FEDERAL TRADE COMMISSION
v.
ORLEANS IRON WORKS, INC.

COMPLAINT IN THE MATTER OF THE ALLEGED VIOLATION OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER 26, 1914.

Docket 749.—June 30, 1921.

SYLLABUS.

Where a corporation engaged in the business of repairing and furnishing repair parts to ships, gave to captains and other employees of vessels, without the knowledge or consent of their employers, valuable gifts, cash commissions, and gratuities as an inducement to have such vessels repaired by it:

Held, That such gifts, under the circumstances set forth, constituted an unfair method of competition.

COMPLAINT.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it that Orleans Iron Works (Inc.), hereinafter referred to as respondent, has been and is using unfair methods of competition in interstate and foreign 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 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:

PARAGRAPH 1. That the respondent, Orleans Iron Works (Inc.), is a corporation organized and existing under the laws of the State of Louisiana, with its principal office and place of business in the city of New Orleans, in said State.

PAR. 2. That respondent is engaged in the business, among other things, of repairing and furnishing repair parts to ships which reach the port of New Orleans, State of Louisiana, while engaged in the transportation of passengers and cargoes between ports in the various States of the United States and the transportation of passengers and cargoes between ports of the United States and foreign nations, in direct, active competition with other persons, partnerships, and corporations similarly engaged; that the respondent carries or causes to be carried aboard such vessels so engaged materials and repair parts and sends its employees aboard such vessels to install such parts and make such repairs thereon as may be required by the owners of such vessels.

PAR. 3. That the respondent, in the course of its business as described in paragraph 2 hereof, gives and has given to captains, engineers, and other employees of vessels reaching the port of New Orleans, without the knowledge or consent of their employers and without other consideration therefor, valuable gifts, cash commissions, and gratuities, to induce such officers and employees to have the ships operated by them for the owners thereof repaired, and repair parts for same furnished, by respondent; that the value of such gifts, cash commissions, and gratuities so given by the respondent aggregated in the first six months of its business approximately $1,650, and that as a result of the giving of such gifts, cash commissions, and gratuities respondent added to its cost of doing business and was compelled to and did add to a fair charge for its services an amount approximating $1,650, which is in addition to a fair charge for such services, and which additional amount the customers of the respondent, and eventually the public, must pay; that as a further result of the respondent's said practices, all of its competitors are affected, and the giving of valuable gifts and cash commissions by the respondent as aforesaid has tended to cause competitors of the respondent, who in many instances had not engaged in such practices, to give captains and engineers and other officers and employees of ships valuable gifts, cash commissions, and gratuities of substantially equal value and like amounts to those paid by respondent as aforesaid, for the same purposes and with the same effect, as a means of protecting their trade and preventing respondent from obtaining the business enjoyed by them.

PAR. 4. That by reason of the facts recited, the respondent has been using an unfair method of competition in commerce within the intent and meaning of section 5 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.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER.

Pursuant to the provisions of an act of Congress approved September 26, 1914, the Federal Trade Commission issued and served a complaint upon the respondent, Orleans Iron Works (Inc.), charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act.

The respondent having entered its appearance and filed its answer herein admitting that it had engaged in the practice of giving valuable gifts, cash commissions, and gratuities to captains, engineers, and employees of the companies owning ships for whom it did repair work, as alleged in paragraph 3 of the complaint herein, and having stipulated and agreed that a statement of facts signed and executed

by the respondent and by Adrien F. Busick, acting chief counsel for the Federal Trade Commission, subject to the approval of the Commission, shall be taken as the facts in this proceeding, and agreeing and consenting that the Federal Trade Commission shall forthwith proceed upon said agreed statement of facts and answer herein to make and enter its findings as to the facts, its conclusion, and order disposing of this proceeding without the introduction of testimony, the filing of briefs, or oral argument in support of the same, and thereupon this proceeding came on for final hearing, and the Commission, having duly considered the record and now being fully advised in the premises, makes this its findings as to the facts and conclusion:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. That the respondent, the Orleans Iron Works (Inc.), is a corporation organized and existing under the laws of the State of Louisiana, with its principal office and place of business in the city of New Orleans, State of Louisiana, and is now and at all times hereinafter mentioned has been engaged in the business of repairing and furnishing repair parts for ships which reach the port of New Orleans while engaged in the transportation of passengers and cargoes between ports in the various States of the United States and of the United States and foreign nations, said business being conducted in direct competition with other persons, partnerships, and corporations similarly engaged; that the respondent carries or causes to be carried aboard such vessels so engaged materials and repair parts and sends its employees aboard such vessels to install such parts and make such repairs thereon as may be required by such vessel owners.

PAR. 2. That the respondent in the course of its business as described in paragraph 1 hereof, since March 1, 1920, has given to captains, engineers, and other employees of vessels reaching the port of New Orleans, without the knowledge or consent of their employers and without other consideration therefor, valuable gifts, cash commissions, and other gratuities to induce such officers and employees to have the ships operated by them for the owners thereof repaired and repair parts for same furnished by the respondent; that the value of such gifts, cash commissions, and gratuities so given by the respondent aggregated in the first six months of its business approximately $1,650; and that as a result of the giving of such gifts, cash commissions, and gratuities, respondent added to its cost of doing business and was compelled to and did add to a fair charge for its services an amount approximating $1,650, which is in addition to a

fair charge for such services, and which additional amount the customers of the respondent, and eventually the public, must pay.

CONCLUSION.

The practices of the said respondent, under the conditions and circumstances described in the foregoing findings, are unfair methods of competition in interstate and foreign commerce and constitute a violation 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."

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, and an agreed statement of facts, and the Commission having made its findings as to the facts with its conclusion that the respondent has violated the provisions 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,"

It is ordered, That the respondent, the Orleans Iron Works (Inc.), and its officers, directors, agents, servants, and employees cease and desist from directly or indirectly giving to captains and other officers and employees of vessels, valuable gifts, cash commissions, and gratuities as an inducement to have the ships operated by them for the owners thereof repaired and repair parts for same furnished by the respondent.

It is further ordered, That the respondent, within 60 days after the date of service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinbefore set forth.

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

Dates of orders.	Docket Nos.	Respondents.	Commodities.	Charges.[1]	Answer, stipulation, or trial.	Reasons for discontinuance or dismissal.
1920. July 2	356	Remington Typewriter Co.	Typewriters and calculating or adding machines.	Rebates or discounts conditioned on exclusive or tying contracts in violation of sections 5 and 3 of the Federal Trade Commission and Clayton Acts, respectively; quantity discounts based on aggregate number of machines used by prospective purchaser, irrespective of their make, with the effect of preventing a small user or purchaser from obtaining the same discounts and giving an undue advantage to the large purchaser or user.	Answer.....	Sufficient showing of public interest not disclosed.
2	357	Royal Typewriter Co., Inc.	.....do.....	.....do.....	.....do.....	Do.
2	358	L. C. Smith & Bros. Typewriter Co.	Typewriting and calculating machines.	Quantity discounts based on aggregate number of machines used by prospective purchaser irrespective of their make, with the effect of preventing a small user or purchaser from obtaining the same discounts, and giving an undue advantage to the large purchaser or user.	.....do.....	Do.
2	359	Underwood Typewriter Co.	.....do.....	System of cumulative rebates or discounts calculated to cause dealers to confine their purchases largely or exclusively to respondent's products;[2] quantity discounts based on aggregate number of machines used by prospective purchaser irrespective of their make, with the effect of preventing a small user or purchaser from obtaining the same discounts, and giving an undue advantage to the large purchaser or user.	.....do.....	Sufficient showing of public interest not disclosed as to last count. Dismissed without prejudice as to first. No reasons assigned.
2	360	Woodstock Typewriter Co.	.....do.....	Quantity discounts based on aggregate number of machines used by prospective purchaser irrespective of their make, with the effect of preventing small users or purchasers from obtaining the same discounts and giving an undue advantage to the large purchaser or user.	.....do.....	Sufficient showing of public interest not disclosed.
2	363	Corona Typewriter Co.	Typewriting, calculating, and adding machines.	System of cumulative rebates or discounts calculated to cause dealers to confine their purchases largely or exclusively to respondent's products.[2]	.....do.....	Dismissed without prejudice; no reasons assigned.
2	368	Noiseless Typewriter Co.	.....do.....	.....do.....	.....do.....	Do.

9	505	C. D. Kenny Co., The.	Coffee and sugar.....	Combination sales with tying condition.....	Answer and trial.	Dismissed and discontinued "for the reason that the practice of tying commodities to a joint sale is an unfair method of competition where the seller has secured a preponderance of control over one of the commodities and uses such control to restrict competition unduly or to create a monopoly, and that such qualifying conditions not having been pleaded, an order to cease and desist would be improvidently issued upon the complaint in this case."
13	518	Benjamin Moore & Co.	Paint.....	Misbranding.....	Answer and stipulation.	Practice charged not a practice of respondent in its business, or known to, or authorized by it, but incidental to taking over newly acquired branch house.
21	567	Acme Coal Mining Co.	Coal; capital stock.....	Stimulation of competitor's trade name.....	Answer and trial.	Charge not sustained.
22	338	United States Food Products Corporation, Liberty Yeast Corporation, The Fagin Co., and Herman Cheifetz.	Yeast.....	Bogus independents; enticing competitors' employees; using competitors' employees to deliver samples of respondent's products to said competitors' customers and to make false and disparaging statements with reference to said competitors' products to said competitors' customers; procuring and using valuable trade secrets from competitors' employees; circulating false, misleading, and derogatory statements about competitors' businesses, practices, and methods; selling below cost.	...do.....	No reasons assigned.
Sept. 21	135	Standard Oil Co. of Louisiana.	Petroleum and oil pumps, tanks, and outfits.	Misrepresenting competitors' products and prices; inducing and attempting to induce breach of competitors' contracts; selling and loaning oil pumps, tanks, and outfits, respectively, below cost and at figures not affording a reasonable return; threatening dealers to sell direct to retailers unless they installed the line of equipment handled by it; falsely representing itself as the agent of devices competitive to the line handled by it, and quoting excessive prices on said devices; all in violation of section 5; and price discrimination in violation of section 2 of Clayton Act.	Answer.....	Dismissed without prejudice; no reasons assigned.
21	328	The Springfield Oil Products Co., Inc.	.....do.....	Leasing oil tanks, pumps, and devices for a nominal consideration, based on exclusive or tying contracts or dealings in violation of sections 5 and 3 of the Federal Trade Commission and Clayton Acts, respectively.	Answer and trial.	No reasons assigned.

