for selling and distributing steel ties. They are also the American Manufacturing Co.'s sole agents for selling and distributing jute bagging in the cotton-growing section west of the Mississippi. By virtue of their selling agency for the Carnegie Co., Warren, Jones & Gratz held a dominating and controlling position in the sale and distribution of cotton ties in the entire cotton-growing section of the country, and thereby it was in a position to force would-be purchasers of ties to also buy from them bagging manufactured by the American Manufacturing Co. A great many merchants, jobbers, and dealers in bagging and ties throughout the cotton-growing States were many times unable to procure ties from any other firm than Warren, Jones & Gratz. In many instances Warren, Jones & Gratz refused to sell ties unless the purchaser would also buy from them a corresponding amount of bagging, and such purchasers were oftentimes compelled to buy from them bagging manufactured by the American Manufacturing Co. in order to procure a sufficient supply of steel ties.

These are conditions closely resembling those under which "full-line forcing," "exclusive-dealing requirements," or "shutting off materials, supplies, or machines from competitors,"—well-known methods of competition, have been held to be unfair, when practiced by concerns holding a preponderant position in the trade. [1]

Fourth. The Circuit Court of Appeals set aside the order of the Commission solely on the ground that it was without authority to determine the merits of specific individual grievances, and that the evidence did not support its finding that Warren, Jones & Gratz had—

"adopted and practiced the policy of refusing to sell steel ties to those merchants and dealers who wished to buy from them unless such merchants and dealers would also buy from them a corresponding amount of jute bagging."

The reason assigned by the Circuit Court of Appeals for so holding was that the evidence failed to show that the practice complained of (although acted on in individual cases by respondents) had become their "general practice." But the power of the Trade Commission to prohibit an unfair method of competition found to have been used is not limited to cases where the practice had become general. What section 5 declares unlawful is not unfair competition. That had been unlawful before. What that section made unlawful were "unfair methods of competition"; that is, the method or means by which an unfair end might be accomplished. The Commission was directed to act, if it had reason to believe that an "unfair method of competition in commerce has been

[1] See "Trust Laws and Unfair Competition" (Federal) Bureau of Corporations (Mar. 15, 1915), pp. 319–323, 328.

or is being used." The purpose of Congress was to prevent any unfair method which may have been used by any concern in competition from becoming its general practice. It was only by stopping its use before it became a general practice, that the apprehended effect of an unfair method in suppressing competition by destroying rivals could be averted. As the Circuit Court of Appeals found that the evidence was sufficient to support the facts set forth above, and since on those facts the Commission could reasonably hold that the method of competition in question was unfair under the circumstances, it had power under the act to issue the order complained of.

In my opinion the judgment of the circuit court of appeals should be reversed.

APPENDIX III.

RULES OF PRACTICE BEFORE THE COMMISSION.

[Adopted June 27, 1915. Amended as shown by footnotes.]

I. SESSIONS.

Principal office. The principal office of the Commission at Washington, D. C., is open each business day from 9 a. m. to 4.30 p. m.

Commission may exercise power elsewhere. The Commission may meet and exercise all its powers at any other place, and may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

Hearings as ordered. Sessions of the Commission for hearing contested proceedings will be held as ordered by the Commission.

Sessions for orders and other business. Sessions of the Commission for the purpose of making orders and for the transaction of other business, unless otherwise ordered, will be held at the office of the Commission at Washington, D. C., on each business day at 10.30 a. m. Three members of the Commission shall constitute a quorum for the transaction of business.

Quorum.

Orders signed by Secretary. All orders of the Commission shall be signed by the Secretary.

II. COMPLAINTS.

Who may ask complaint. Any person, partnership, corporation, or association may apply to the Commission to institute a proceeding in respect to any violation of law over which the Commission has jurisdiction.

Form of application. Such application shall be in writing, signed by or in behalf of the applicant, and shall contain a short and simple statement of the facts constituting the alleged violation of law and the name and address of the applicant and of the party complained of.

Commission to investigate. The Commission shall investigate the matters complained of in such application, and if upon investigation the Commission shall have reason to believe that there is a violation of law over which the Commission has jurisdiction, the Commission shall issue and serve upon the party complained of a complaint stating its charges

Issuance and service of complaint.

and containing a notice of a hearing upon a day and at a place therein fixed, at least 40 days after the service of said complaint.[1] Notice.