[1] Except where otherwise stated, the matter charged is charged as a violation of sec. 5 of the Federal Trade Commission act.

[2] The language of the complaint reads in part: "A system of giving cumulative rebates in the sale of its products whereby purchasers of its products obtain at the end of each calendar year, or at the end of a definite period, certain rebates or discounts based and estimated upon the aggregate of the separate purchases made by such dealers during the calendar year or such fixed period."

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.
Oct. 23	325	American Oil & Supply Co.	Petroleum and oil pumps, tanks, and outfits.	Leasing oil tanks, pumps, and devices for a nominal consideration, based on exclusive or tying contracts or dealings in violation of sections 5 and 3 of the Federal Trade Commission and Clayton Acts, respectively.	Answer and trial.	No reasons assigned.
28	315	The Kentucky Independent Oil Co.	....do....	....do....	....do....	Do.
Nov. 19	592	Mebane Iron Bed Co., Inc.	Mattresses and bedsprings.	Simulation of competitor's name....	....do....	Do.
26	280	Prest-O-Lite Co., Inc.	Acetylene and steel containers therefor.	Exacting and keeping deposits for respondent's containers under such conditions as to enable it to obtain a virtual monopoly in the sale of the gas.	....do....	Dismissed without prejudice to Commission's right to issue another complaint with respect to the same subject matter and directed to such respondents as the Commission may elect. No reasons assigned.
Dec. 3	126	Ironite Co., Master Builders' Co., and United Products Co.	Cement and concrete hardeners.	Misrepresenting consent decree secured by two of the respondents; threats, not made in good faith, to sue for alleged violation of respondent's patent; misrepresenting the extent of said patent; false and disparaging statements regarding certain competitors; and resale price maintenance.	....do....	Relief which would be afforded by an order to cease and desist already secured through a court decree.
3	612	The Great Western Oil Co.	Petroleum and petroleum products.	False and misleading advertising....	....do....	Public interest does not warrant further proceedings in view of the fact that respondent ceased the practice charged prior to the issuance of the complaint and there is no apparent purpose on its part to continue the use of same.
4	548	Vacuum Oil Co....	....do....	System of cumulative rebates or discounts calculated to cause dealers to confine their purchases largely or exclusively to respondent's products; offer of additional discounts to automotive manufacturers conditioned on their recommending, either in their instruction books or on the plates attached to their machines, use of respondent's lubricating oils for their products.	....do....	Dismissed without prejudice; no reasons assigned.
4	564	Turner & Harrison Pen Manufacturing Co., Inc.	Pen points....	Misbranding....	Answer....	Practices in question ceased prior to the issuance of the complaint.
4	565	C. Howard Hunt Pen Co.	....do....	....do....	....do....	Do.

9	335	Louis Blaustein, doing business as American Oil Co.	Petroleum and oil pumps, tanks, and outfits.	Leasing oil tanks, pumps, and devices for a nominal consideration based on exclusive or tying contracts or dealings in violation of secs. 5 and 3 of the Federal Trade Commission and the Clayton Acts, respectively.	Answer and trial.	No reasons assigned.
20	537	Shibakawa & Co., Inc.	Safety matches	Misbranding	Answer	Want of sufficient proof.
30	224	National Bridge Co., Daniel B. Luten, Frank H. Drury.	Designs and working plans for bridge construction.	Misrepresenting extent and validity of respondent's patents; misrepresenting effect of consent decrees secured; and making threats, not in good faith, to sue for alleged infringement unless a royalty should be paid; all to force bridge builders to pay large sums in royalties for alleged infringement.	do	Relief granted in the courts.
Dec. 30	341	W. A. Case & Son Manufacturing Co., Inc.	Water-closet tanks	Misbranding	Answer and trial.	Failure of proof.
1921.						
Jan. 10	310	Oklahoma Producing & Refining Corporation of America.	Petroleum and oil pumps, tanks, and outfits.	Leasing oil tanks, pumps, and devices for a nominal consideration based on exclusive or tying contracts or dealings in violation of secs. 5 and 3 of the Federal Trade Commission and the Clayton Acts, respectively.	do	Dismissed without prejudice to the institution by the Commission of another proceeding against the respondent covering the same subject matter. No reasons assigned.
28	653	Gulf Machine Works.	Materials, repair parts, machinery and equipment for repairing ships.	Commercial bribery	Answer	Respondent has sold and discontinued its business and does not intend again to engage therein.
Feb. 1	376	Max Fuchs Co	Sponges	Adulteration		Respondent dissolved and has, by operation of law, ceased to exist.
1	378	Meyer Bros. Drug Co.	do	do	Answer and trial.	No reasons assigned.
1	388	John E. Leousi and Abram M. Clonney, copartners, doing business under the firm name and style of Leousi, Clonney & Co.	do	do	Answer	Dismissed without prejudice to the Commission's right to issue another complaint directed against the same or other respondents with respect to the same or other subject matter; respondents have sold out the business involved and do not intend to enter same again.
Apr. 15	714	Brothers Law Co	Groceries	False and misleading advertising		Dismissed without prejudice; respondent gone out of business.
30	251	American Sheet & Tin Plate Co.	Sheet tin	Price discrimination in violation of sec. 2 of the Clayton Act.	Answer	No reasons assigned.
June 7	590	Bankers Petroleum & Refining Co.	Capital stock	False and misleading advertising and misrepresentation in connection with the sale of oil stock.	Answer and trial.	Failure of proof.
11	47	Ward & Mackey Biscuit Co.	do	False and misleading advertising and misrepresentation in connection with the sale of respondent's stock.	do	Respondent "has ceased to engage actively in business and has disposed of all its assets." Complaint dismissed without prejudice.
18	494	Super Tread Tire Co.	Automobile tires (rebuilt).	False and misleading advertising	Answer	Failure of proof.

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.

[1] It should be noted that the jurisdiction of the Commission is limited by the "Packers and Stockyards Act, 1921," approved Aug. 15, 1921, Ch. 64, 42 Stat., 159, sec. 406 of said Act providing that "on and after the enactment of this Act and so long as it remains in effect the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this Act is made subject to the jurisdiction of the Secretary [of Agriculture] except in cases in which, before the enactment of this Act, complaint has been served under sec. 5 of the Act, entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved Sept. 26, 1914, or under sec. 11 of the Act, entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved Oct. 15,

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

Term, seven years.

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.

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 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.

Appointment of secretary. Salary, $5,000.

Other employees. Salaries fixed by Commission.

1914, and except when the Secretary of Agriculture, in the exercise of his duties hereunder, shall request of the said Federal Trade Commission that it make investigations and report in any case."

The annotations are from decisions handed down before July 1, 1921, on petitions to review orders of the Commission, with the exception of *Nulomoline* and *T. C. Hurst* cases, in which it was sought to restrain the Commission from proceeding under sec. 5, of the *Basic Products* case, a mandamus proceeding instituted at the instance of the Commission to compel the submission of information called for by it under sec. 6; and the *Maynard Coal Co.* case, in which the companies sought to enjoin the Commission from enforcing compliance with requests made under said section, and also with the exception of annotations at the end of the Act bearing in a general way on the question of resale price maintenance.

With respect to the decisions on petitions to review, it should be noted that the cases of *Beech-Nut Packing Co.* v. *Federal Trade Commission*, 264 Fed. 885; *Curtis Publishing Co.* v. *Federal Trade Commission*, 270 Fed. 881, and *Winsted Hosiery Co.* v. *Federal Trade Commission*, 272 Fed. 957, are pending on appeal in the Supreme Court, petitions for certiorari having been granted in said cases.

With respect to the *Basic Products* and *Maynard Coal Co.* cases, involving the requiring of reports by the Commission under sec. 6, under

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

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.

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

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.

Commission may rent suitable offices.

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

Auditing of accounts.

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

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the circumstances there concerned, it should be noted with respect to the general question involved, that after decision in the case last referred to (on motion for temporary injunction restraining the Commission from requiring reports under sec. 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 sec. 9, at the request of the Commission, to compel the companies in the two cases to file reports previously demanded under sec. 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 as of June 30, 1921, neither the *Maynard Coal* case, *Claire Furnace* case, nor mandamus proceedings have been heard.

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, 63d Cong., 2d sess.); report of Senator Cummins 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

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

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and 8 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; 9063; 14925–14933 (part 15); Dickinson for, part 9, pp. 9180–9190; Mann against, part 15, pp. 14939–14946; 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), 12061–13065 (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, 14768–14770 (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, 13056–13061 (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

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.

Principal office in Washington, but Commission may meet elsewhere.

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" 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.

"Commerce."

"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.

"Corporation."

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

"Documentary evidence."

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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 sec. 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. *Gratz*, 253 U. S. 421, 429–442. (See case also in Vol. II of Commission's Decisions, p. 564 at pp. 570–579, or in 1920 "Acts from which the Commission," etc., p. 98 at pp. 104–113.)

Sec. 4. DEFINITIONS—Continued.

"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;[16] 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 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.

ANNOTATIONS.

"CORPORATION"—UNINCORPORATED ASSOCIATION NOT DIRECTLY ENGAGED IN BUSINESS.

1. "* * * The Harness Manufacturers' Association is a voluntary, unincorporated association and thus without capital stock. It is not itself engaged in business. Petitioner contends that it therefore is not within the Act. * * * The language of the Act affords no support for the thought that individuals, partnerships, and corporations can escape restraint, under the Act, from combining in the use of unfair methods of competition, merely because they employ as a medium therefor an unincorporated, voluntary association, without capital and not itself engaged in commercial business." *Nat'l. Harness Mfrs. Ass'n.* v. *Federal Trade Commission*, Dec. 7, 1920, 268 Fed. 705, 708, 709. (See case in this volume, p. 570 at 575.)

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

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 regu-

[16] For text of Sherman Act, see footnote on pp. 483–485.

[a] Jurisdiction of Commission under this section limited by sec. 406 of the "Packers and Stockyards Act, 1921," approved Aug. 15, 1921, ch. 64, 42 Stat., 159. See first paragraph of footnote on p. 439.

late 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 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.

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.

Modification or setting aside by the Commission of its order.

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

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 applica-

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

tion 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 the Supreme Court upon certiorari as provided in section two hundred and forty 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

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.

Petition by respondent to review order to cease and desist.

To be served on Commission.

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 of Appeals same as on application by Commission, and Commission'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 shall be exclusive.

Jurisdiction of Court 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 judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.

Proceedings to have precedence over other cases.

Liability under antitrust acts not affected.

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 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, 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 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 complaints, orders, and other processes.

Personal; or

At office or place of business; or

By registered mail.

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

ANNOTATIONS.

2, 3. "Unfair methods of competition"—In general.
—— In particular cases. (Reference to pars. 9–25.)
—— Commercial bribery. (Reference to pars. 9, 10.)
—— Conspiracies or combinations to punish or coerce. (Reference to par. 11.)
—— False and misleading advertising. (Reference to pars. 12, 13.)

2, 3. "Unfair methods of competition"—Continued.
—— Free goods as inducement to purchase. (Reference to par. 14.)
—— Full line forcing. (Reference to pars. 15–21.)
—— Misbranding or mislabeling—Quality or composition—Commission jurisdiction. (Reference to par. 62.)

ANNOTATIONS, SEC. 5—Continued.

2, 8. "Unfair methods of competition"—Continued.
—— —— —— Nondeception of trade. (Reference to par. 22.)
4–6. —— Monopolistic tendency or element.
—— Passing off—Commission jurisdiction as distinguished from common-law jurisdiction. (Reference to par. 62.)
—— Prices at which goods sold. (Reference to pars. 12, 13.)
7. —— Public interest.
8. —— —— Order based on practice abandoned before complaint issued.
—— Resale price maintenance. (Reference to par. 23.)
—— Tying or exclusive contracts or leases. (Reference to pars. 24, 25.)
9. Practices in particular cases—Commercial bribery—Gratuities.
10. —— —— Money and gratuities.
11. —— Conspiracies or combinations to punish or coerce objectionable competitors.
—— False and misleading advertising—Disparaging or misrepresenting competitors' prices and/or products. (Reference to par. 12.)
—— —— Misrepresenting methods used. (Reference to par. 12.)
12, 13. —— —— Misrepresenting prices.
—— —— Misbranding or mislabeling. (Reference to par. 22.)
14. —— Free goods as inducement to purchase.
15–21. —— Full line forcing.
22. —— Misbranding or mislabeling—Quality or composition—Nondeception of trade.
23. —— Resale price maintenance.
24, 25. —— Tying or exclusive contracts or leases.
Constitutionality—As attempting to regulate intra as well as inter state commerce. (Reference to pars. 28, 29.)
26–32. —— As combining or delegating legislative, executive, and judicial powers.
—— As violating due process and just compensation provisions. (Reference to pars. 26–32.)
33. —— Indefiniteness.
34. Damages.
35–37. Injunctions to restrain Commission from proceeding—District courts.
38. —— Interlocutory orders.
39. Interstate commerce—Contracts of domestic concerns receiving subject matter through interstate commerce.
40–41. —— Sales initiated and consummated intrastate by foreign concern.
42. —— Trade associations.
43. —— Unfair methods directly affecting.
44. Judicial review—In general.
45–48. —— Court's powers.
49. —— Effect of court decision passing on practice in private litigation.
50. —— Substantial doubt.
51. —— Tendencies of practices.
52–55. Pleading.
56–63. Scope in general.
64–66. "That the findings of fact, if supported by testimony, shall be conclusive."
67. Unincorporated voluntary association not directly engaged in business — Proceeding against.

"UNFAIR METHODS OF COMPETITION"—IN GENERAL.

See also *post*, pars. 43–51, 56–63.

2. "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 *Fed-*

eral Trade Commission v. *Gratz*, June 7, 1920, 253 U. S., 421, 427, 40 Sup. Ct. 572, 575. (See case also in Vol. II of Commission's Decisions, p. 564 at p. 569, or in 1920 "Acts from which the Commission," etc., p. 98 at p. 103.)

3. "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 also in Vol. II of Commismission's Decisions, p. 565 at pp. 575, 577, or in 1920 "Acts from which the Commission," etc., p. 98 at pp. 109, 111.)

—— IN PARTICULAR CASES.

See *post*, pars. 9–25.

—— COMMERCIAL BRIBERY.

See *post*, pars. 9–10.

——CONSPIRACIES OR COMBINATIONS TO PUNISH OR COERCE.

See *post*, par. 11.

—— FALSE AND MISLEADING ADVERTISING.

See *post*, pars. 12, 13.

—— FREE GOODS AS INDUCEMENTS TO PURCHASE.

See *post*, par. 14.

—— FULL LINE FORCING.

See *post*, pars. 15–21.

—— MISBRANDING OR MISLABELING—QUALITY OR COMPOSITION—COMMISSION JURISDICTION.

See *post*, par. 63.

—— —— NONDECEPTION OF TRADE.

See *post*, par. 22.

—— MONOPOLISTIC TENDENCY OR ELEMENT.

4. "* * * freedom of access to the consumer, and the entire absence of monopoly and nondeprivation of the public, have been regarded as an important element in the decision of cases of alleged unfair business competition. * * *" *Curtis Publishing Company* v. *Federal Trade Commission*, March 2, 1921, 270 Fed. 881, 914. (See case in this volume, p. 579 at p. 616.)

ANNOTATIONS, SEC. 5—Continued.

"UNFAIR METHODS OF COMPETITION"—MONOPOLISTIC TENDENCY OR ELEMENT—Continued.

5. "The Commission justifies the order complained of by looking to the future rather than at the present, * * *."

"The Commission looking forward sees in the present highly competitive business of the various wholesalers a seed which will in time produce the fruit condemned in *Patterson* v. *United States*, 222 Fed. 599, * * *."

6. It may be admitted that one function of the Trade Commission is to discern and suppress such practices in their beginning; but a thing exists from its beginning, and it is not a conclusion of law from any facts here found that a system [referring to petitioner's system condemned by the Commission of leasing oil tanks and pumps for a nominal rental in consideration of the lessee using lessor's product exclusively in connection therewith], which at present is keenly competitive, extremely advantageous to the public, and, in the opinion of a majority of the competent witnesses economical, is at present unfair to anyone or unfair because tending to monopoly. A tendency is an inference from proven facts, and an inference from the facts as found by the Commission is a question of law for the court. As a matter of law there is at present no violation of the Trade Commission statute; therefore the first of respondent's contentions can not be sustained. *Standard Oil Co. of New York* v. *Federal Trade Commission*, May 11, 1921, 273 Fed. 478, 481, 482. (See case in this volume, p. 622 at pp. 626, 627.)

—— PASSING OFF—COMMISSION JURISDICTION AS DISTINGUISHED FROM COMMON-LAW JURISDICTION.

See *post*, par. 63.

—— PRICES AT WHICH GOODS SOLD.

See *post*, pars. 12, 13.

—— PUBLIC INTEREST.

See also *post*, pars. 56–63.

7. "The Commission is not made a censor of commercial morals generally. Its authority is to inquire into unfair methods of competition in interstate and foreign commerce, if so doing will be of interest to the public; and if such method of competition is prohibited by the act, to issue an order requiring the person or corporation using it to cease and desist from doing so. We have heretofore so understood the extent of the Commission's authority in Federal Trade Commission *v.* Gratz, 258 Fed. Rep. 314; affirmed 253 U. S. 421, and New Jersey Asbestos Co. *v.* Federal Trade Commission, 264 Fed. Rep. 509." *Winsted Hosiery Co.* v. *Federal Trade Commission*, April 13, 1921, 272 Fed. 957, 960. (See case in this volume, p. 618 at p. 621.)

—— —— ORDER BASED ON PRACTICE ABANDONED BEFORE COMPLAINT ISSUED.

8. "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 petitioners'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 also in Vol. II of Commission's Decisions, p. 536 at p. 540, or in 1920 "Acts from which the Commission," etc., p. 70 at p. 74.)

——RESALE PRICE MAINTENANCE.

See *post*, par. 23.

——TYING OR EXCLUSIVE CONTRACTS OR LEASES.

See *post*, pars. 24, 25.

PRACTICES IN PARTICULAR CASES—COMMERCIAL BRIBERY—GRATUITIES.

9. 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. 472 on the basis of the decision of the lower court in the Gratz case (see case also in Vol. II of Commission's Decisions, at pp. 545-549, or in 1920 "Acts from which the Commission," etc., pp. 79-83) that the matter was one not so affecting the public as to be within the jurisdiction of the Commission. (See case also in Vol. II of Commission's Decisions, at pp. 553-556, or in 1920 "Acts from which the Commission," etc., pp. 87-90.)

——MONEY AND GRATUITIES.

10. *Held* in *T. C. Hurst & Son* v. *Federal Trade Commission*, October 2, 1920, 268 Fed. 874, on petition to enjoin the Commission from proceeding against petitioner under its complaint in which it charged

ANNOTATIONS, SEC. 5—Continued.