III. ANSWERS.

Within 30 days from the service of the complaint, unless such time be extended by order of the Commission, the defendant shall file with the Commission an answer to the complaint. Such answer shall contain a short and simple statement of the facts which constitute the ground of defense. It shall specifically admit or deny or explain each of the facts alleged in the complaint, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Answers in typewriting must be on one side of the paper only, on paper not more than 8½ inches wide and not more than 11 inches long, and weighing not less than 16 pounds to the ream, folio base, 17 by 22 inches, with left-hand margin not less than 1½ inches wide, or they may be printed in 10 or 12 point type on good unglazed paper 8 inches wide by 10½ inches long, with inside margins not less than 1 inch wide. Three copies of such answer must be filed.[2] Time allowed for answer. Form of answer. Size of paper, margin, etc.

IV. SERVICE.

Complaints, orders, and other processes of the Commission may be served by anyone duly authorized by the Commission, either (*a*) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer, or a director, of the corporation or association to be served; or (*b*) by leaving a copy thereof at the principal office or place of business of such person, partnership, corporation, or association; or (*c*) by registering and mailing a copy thereof addressed to such person, partnership, corporation, or association at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other Personal, or By leaving copy, or By registered mail. Return.

[1] The third paragraph of Rule II originally read as follows: "The Commission shall investigate the matters complained of in such application, and if upon investigation it shall appear to the Commission that there is a violation of law over which the Commission has jurisdiction, the Commission shall issue and serve upon the party complained of a complaint stating its charges and containing a notice of a hearing upon a day and at a place therein fixed at least 40 days after the service of said complaint." It was amended to its present form on Oct. 29, 1915.

[2] Resolution passed by the Commission Oct. 19, 1920, calls for the filing of three copies of the answer.

process, setting forth the manner of said service, shall be proof of the same, and the return post-office receipt for said complaint, order, or other process, registered and mailed as aforesaid, shall be proof of the service of the same.

V. INTERVENTION.

Form of application.

Any person, partnership, corporation, or association desiring to intervene in a contested proceeding shall make application in writing, setting out the grounds on which he or it claims to be interested. The Commission may, by order, permit intervention by counsel or in person to such extent and upon such terms as it shall deem just.

Permitted by order.

Size of paper, margin, etc., used on application.

Applications to intervene must be on one side of the paper only, on paper not more than 8½ inches wide and not more than 11 inches long, and weighing not less than 16 pounds to the ream, folio base, 17 by 22 inches, with left-hand margin not less than 1½ inches wide, or they may be printed in 10 or 12 point type on good unglazed paper 8 inches wide by 10½ inches long, with inside margins not less than 1 inch wide.

VI. CONTINUANCES AND EXTENSIONS OF TIME.

In discretion of Commission.

Continuances and extensions of time will be granted at the discretion of the Commission.

VII. WITNESSES AND SUBPŒNAS.

Examination ordinarily oral.

Witnesses shall be examined orally, except that for good and exceptional cause for departing from the general rule the Commission may permit their testimony to be taken by deposition.

Subpœnas for witnesses.

Subpœnas requiring the attendance of witnesses from any place in the United States at any designated place of hearing may be issued by any member of the Commission.

Subpœnas for production of documentary evidence.

Subpœnas for the production of documentary evidence (unless directed to issue by a Commissioner upon his own motion) will issue only upon application in writing, which must be verified and must specify, as near as may be, the documents desired and the facts to be proved by them.

Witness fees and mileage.

Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken, and the persons taking the same, shall severally be entitled to the same fees as are paid

for like services in the courts of the United States. Witness fees shall be paid by the party at whose instance the witnesses appear.[1]

VIII. TIME FOR TAKING TESTIMONY.[2]

Exmination of witnesses to proceed as fast as practicable.

Upon the joining of issue in a proceeding by the Commission the examination of witnesses therein shall proceed with all reasonable diligence and with the least practicable delay. Not less than five nor more than ten days' notice shall be given by the Commission to counsel or parties of the time and place of examination of witnesses before the Commission, a Commissioner, or an Examiner.

Notice to counsel.

IX. OBJECTIONS TO EVIDENCE.

To state grounds of objection, etc.

Objections to the evidence before the Commission, a Commissioner or an Examiner shall, in any proceeding, be in short form, stating the grounds of objections relied upon, and no transcript filed shall include argument or debate.

X. MOTIONS.

To briefly state nature of order applied for, etc.

A motion in a proceeding by the Commission shall briefly state the nature of the order applied for, and all affidavits, records, and other papers upon which the same is founded, except such as have been previously filed or served in the same proceeding, shall be filed with such motion and plainly referred to therein.

XI. HEARINGS ON INVESTIGATIONS.

By single commissioner.