PRACTICES IN PARTICULAR CASES—COMMERCIAL BRIBERY—MONEY AND GRATUITIES—Continued.

said petitioner, a ship chandler, with giving captains and other employees of vessels, "without the knowledge and consent of the owners thereof, sums of money and other gratuities, as an inducement to influence such employees or owners to purchase supplies from the respondents, the complainants herein, which said acts were charged to be unfair methods of competition in commerce, within the intent and meaning of section 5, that the Commission acted entirely within its rights, of and concerning a matter liable to injuriously affect commerce." (See case in this volume, p. 565, and 3 F. T. C. 223 for Commission's findings and order.)

—— CONSPIRACIES OR COMBINATIONS TO PUNISH OR COERCE OBJECTIONABLE COMPETITORS.

11. Where it appeared among other things that one of the objects of the Harness Manufacturers' Association, as stated in its constitution and by-laws, is "to protect the harness dealers from the unjust sale of goods by wholesale dealers direct to consumers; that the officers, committees, and members of the Harness Manufacturers' Association and of the Saddlery Association had actively cooperated to establish the principle that a combined and closely affiliated wholesale and retail business was not a legitimate wholesale business; that the secretary of the Saddlery Association had attempted to prevent accessory manufacturers from recognizing, as legitimate jobbers, wholesalers whose names were furnished by the Harness Manufacturers' Association to the Saddlery Association, as complained of by retailers, for competing with them; * * * that the Harness Manufacturers' Association had used its influence with the Saddlery Association to prevent the admission of specific concerns to membership in the latter association and the recognition of such concerns as legitimate jobbers; * * * that the Harness Manufacturers' Association had requested and secured the cooperation of members of the Saddlery Association in a refusal to sell mail-order houses, hardware stores, general stores, and other competitors of retail harness manufacturers not recognized by the Harness Manufacturers' Association as legitimate; that the latter had refused the privilege of associate membership to accessory manufacturers and jobbers who sell to mail-order houses, establishing, however, an associate membership restricted to manufacturers and jobbers who do not sell to consumers and to mail-order houses, and who are otherwise in harmony with the policy of the association, and issuing credentials thereof to the traveling salesmen of associate members and urging and encouraging the affiliated retailers to withdraw and withhold patronage from concerns whose salesmen were not so equipped; and have induced the members of the Saddlery Association to use their influence with the accessory manufacturers not to sell mail-order houses; * * * that by reason of refusals of accessory manufacturers, due to objections of the Saddlery Associa-

tion, to recognize as jobbers certain competitors of members of that association, such competitors have been forced to buy from the Saddlery Association at prices higher than charged by manufacturers to recognized jobbers, [and] * * * that as a result of the opposition of the Harness Manufacturers' Association to sales by manufacturers and jobbers to the classes of competitors before mentioned, the latter had been prevented from purchasing as freely in interstate commerce as they would have been without such opposition. * * *": *Held*, That the Commission's findings of fact, and the existence of the combinations, schemes, and practices directed to be discontinued are amply sustained, and that the findings of fact being so supported, the Commission's order (see 1 F. T. C. 335, 362) is "fully justified by the authorities to which attention has already been called, including especially *Eastern States Lumber Co.* v. *United States*." [234 U. S. 600.] *Nat'l Harness Mfrs. Ass'n* v. *Federal Trade Commission*, December 7, 1920, 268 Fed. 705. (See case in this volume, p. 570 at pp. 576–578.)

——FALSE AND MISLEADING ADVERTISING—DISPARAGING OR MISREPRESENTING COMPETITORS' PRICES AND/OR PRODUCTS.

See *post*, par. 12.

————MISREPRESENTING METHODS USED.

See *post*, par. 12.

————MISREPRESENTING PRICES.

12. Where it appeared that for more than two years petitioner had falsely and misleadingly advertised that it, "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; [and] * * * is selling its sugar at a price much lower than that of its competitors * * * thereby imputing to its competitors the purpose of charging more than a fair price for their sugar;" the fact being that it was "selling certain of its merchandise at less than cost on the condition that the customer simultaneously purchase other merchandise at prices which give * * * a profit on the transaction, without letting the customer know the facts;" and had been "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 mechandise 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": *Held*, That such false and misleading advertising, under the circumstances set forth, constituted an unfair method of competition, and that the Commission's order should be sustained with the exception of the second paragraph, in which the petitioner is required to cease seling sugar below cost, the court stating on this point:

13. "* * * 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

ANNOTATIONS, SEC. 5—Continued.

PRACTICES IN PARTICULAR CASES—FALSE AND MISLEADING ADVERTISING—MISREPRESENTING PRICES—Continued.

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 also in Vol. II of Commission's Decisions, p. 536 at p. 542, or in 1920 "Acts from which the Commission," etc., p. 70 at p. 76.)

——— MISBRANDING OR MISLABELING.

See *post*, par. 22.

——— FREE GOODS AS INDUCEMENT TO PURCHASE.

14. 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. 39, 40. (See case also in Vol. II of Commission's Decisions, at pp. 550–552, or in 1920 "Acts from which the Commission," etc., at pp. 84–86.)

——— FULL LINE FORCING.

15. "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 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*, 253 Fed. 314, 317. (See case also in Vol. II of Commission's Decisions, p. 545 at pp. 548, 549, or in 1920 "Acts from which the Commission," etc., p. 79 at pp. 82, 83.)

16. "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.

17. "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.*, March 1, 1920, 252 U. S. 85.

18. "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 also in Vol. II of Commission's Decisions, p. 564 at p. 570, or in 1920 "Acts from which the Commission," etc., p. 98 at p. 104.)

Brandeis, J., dissenting, at pp. 438–441. (See case also in Vol. II of Commission's Decisions, p. 564 at pp. 576–578, or in 1920 "Acts From Which the Commission," etc., p. 98 at pp. 110–112.)

19. "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. * * *"

20. "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

ANNOTATIONS, SEC. 5—Continued.

PRACTICES IN PARTICULAR CASES—FULL LINE FORCING—Continued.

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.

21. "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."

—— MISBRANDING OR MISLABELING—QUALITY OR COMPOSITION—NONDECEPTION OF TRADE.

22. Where a corporation engaged in the manufacture and sale of knit underwear, in competition with manufacturers and importers of underwear composed wholly of wool, and also with manufacturers and importers of underwear composed partly of cotton, who either correctly branded and labeled their underwear with reference to composition or failed to brand and label the same at all in that respect; branded, labeled, advertised and sold certain lines of its underwear not composed wholly of wool, but the fabric of which, due to its manufacture from "wool-spun" yarns composed of cotton and wool, was soft and woolly, as "Men's Natural Merino Shirts," "Men's Gray Wool Shirts," "Men's Natural Worsted Shirts," "Australian Wool Shirts," and "Men's Natural Wool Shirts," and thereby misled a substantial part of the purchasing public into believing that such goods were all wool, and also tended to encourage and aid representations to consumers to that effect by ignorant or unscrupulous retailers and sales people; but where, in the opinion of the court, "the labels were thoroughly established and understood in the trade. There was no passing off of the petitioner's goods for those of another manufacturer. There was no combination in restraint of trade nor any attempt to establish a monopoly." *Held*, That such misbranding and mislabeling, under the circumstances set forth, did not constitute an unfair method of competition. *Winsted Hosiery Co.* v. *Federal Trade Commission*, April 13, 1921, 272 Fed. 957. (Reversing Commission's order in 2 F. T. C. 202 and 3 F. T. C. 189. See case in this volume, p. 618 at p. 621.)

—— RESALE PRICE MAINTENANCE.

See also *post*, pars. 83–90.

23. 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*, February 26, 1920, 264 Fed. 885 (see case also in Vol. II of Commission's Decisions, pp. 556–564, or in 1920 "Acts from which the Commission," etc., pp. 90–98), 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.[8]

——TYING AND EXCLUSIVE CONTRACTS OR LEASES.

24. Where a corporation engaged in the publication, distribution, and sale of periodicals entered into contracts with a large number of established wholesale dealers, and with other dealers who subsequently became wholesalers, constituting in most instances the principal and most efficient and, in numerous cases, the only medium for the distribution of such publications, whereby such dealers were bound not to, and did not, "act as agent for or supply at wholesale rates any periodicals other than those published" by the corporation without the written consent of such corporation, which consent was uniformly refused as to certain immediate competitors, and thus prevented competitors from utilizing established channels for the distribution and sale of their periodicals; but where, in the opinion of the court, "the case did not turn on this restricted phase which, in our judgment, totally ignores the real situation, and makes no finding on those facts which are really determinative of the question whether the competition of the Curtis Company was unfair business competition. That real situation, as we have seen from the uncontradicted proof, among other features, consists of, first, the creation, through years, with great effort and large expense, of the Curtis Company's schoolboy selling organization; second, that the district distributing agents constitute the control, morale, recruiting, and existence of the schoolboy selling organization; third, the efforts of two competitors to appropriate that selling agency to themselves, with the undisputed consequence of undermining its morale and destroying its efficiency; and, lastly, that the purpose of the Curtis Company in putting in its contract the clauses objected to was not to interfere with commerce or with the circulation of the 400 magazines, but solely to thwart the unfair plan of 2 unfair competitors, who sought to undermine the undivided loyalty of the Curtis distributing district agents, and through them disrupting the Curtis schoolboy organizations," the court further finding that the corporation, "in building up this boy selling organization through the distributing district agents, was not throttling or indeed dealing with the ordinary channels of commerce, but was enlarging

[8] 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.

ANNOTATIONS, SEC. 5—Continued.

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

the sphere of commerce by enlisting in its service the selling power of schoolboys, who, but for this organization, would not only not have taken part in present commerce, but who would have missed the commercial training the Curtis Company alone gave them for future commerce," and that "there is no proof in this record that any harm has been done in the past by the business methods followed by the Curtis Company, nor is there any proof that commerce has been in any way throttled thereby." *Held*, That the use of such contracts, under the circumstances set forth, did not constitute an unfair method of competition. *Curtis Publishing Co.* v. *Federal Trade Commission*, March 2, 1921, 270 Fed. 881, 911, 912, 914, (Reversing Commission's order in 2. F. T. C. 20. See case in this volume, p. 579 at pp. 613, 614, 615, 617.)

25. Where a corporation competitively engaged in refining crude petroleum, buying and selling gasoline, and in transporting and marketing such products, and also engaged in leasing pumps, tanks, and other equipment for the storage and handling of petroleum products in competition with manufacturers and sellers of such equipment, to its retail customers, of whom relatively very few required more than a single pump outfit in the conduct of their business; leased to such retailers pumps, tanks, and equipment at a nominal rental, not affording it a reasonable profit on its investment, upon the condition that they should use the same only for the purpose of storing and handling its products, a practice not followed by many competitors, having for its purpose the furtherance of the corporation's petroleum business, and resulting in loss of customers by competitors; but where, in the opinion of the court, competition between the distributors or loaners was very keen, the practice was extremely advantageous to the public, and was regarded by many distributors as a profitable form of advertising and of keeping before the consuming public their trade-mark, borne by the equipment leased or loaned by them, the court observing in this connection that the distribution of another manufacturer's product therefrom would be dishonest: *Held*, That the use of such leases, under the circumstances set forth, did not constitute an unfair method of competition. *Standard Oil Co. of New York* v. *Federal Trade Commission*, May 11, 1921, 273 Fed. 478. (For order similar to that reversed, see 2 F. T. C. 346 at 356. See case in this volume, p. 622 at pp. 625–627.)

CONSTITUTIONALITY—AS ATTEMPTING TO REGULATE INTRA AS WELL AS INTERSTATE COMMERCE.

See *post*, pars. 28, 29.

——AS COMBINING OR DELEGATING LEGISLATIVE, EXECUTIVE, AND JUDICIAL POWERS.

26. "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.]

27. "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 29, 1919, 258 Fed. 307, 311. (See case also in Vol. II of Commission's Decisions, p. 536 at p. 542, or in 1920 "Acts from which the Commission," etc., p. 70 at p. 76.)

28. "The complainants aver that sections 5, 6, 9, and 10 of the act creating the Commission are unconstitutional and void, (*a*) because beyond the powers vested in Congress by the Constitution; (*b*) because they delegate to the Commission legislative authority, in violation of Articles I and III and Amendment X of the Constitution; (*c*) because the Commission is empowered to define and determine what shall constitute 'unfair method of competition in commerce'; (*d*) because the act attempts to regulate intra as well as inter state commerce; and (*e*) because the order and proceedings sought to be enjoined discriminates between persons engaged in the same line of business and takes away the property of one without due process of law and without just compensation in violation of the fifth, sixth, ninth, and tenth amendments of the Constitution without molesting the other, and for other alleged grievances more particularly and specifically set up in the bill of the complainants."

29. "The contention that the act of Congress is unconstitutional for any of the reasons specified is without merit, as it is manifestly within the power of Congress to legislate generally in respect to the burdens that may or may not be imposed upon foreign and interstate commerce, and it is also within its power to declare what would be fair and what unfair methods and dealings in relation thereto, and how the same should be ascertained and determined. The Commission is given full

ANNOTATIONS, SEC. 5—Continued.

CONSTITUTIONALITY—AS COMBINING OR DELEGATING LEGISLATIVE, EXECUTIVE, AND JUDICIAL POWERS—Continued.

power and authority to investigate, make findings of fact, and render its judgment and order in relation thereto, and before the same is carried into effect the judgment of the circuit court of appeals, the second highest court under the Government, is to be sought by the Commission to enforce its order, and any party required by such order to cease and desist from using such method of competition may obtain a review of such order in the circuit court of appeals by filing its written petition praying therefor. * * *" *T. C. Hurst & Son* v. *Federal Trade Commission*, October 2, 1920, 268 Fed. 874, 875-877. (See case in this volume, p. 565 at pp. 567, 569.)

30. "The constitutionality of the act is assailed, first, as assuming 'to combine legislative, executive, and judicial powers and functions and to confer them upon one and the same administrative body, contrary to Articles I, II, and III of the Constitution, and because it assumes to authorize the Commission, which is ostensibly an administrative body, to deprive persons of their property without due process of law, contrary to the fifth amendment of the Constitution.'

31. "This proposition is to our minds without merit. Congress plainly has power to declare unfair methods of competition unlawful and to require that their practice cease. This Congress has done by the act in question. It with equal clearness has the power to authorize an administrative commission to determine (*a*) the question what methods of competition the given trader employs, and (*b*) provisionally, the mixed question of law and fact whether such methods are unfair. These questions being determined against the trader, the administrative requirement to cease and desist, prescribed by Congress, follows, as a matter of course, but only provisionally. The Commission's determination of these questions is not final. Not only does the statute give a right of review thereon upon application by an aggrieved trader to a circuit court of appeals of the United States, but the Commission's order is not enforceable by the Commission but only by order of court. [Citing *Federal Trade Commission* v. *Gratz*, 253 U. S. 421.]

32. "Throughout the proceedings, not only before the Commission but before the court, the trader is given the right and opportunity to be heard. The act delegates to the Commission no judicial powers, nor does it, in our opinion, confer invalid executive or administrative authority. [Citing cases.] The criticism that the statute makes the Commission both judge and prosecutor is too unsubstantial to justify discussion. The constitutionality of the act, against objections similar to those presented here, has recently been sustained by the Circuit Court of Appeals of the Seventh Circuit in a considered and persuasive opinion. *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307. [See case also in Vol. II of Commission's Decisions, at p. 536, or in 1920 "Acts from which the Commission," etc., at p. 70.] None of the petitioner's citations contain, in our opinion, anything

necessarily opposed thereto. * * *." *Nat'l. Harness Mfr's. Ass'n.* v. *Federal Trade Commission*, December 7, 1920, 268 Fed. 705, 707. (See case in this volume, p. 570 at pp. 573, 574.)

——AS VIOLATING DUE PROCESS AND JUST COMPENSATION PROVISIONS.

See *ante*, pars. 26–32.

——INDEFINITENESS.

33. "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 also in Vol. II of Commission's Decisions, p. 536 at p. 541, or in 1920 "Acts from which the Commission," etc., p. 70 at p. 75.)

DAMAGES.

34. "In view of what has appeared, the criticism of lack of public injury is without force. The suggestion that no damage has been shown, even if true in fact, is answered by the consideration that the remedy afforded by the statute is preventive, not compensatory." *National Harness Mnfrs. Ass'n.* v. *Federal Trade Commission*, December 7, 1920, 268 Fed. 705, 712. (See case in this volume, p. 570 at p. 579.)

INJUNCTIONS TO RESTRAIN COMMISSION FROM PROCEEDING—DISTRICT COURTS.

35. *Held* in *T. C. Hurst & Son* v. *Federal Trade Commission*, October 2, 1920, 268 Fed. 874, that the district court would not restrain the Commission from proceeding against the petitioner in said case and the respondent in a proceeding before it, in which it had charged said respondent with a violation of section 5, on the alleged grounds that the Act was unconstitutional.

The court stated in part (see p. 878 of the report and this volume, p. 565 at pp. 569, 570):

36. "* * * The jurisdiction of the circuit court of appeals to enforce, set aside, or modify orders of the Commis-

ANNOTATIONS, SEC. 5—Continued.

INJUNCTIONS TO RESTRAIN COMMISSION FROM PROCEEDING — DISTRICT COURTS—Continued.

sion is exclusive. In all of the proceedings, whether before the Commission or the court, the amplest provision is made for notice to and full hearing of all parties interested, and for this court, for any of the reasons urged, to anticipate by injunction the action of the Commission and the judgment of the court charged under the law with the review thereof, would be clearly an usurpation of authority.

37. "* * * While undoubtedly the relief sought may sometimes be afforded by injunction, still it does not seem to the court the proper remedy here, where the enforcement of the order sought to be enjoined is exclusively within the jurisdiction of the circuit court of appeals. *Wilson* v. *Lambert*, 168 U. S. 611, 618. From this court's action, as well in refusing as granting an injunction (Judicial Code, sec. 129), an appeal lies direct to that court, and it, or a judge thereof, would doubtless stay proceedings sought to be enjoined, where the appeal was from an order refusing an injunction, if in the judgment of the court such action should be necessary to meet the ends of justice."

——INTERLOCUTORY ORDERS.

38. In complaint No. 29, *Federal Trade Commission* v. *The Nulomoline Co.* (see 1 F. T. C. 400), the United States Circuit Court of Appeals of the Second Circuit, sitting in New York City, refused on August 16, 1918 (see memorandum decision in 254 Fed. 988), to interfere with the Commission in the taking of testimony. Respondent had 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.

INTERSTATE COMMERCE[4]—CONTRACTS OF DOMESTIC CONCERNS RECEIVING SUBJECT MATTER THROUGH INTERSTATE COMMERCE.

39. "Federal Trade Commission and Clayton Acts have no application to a contract between a domestic oil company and a domestic partnership engaged in the garage business," under the terms of which the oil company lent the partnership a gasoline pump in consideration, among other things, of the latter agreeing not to use said pump for any other product than the lender's, "claimed by the garage partners, when sued under it, to have been against public policy and in restraint of trade, though the gasoline involved was brought to plaintiff oil company's place of business by interstate commerce." (Quotation from syllabus.) *Quincy Oil Co.* v. *Sylvester*, March 7, 1921, 130 N. E. 217 (Mass.).

——SALES INITIATED AND CONSUMMATED INTRASTATE BY FOREIGN CONCERN.

40. 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

[4] On interstate commerce, see also annotations to Clayton Act, pars. 47–51, pp. 497–499.

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 also in Vol. II of Commission's Decisions at pp. 550–552, or in 1920 "Acts from which the Commission," etc., at pp. 84–86), reversing Commission's order in 1 F. T. C. 388.