When a matter for investigation is referred to a single Commissioner for examination or report, such Commissioner may conduct or hold conferences or hearings thereon, either alone or with other Commissioners who may sit with him, and reasonable notice of the time and place of such hearings shall be given to parties in interest and posted.

General counsel or assistant to conduct hearing.

The General Counsel or one of his assistants, or such other attorney as shall be designated by the Commission, shall attend and conduct such hearings, and such hearings may, in the discretion of the Commissioner holding same, be public.

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[1] This sentence added pursuant to resolution passed by the Commission Nov. 19, 1920.

[2] Rules VIII, IX, X, and XI were not a part of the original rules. They were adopted on Apr. 25, 1917. The rules now numbered XII, XIII, XIV, and XV were originally numbered VIII, IX, X, and XI.

XII. DEPOSITIONS IN CONTESTED PROCEEDINGS.

Commission may order. The Commission may order testimony to be taken by deposition in a contested proceeding.

Before any person designated. Depositions may be taken before any person designated by the Commission and having power to administer oaths.

Applications for depositions. Any party desiring to take the deposition of a witness shall make application in writing, setting out the reasons why such deposition should be taken, and stating the time when, the place where, and the name and post-office address of the person before whom it is desired the deposition be taken, the name and post-office address of the witness, and the subject matter or matters concerning which the witness is expected to testify. If good cause be shown, the Commission will make and serve upon the parties, or their attorneys, an order wherein the Commission shall name the witness whose deposition is to be taken and specify the time when, the place where, and the person before whom the witness is to testify, but such time and place, and the person before whom the deposition is to be taken, so specified in the Commission's order, may or may not be the same as those named in said application to the Commission.

Testimony of witness. The testimony of the witness shall be reduced to writing by the officer before whom the deposition is taken, or under his direction, after which the deposition shall be subscribed by the witness and certified in usual form by the officer.

Deposition to be forwarded After the deposition has been so certified it shall, together with a copy thereof made by such officer or under his direction, be forwarded by such officer under seal in an envelope addressed to the Commission at its office in Washington, D. C.

And filed. Copy to defendant or his attorney. Upon receipt of the deposition and copy the Commission shall file in the record in said proceeding such deposition and forward the copy to the defendant or the defendant's attorney.

Size of paper, etc. Such depositions shall be typewritten on one side only of the paper, which shall be not more than 8½ inches wide and not more than 11 inches long and weighing not less than 16 pounds to the ream, folio base, 17 by 22 inches, with left-hand margin not less than 1½ inches wide.

Notice. No deposition shall be taken except after at least six days' notice to the parties, and where the deposition is taken in a foreign country such notice shall be at least 15 days.

No deposition shall be taken either before the proceeding is at issue, or, unless under special circumstances and for good cause shown, within 10 days prior to the date of the hearing thereof assigned by the Commission, and where the deposition is taken in a foreign country it shall not be taken after 30 days prior to such date of hearing. Limitations as to time.

XIII. DOCUMENTARY EVIDENCE.

Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evidence, such document will not be filed, but a copy only of such relevant and material matter shall be filed. Relevant and material matter only to be filed.

XIV. BRIEFS.

Unless otherwise ordered, briefs may be filed at the close of the testimony in each contested proceeding. The presiding Commissioner or Examiner shall fix the time within which briefs shall be filed and service thereof shall be made upon the adverse parties. Time of filing.

All briefs must be filed with the secretary and be accompanied by proof of service upon the adverse parties. Twenty[1] copies of each brief shall be furnished for the use of the Commission, unless otherwise ordered. Filed with secretary with proof of service.

Application for extension of time in which to file any brief shall be by petition in writing, stating the facts upon which the application rests, which must be filed with the Commission at least five days before the time for filing the brief. Applications for extension of time.

Every brief shall contain, in the order here stated—

(1) A concise abstract or statement of the case. Form of brief.

(2) A brief of the argument, exhibiting a clear statement of the points of fact or law to be discussed, with the reference to the pages of the record and the authorities relied upon in support of each point.

Every brief of more than 10 pages shall contain on its top fly leaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where the cases are cited. Requirements if more than 10 pages.

Briefs must be printed in 10 or 12 point type on good unglazed paper 8 inches by 10½ inches, with inside mar- Size of type, paper, etc.

[1] Fifteen copies originally called for. Amended to its present form July 29, 1920.

gins not less than 1 inch wide, and with double-leaded text and single-leaded citations.

Oral arguments.

Oral arguments will be had only as ordered by the Commission.

XV. ADDRESS OF THE COMMISSION.

Federal Trade Commission, Washington, D. C.

All communications to the Commission must be addressed to Federal Trade Commission, Washington, D. C., unless otherwise specifically directed.