The court stated at page 331 (see Vol. II of Commission's Decisions, p. 551, or 1920 "Acts from which the Commission," etc., at p. 85):

41. "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."

——TRADE ASSOCIATIONS.

42. "The contention that the Harness Manufacturers' Association is not engaged in commerce is answered by the consideration, first, that many of its members are so engaged, and, second, that interstate commerce is claimed to have been directly affected by the alleged unfair methods of competition. *Loewe* v. *Lawlor*, *supra* [208 U. S. 274]; *Eastern States Lumber Co.* v. *United States*, *supra* [234 U. S. 600]; *Nash* v. *United States*, 229 U. S. 373, 379." *Nat'l Harness Mfrs. Ass'n.* v. *Federal Trade Commission*, December 7, 1920, 268 Fed. 705, 709. (See case in this volume, p. 570 at pp. 575, 576.)

——UNFAIR METHODS DIRECTLY AFFECTING.

43. "The contention that the Harness Manufacturers' Association is not engaged in commerce is answered by the consideration * * * that interstate commerce is claimed to have been directly affected by the alleged unfair methods of competition. *Loewe* v. *Lawlor*, *supra* [208 U. S. 274]; *Eastern States Lumber Co.* v. *United States*, *supra* [234 U. S. 600]; *Nash* v. *United States*, 229 U. S. 373, 379." *Nat'l Harness Mfrs. Ass'n.* v. *Federal Trade Commission*, December 7, 1920, 268 Fed. 705, 709. (See case in this volume, p. 570 at pp. 575, 576.)

JUDICIAL REVIEW—IN GENERAL.

44. "Whatever may be the exact meaning or extreme scope of the still novel phrase "unfair method of competition," it is settled that it is for the courts and not the Commission to determine as matter of law what is and what is not included in the phrase. (*Federal, Etc., Commission* v. *Gratz*, 253 U. S. 421.) And this rule is not avoided by stating as a finding of fact what is a mere conclusion of law. *New Jersey,*

ANNOTATIONS, SEC. 5—Continued.

JUDICIAL REVIEW—IN GENERAL—Continued.

Etc., Co. v. *Trade Commission*, 264 Fed. 509." *Standard Oil Co. of New York* v. *Federal Trade Commission*, May 11, 1921, 273 Fed. 478, 481. (See case in this volume, p. 622 at p. 626.)

——COURT'S POWERS.

45. "* * * while Congress has enacted, * * * 'that unfair methods of competition in commerce are declared unlawful,' it has not defined unfair competition, or specified what shall constitute unfair competition. From this absence of definition, it is reasonable to infer that it was in the mind of Congress that, as unfair competition had long been a subject of judicial scrutiny, determination, and was involved in remedial suits at law for damages and of injunctive suits in equity, to prevent continuance, the definition and ascertainment of what constituted unfair competition was a legal question which the law could determine. Indeed, in the nature of things, it was impossible to describe and define in advance just what constituted unfair competition, and in the final analysis it became a question of law, after the facts were ascertained, whether such facts constitute unfair competition in business, for the test of fairness, as of fraud, is the application by the law of moral standards to the actions of men."

46. "While it was the exclusive right of a jury in a case at law to find the facts in any given case, it still remained the duty of the trial judge, before entering judgment, to decide whether from those facts the injury of unfair competition in business could be lawfully inferred. So, also, when the case was in equity, while it was the province of the judge to find the facts, it also was his duty, and as well the duty of a reviewing court, to decide whether, upon those facts so found, the injury of unfair competition in business existed. Presumably, with this recognized existing jurisdiction of Federal courts over cases of unfair business competition in mind, Congress passed the Trade Commission Act, * * *."

47. "Such, then, being the existing and by the act unchanged jurisdiction of such courts in reference to questions of unfair competition between business competitors generally, and that jurisdiction being exercised on well-established legal principles, it follows that, when Congress invoked an exercise of supervisory power on the part of such courts over the action of the Trade Commission, and enacted that this supervisory power should be exercised before the orders of the Trade Commission could be enforced, it would seem to follow that the supervisory powers which the court was meant and intended to exercise were the usual powers exercised in the usual way by those courts when exercising their power to review, and, while the act provided that the findings of fact made by the Commission were final and conclusive, it still remained the duty of the supervising court to determine the same legal questions which a supervising court had in reviewing actions of the trial court, namely, whether under all the facts found by the Trade Commission a case of un-

fair business competition was established * * *."

48. "To our mind, the situation is wholly different from that of the Interstate Commerce Commission. There the basic question is the fixation of rates, which is a question of business discretion, and in no sense a legal, judicial, or moral one. Manifestly, Congress did not mean to confer upon the Trade Commission the power to grant injunctions in cases of business competition, where courts would not be justified in granting injunctions. Indeed, when Congress, in invoking such reviewing and supervisory power, said 'the court * * * 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,' it was using language which aptly described the customary jurisdiction and power theretofore exercised by circuit courts of appeals in reviewing cases of alleged unfair business competition." *Curtis Publishing Co.* v. *Federal Trade Commission*, March 2, 1921, 270 Fed. 881, 908, 909. (See case in this volume, p. 579 at pp. 610–612.)

——EFFECT OF COURT DECISION PASSING ON PRACTICE IN PRIVATE LITIGATION.

49. "Of course, the decree in that case [referring to adjudication involving the same private parties and same general subject matter], where private rights only are concerned, binds only the parties, and can in no way affect the jurisdiction of the Trade Commission; but the fact that while the business relations of these parties were under review by the Commission one of the parties invoked, as it had a right to do, the jurisdiction of a court in equity and sought to enjoin such alleged unfair competition, and that court, after hearing, held that the defendant's business operations did not constitute unfair competition, but, on the contrary, the complainant's actions did, and the Trade Commission thereafter, upon similar facts shown to it, held the Curtis Company was guilty of unfair competition in business, the mere existence of such an anomalous and contradictory holding of legal conclusion upon the same general facts in and of itself suggests that, in the exercise of our reviewing, supervisory, jurisdiction, it is for us to decide whether the legal question before the Trade Commission was rightly decided by it, and in deciding that question we may give due consideration to the reasoning and opinion of the court referred to, with a view to avoiding conflicting holdings under substantially similar states of fact." *Curtis Publishing Co.* v. *Federal Trade Commission*, March 2, 1921, 270 Fed. 881, 910, 911. (See case in this volume, p. 579 at pp. 612, 613.)

——SUBSTANTIAL DOUBT.

50. "Injunction is so drastic and prohibitive a remedy, its issuance by a court of equity so carefully safeguarded, that to have substantial question of the wisdom of such issue often suffices to withhold. To doubt is to decide, and this well-founded principle of equity in itself would lead a court of original jurisdiction to deny the strong arm of injunctive relief. * * *"

ANNOTATIONS, SEC. 5—Continued.

JUDICIAL REVIEW—SUBSTANTIAL DOUBT—Continued.

Curtis Publishing Co. v. *Federal Trade Commission*, March 2, 1921, 270 Fed. 881, 914. (See case in this volume, p. 579 at p. 617.)

—— TENDENCIES OF PRACTICES.

51. "* * * A tendency is an inference from proven facts, and an inference from the facts as found by the Commission is a question of law for the court. * * *" *Standard Oil Co. of New York* v. *Federal Trade Commission*, May 11, 1921, 273 Fed. 478, 482. (See case in this volume, p. 622 at p. 627.)

PLEADING.

52. "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.

53. "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.

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

55. "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 also in Vol. II of Commission's Decisions, p. 564 at pp. 569, 570, or in 1920 "Acts from which the Commission," etc., p. 98 at pp. 103, 104. On same subject see also annotations to Clayton Act, pars. 52–55, p. 409.)

SCOPE IN GENERAL.

See also *ante*, par. 7.

56. "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 also in Vol. II of Commission's Decisions, p. 536 at p. 541, or in 1920 "Acts from which the Commission," etc., p. 70 at p. 75.)

57. "It seems to use 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 mehods, 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. * * *

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

59. "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. [258 Fed. 307. See case also in Vol. II of Commission's Decisions, p. 536, or in 1920 "Acts from which the Commission," etc., at p. 70.] 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 14, 1919, 258 Fed. 314, 316, 317. (See case also in Vol. II of Commission's Decisions, p. 545 at pp. 548, 549, or in 1920 "Acts from which the Commission," etc., p. 79 at pp. 82, 83.)

60. "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 antiturst 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.

ANNOTATIONS, SEC. 5—Continued.

SCOPE IN GENERAL—Continued.

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 28, 1920, 264 Fed. 885, 890. (See case also in Vol. II of Commission's Decisions, p. 556 at p. 562, or in 1920 "Acts from which the Commission," etc., p. 90 at p. 96.)

61. "* * * 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 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 also in Vol. II of Commission's Decisions, p. 564 at p. 574, or in 1920 "Acts from which the Commission," etc., p. 98 at p. 108.)

62. "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 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, 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 also in Vol. II of Commission's Decisions, p. 564 at pp. 578, 579, or

in 1920 "Acts from which the Commission," etc., p. 98 at pp. 112, 113.)

63. On appeal from a decision of the district court granting a motion to dismiss a bill filed by manufacturers of linoleum to enjoin defendant from advertising, offering, and selling as linoleum any product not theretofore so known and understood, on the ground that "an action for unfair competition lies only when a property right of the complainant has been invaded, and the fact that a defendant makes an article and sells it under a false name or designation and thus deceives the public does not give a right of action to another, who makes the genuine article so designated, where it is not shown that defendant has represented or sold its product as that of complainant" [quotation from syllabus], the circuit court of appeals in *Armstrong Cork Co.* v. *Ringwalt Linoleum Works*, April 4, 1917, 240 Fed. 1022, reversed the lower court and remanded the case "with directions to reinstate the bill, overrule the demurrer, without prejudice to raising the same questions on final hearing, and to proceed to final hearing," adding that "in view of the possibility of bringing such matters as are here involved before Federal Trade Commission, this order is made without prejudice to the right of the parties while this bill is pending to apply for relief to that body, if it so desires." (Which was done. See findings and order in 1 F. T. C. 436.)

"THAT THE FINDINGS OF FACT, IF SUPPORTED BY TESTIMONY, SHALL BE CONCLUSIVE."

64. " * * * The findings of fact by the Trade Commission we have quoted in full. Those findings we accept as established, and they are the sole foundation on which the order of the Commission is bottomed. 'From the foregoing findings, the Commission concludes,' is its own statement."

65. "Now, it is very apparent that, where the supervisory review by the circuit court of appeals, which Congress invoked, provided that that court 'shall have power to make and enter *upon the pleadings, testimony, and proceedings* set forth in such transcript, a decree,' it is the province, and indeed the duty, of the reviewing court, to consider, not merely the findings of the Commission, but the whole record, the whole proofs, and the whole proceeding, and to say, first, whether in view of all the proofs, the limited facts found by the Commission really passed on the pertinent and decisive facts, and so warranted an injunction; and, second, if such limited facts do not reach the merits, and do not alone legally justify and warrant a decree of unfair competition and injunctive relief, then, since Congress has enacted that the circuit courts of appeals 'shall 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,' it is quite clear that it is not only the province, but the duty, of the circuit court of appeals, and indeed the expressed purpose of Congress that such reviewing court should itself examine the pleadings, the entire testimony and proceedings, and upon such inclusive examination determine whether the facts found by the Commission and the proofs on

ANNOTATIONS, SEC. 5—Continued.

"THAT THE FINDINGS OF FACT, IF SUPPORTED BY TESTIMONY, SHALL BE CONCLUSIVE"—Continued.

which the Commission made no findings, and which the court, in the absence of such finding, itself finds and determines, *legally established a case of* unfair business competition by the Curtis Company."

66. " * * * accepting in their entirety and finality all facts found by the Commission, but taking the whole record and the proofs on which the Commission has made no finding, we are satisfied, as the statute provides, 'upon the pleadings, testimony, and proceedings set forth in the transcript,' the charge of unfair methods of competition could not be legally adjudged. If this was a case where a trial court had submitted these proofs to a jury from which to find a verdict of unfair business competition, a reviewing court would be constrained to set such verdict aside as not having testimony to support it." *Curtis Publishing Co.* v. *Federal Trade Commission*, March 2, 1921, 270 Fed. 881, 911, 912, 914, 915. (See case in this volume, p. 579 at pp. 613, 614, 617.)

UNINCORPORATED VOLUNTARY ASSOCIATION NOT DIRECTLY ENGAGED IN BUSINESS—PROCEEDING AGAINST.

67. "By section 5 of the Federal Trade Commission Act the Commission is given jurisdiction when it has reason to believe that 'any person, partnership, or corporation has been or is using any unfair methods 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.' Section 4 of the act defines a corporation as 'any company or association, incorporated or unincorporated' which either (*a*) is organized to carry on business for profit and has shares of capital or capital stock, or (*b*) is '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.' The Harness Manufacturers' Association is a voluntary, unincorporated association and thus without capital stock. It is not itself engaged in business. Petitioner contends that it therefore is not within the Act. But this contention overlooks the fact that the association is not the only one proceeded against; but that its officers and the members of its executive committee, as well as its membership generally, are included in the proceedings as parties and made subject to the Commission's order. The language of the Act affords no support for the thought that individuals, partnerships, and corporations can escape restraint, under the Act, from combining in the use of unfair methods of competition, merely because they employ as a medium therefor an unincorporated, voluntary association, without capital and not itself engaged in commercial business. The order may be enforced by reaching the officers and members, personally and individually. A voluntary association, having many members, may be brought into court by service on its officers and such of its members as are known and can be conveniently reached, sufficient being served to represent all the diverse interests."

[Citing cases.] *Nat'l Harness* 268 Fed. 705, 708, 709. (See *Mfrs. Ass'n* v. *Federal Trade Commission*, December 7, 1920, case in this volume, p. 570 at p. 575.)

Sec. 6. FURTHER POWERS.[5]

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

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

(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 require annual or special reports from 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.

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

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

(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,[5a] 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 transmit findings and recommendations to Attorney General.

[5] On constitutionality, see also *ante*, pars. 28, 29, p. 459.

Provisions and penalties of secs. 6, 8, 9, and 10 of this Act made applicable to the jurisdiction, powers, and duties conferred and imposed upon the Secretary of Agriculture by sec. 402 of the "Packers and Stockyards Act, 1921," approved Aug. 15, 1921, ch. 64, 42 Stat. 159.

[5a] For text of Sherman Act, see footnote on pp. 483–485. As enumerated in last paragraph of sec. 4 of this act, see p. 444.

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[5a] 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[5a] 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.

ANNOTATIONS.

68–71. "Manufacture" or "production" distinguished from commerce — As affecting right to investigate concern under Clause A.

72–79. —— As affecting right to demand reports under Clause B.

"MANUFACTURE" OR "PRODUCTION" DISTINGUISHED FROM "COMMERCE"—AS AFFECTING RIGHT TO INVESTIGATE CONCERN UNDER CLAUSE A.[6]

68. 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

[5a] For text of Sherman Act, see footnote on pp. 483–485. As enumerated in last paragraph of sec. 4 of this act, see p. 444.

[6] On interstate commerce, see also *ante*, pars. 39–43 (pp. 462, 463), and annotations to Clayton Act, pars. 47–51 (pp. 497–499).

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": *Held*, in *United States* v. *Basic Products Co.*, September 9, 1919, 260 Fed. 472, that such investigation, under the circumstances involved, was beyond the powers of the Commission.[1]

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

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

70. "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:

71. "'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 * * *.'" (See case in this volume, p. 542 at p. 553.)

——AS AFFECTING RIGHT TO DEMAND REPORTS UNDER CLAUSE B.

72. "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

[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 fourth paragraph of footnote to Federal Trade Commission Act on pp. 440, 441.

ANNOTATIONS, SEC. 6—Continued.

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

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*,[8] April 19, 1920, Supreme Court of the District of Columbia. (Not reported in Reporter series.)

The court stated, *inter alia:*

73. "* * * 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.'

74. "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.

75. "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. No. 71).]"

76. "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 or 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."

77. "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 * * *."

78. "The corporations referred to in the Act are, by its

[8] Granting temporary injunction against the Commission. In connection with this case see fourth paragraph of footnote to Federal Trade Commission Act on pp. 440, 441.

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 * * *.

79. "It follows, therefore, that the Commission can not compel the making of the reports which it has demanded of the plaintiff." (See case in this volume, p. 555 at pp. 558, 563, 564.)

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

Court may refer suit to Commission.

SEC. 7. That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts,[8a] 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.

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.

ANNOTATIONS.

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

80. 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.*, August 24, 1915, 226 Fed. 62, 81.

Sec. 8. COOPERATION OF OTHER DEPARTMENTS AND BUREAUS.[9]

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

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 corpo-

[8a] For text of Sherman Act, see footnote on pp. 483–485. As enumerated in last paragraph of sec. 4 of this act, see p. 444.

[9] Provisions and penalties of secs. 6, 8, 9, and 10 of this Act made applicable to the jurisdiction, powers, and duties conferred and imposed upon the Secretary of Agriculture by sec. 402 of the "Packers and Stockyards Act, 1921," approved Aug. 15, 1921, ch. 64, 42 Stat. 159.

Sec. 8. COOPERATION OF OTHER DEPARTMENTS AND BUREAUS—Continued.

ration 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.

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

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

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 subpœna the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any members of the commission may sign subpœnas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

May require attendance of witnesses and production of evidence.

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

* Provisions and penalties of secs. 6, 8, 9, and 10 of this act made applicable to the jurisdiction, powers, and duties conferred and imposed upon the Secretary of Agriculture by sec. 402 of the "Packers and Stockyards Act, 1921," approved Aug. 15, 1921, ch. 64, 42 Stat. 159.

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. 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.

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.

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

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.

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

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

Perjury excepted.

ANNOTATIONS.

CONSTITUTIONALITY [10]—AS VIOLATING PROVISION AGAINST UNREASONABLE SEARCHES AND SEIZURES.

81. "The Act is also assailed as violating the fourth amendment to the Federal Constitution, which protects against "unreasonable searches and seizures," which petitioner asserts are provided for by the so-called inquisitorial feature of section 9, in the declaration 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 inves-

[10] See also *ante*, paras. 28, 29, p. 459.

ANNOTATIONS, SEC. 9—Continued.

CONSTITUTIONALITY—AS VIOLATING PROVISION AGAINST UNREASONABLE SEARCHES AND SEIZURES—Continued.

tigated or proceeded against'; a provision whose enforcement is provided for by section 10, which subjects any person to fine or imprisonment, or both, '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.'

82. "Of this criticism it is enough to say that the provisions in question of sections 9 and 10 are not before this court. The Commission has not attempted to exercise them. Section 9 otherwise contains complete provision for enforcing, by subpœna, the attendance and testimony of witnesses and the production of all documentary evidence relating to any matter under investigation. Beyond this the Commission has not gone. That one attacking a statute as unconstitutional must show that the alleged unconstitutional feature injures him is settled by a long line of authorities. [Citing cases.] *Nat'l Harness Mfrs. Ass'n* v. *Federal Trade Commission*, December 7, 1920, 268 Fed. 705, 708. (See case in this volume, p. 570 at p. 574.)

Sec. 10. PENALTIES.[11]

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

[11] On constitutionality, as violating provision against unreasonable searches and seizures, see *ante*, pars. 28, 29, p. 459, and par. 81, p. 477.

Provisions and penalties of secs. 6, 8, 9, and 10 of this Act made applicable to the jurisdiction, powers, and duties conferred and imposed upon the Secretary of Agriculture by sec. 402 of the "Packers and Stockyards Act, 1921," approved Aug. 15, 1921, ch. 64, 42 Stat. 159.

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 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.

Willful refusal to submit documentary evidence to Commission.

Offender subject to fine or imprisonment, or both.

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.

Failure of corporation to file required report.

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.

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.

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

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

SEC. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts[116] or the Acts to regu-

Not affected by this act.

[116] For text of Sherman Act, see footnote on pp. 483–485. As enumerated in last paragraph of sec. 4 of this act, see p. 444.

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

late 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.

ANNOTATIONS TO ACT AS A WHOLE.

83. Resale price maintenance—In general.
84. —— As an agreement or combination under Sherman Antitrust Act.
85. —— Refusal to sell—As price fixing.
86–90. —— ——Right to.

RESALE PRICE MAINTENANCE — IN GENERAL.[12]

See also *ante*, par. 23.

83. 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.

——AS AN AGREEMENT OR COMBINATION UNDER SHERMAN ANTITRUST ACT.

84. *Held* (three judges dissenting), That a charge by the trial court to the jury in which the court stated to them that "if you shall find that the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find the defendant called this particular feature of this plan to their attention on very many occasions, and you find the great majority of them not only expressing no dissent from such plan but actually cooperating in carrying it out by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement forbidden by the Sherman Antitrust Act" was erroneous and material, as the facts recited "do not suffice to establish an agreement or combination forbidden by the Sherman Act." *Frey & Son* v. *Cudahy Packing Co.*, April 18, 1921, 255 U. S. —, 41 Sup. Ct. 451.

—— REFUSAL TO SELL[13]—AS PRICE FIXING.

85. "* * * Let it be assumed that the defendant declines business with all who refuse to maintain prices. If such refusal affected a necessity of life, or even a staple article of trade, the matter might be serious, and history might be appealed to for instances of statutory punishment—e. g., the engrossing acts—but mere abstention from dealing can not *per se* be price fixing, because the price is not made to depend upon any contract or agreement even thought by the parties to be enforceable. To call defendant's acts price fixing is inaccurate and evades obvious

[12] 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.

[13] On refusal to sell as involved in connection with resale price maintenance, see also *post*, annotations to Clayton Act, pars. 4–15, pp. 487–490.

legal questions, viz, whether defendant has the right to decline business, and whether it is anybody's business why the business is declined." *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, July 20, 1915, 224 Fed. 566, 572; affirmed November 10, 1915, 227 Fed. 46.

——RIGHT TO.

See also *ante*, par. 23.

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

87. "Using the word 'sell' or 'sale' conceals the issue. If a man prefers to keep what he has, an offer of money to salve the taking thereof does not prevent such taking from being confiscation. The Cream of Wheat Co. is purely a private concern except as regulated by its creating law. It is an ordinary merchant whose business is affected by no public use whatever. The statute, as construed by plaintiff, descends upon that private merchant and commands him to make a contract by which he transfers his property for a price but against his will. The contract and the price are legally mere surplusage: the constitutional violation lies in the compulsion whereby he is deprived of his property for a private purpose. If defendant's actual scheme of interstate business is unlawful, the United States certainly, and now perhaps an individual plaintiff can put it out of business; but neither the Nation nor any individual can take away its property with or without compensation for the private use of anyone." *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, July 20, 1915, 224 Fed. 566, 574, 575.

88. "* * * We had supposed that it was elementary law that the trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern. 'It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or be the result of whim, caprice, prejudice, or malice.' Cooley on Torts, page 278. See, also, our own opinion in *Greater New York Film Co.* v. *Biograph Co.* 203 Fed. 39, 121, C. C. A. 375.

89. "Before the Sherman Act it was the law that a dealer might reject the offer of a proposing buyer, for any reason that appealed 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

ANNOTATIONS TO ACT AS A WHOLE—Continued.

RESALE PRICE MAINTENANCE—REFUSAL TO SELL—RIGHT TO—Continued.

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.

90. "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 Sons 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.

THE CLAYTON ACT.[14]

[Approved Oct. 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.

"Antitrust laws."

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

[14] Annotations cover cases through 273 Fed. 768 (part 3, Advance Sheets, issued as of Sept. 1, 1921), and 41 Sup. Ct. Reporter 625, which disposes of all cases decided at the October term, 1920 (last decisions handed down on June 6 1921). 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. 52), 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 be noted that the cases of *Standard Fashion Co.* v. *Magrane, Houston Co.*, June 28, 1919, 259 Fed. 793; *United States* v. *United Shoe Machinery Co.*, Mar. 31, 1920, 264 Fed. 138; *Curtis Publishing Co.* v. *Federal Trade Commission*, Mar. 2, 1921, 270 Fed. 811, and

the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety[15]; 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 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," 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

"Commerce."

Fruit Growers Express, Inc. v. *Federal Trade Commission*, June 16, 1921, 274 Fed. 205, are, as of June 30, 1921, pending on appeal in the Supreme Court.

It should also be noted in connection with this law—

That the so-called Shipping Board Act (sec. 15, ch. 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 * * *";

That the jurisdiction of the Commission is limited by the "Packers and Stockyards Act, 1921," approved Aug. 15, 1921, ch. 64, 42 Stat. 159, sec. 406 of said Act, providing that "on and after the enactment of this Act and so long as it remains in effect the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this Act is made subject to the jurisdiction of the Secretary [of Agriculture], except in cases in which, before the enactment of this Act, complaint has been served under sec. 5 of the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved Sept. 26, 1914, or under sec. 11 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and except when the Secretary of Agriculture, in the exercise of his duties hereunder, shall request of the said Federal Trade Commission that it make investigations and report in any case"; and

That by the last paragraph of sec. 407 of the Transportation Act, approved Feb. 28, 1920, ch. 91, 41 Stat. 456 at 482, the provisions of the Clayton Act and of all other restraints or prohibitions, State or Federal, are made inapplicable to carriers, in so far as the provisions of the section in question, which relate to division of traffic, acquisition by a carrier of control of other carriers and consolidation of railroad systems or railroads, are concerned.

[15] 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, 1921, and 1922 (Sundry Civil Appropriation Act, July 19, 1919, ch. 24, 41 Stat. 208, Sundry Civil Appropriation Act, June 5, 1920, ch. 235, 41 Stat. 922,

Sec. 1. DEFINITIONS—Continued.

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

"Person or persons."

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.

"COMMERCE."

On interstate commerce, see annotations to Federal Trade Commission Act, pars. 39–43 (pp. 462, 463), and annotations to this act, pars 47–51 (pp. 497–499).

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and Sundry Civil Appropriation Act, Mar. 4, 1921, ch. 161, 41 Stat. 1411, 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 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.

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 per-

Sec. 2. PRICE DISCRIMINATION.[18]

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

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

son 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 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.

[18] On provisions of the Shipping Board Act, Packers and Stockyards Act, 1921, and Transportation Act, limiting the scope of the Clayton Act in certain cases, see second, third, and fourth paragraphs of the footnote on p. 483.

Sec. 2. PRICE DISCRIMINATION—Continued.

States or any Territory thereof or the District of Columbia 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.

ANNOTATIONS.

1. Commission action not prerequisite to private suit.
2. Leases.
3. Refusal to sell chain-store concern as not a wholesaler.
4–7. Refusal to sell on account of failure to observe suggested resale prices.
8–11. "Restraint of trade"—As involved by or resting on patent, trade name or mark or copyright monopoly, and refusal to sell.
12, 13. "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.
14, 15. Trade classifications—Wholesaler as distinguished from jobber and retailer.
16, 17. "Where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

COMMISSION ACTION NOT PREREQUISITE TO PRIVATE SUIT.

1. *Held*, That "an action may sometimes be maintained in the Federal district court to recover damages for alleged price discriminations by defendant against plaintiff in violation of Clayton Act, October 15, 1914, ch. 323, 38 Stat. 730, although the Federal Trade Commission has taken no action in the premises." (Quotation from syllabus.) *Frey & Son, Inc.*, v. *Cudahy Packing Co.*, April 27, 1916, 232 Fed. 640.

LEASES.

2. "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 CHAIN-STORE CONCERN AS NOT A WHOLESALER.

3. *Held*, In *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, Circuit Court of Appeals, November 10, 1915, 227 Fed. 46, that such a refusal does not constitute a discrimination in price, under the circum-

stances set forth, in violation of section 2. (See *post*, pars. 14, 15.)

REFUSAL TO SELL ON ACCOUNT OF FAILURE TO OBSERVE SUGGESTED RESALE PRICES.[17]

See also *post*, parts. 8–11, 14–15.

4. "Defendant was engaged in selling, under a trade name, purified wheat middlings, selected by it and put up in packages. Its whole business covered less than 1 per cent of the total middlings bought and sold in the country. It decided to sell only to wholesalers, and so announced to the trade, but for a time made an exception" to a concern operating a line of chain stores selling to the general public at retail. It also announced that it reserved the right to discontinue selling to those failing to observe the prices which it announced, as the prices at which it desired its product to be resold, and, pursuant to such announcement, discontinued selling to plaintiff, the concern above referred to. (Quotation from syllabus.)

5. "It is urged that defendant's professed and published scheme of sales, plus its practice thereunder, creates an actual monopoly of, and do lessen competition in, Cream of Wheat; that this result is in itself unlawful and is produced by means which are specifically prohibited by section 2 of the Clayton Act, namely, price discrimination not justified by any of the exceptions of that section, * * *."

6. "Plaintiff's syllogisms in support of the demand for relief are simple, thus: (1) Defendant has a monopoly in Cream of Wheat; (2) through such monopoly it fixes the resale price of that article; therefore, (3) it prevents competition in Cream of Wheat and violates the body of section 2. Again: (1) Preventing competition is restraint of trade; (2) defendant does prevent competition; therefore (3) it restrains trade and is not within the exception of section 2. * * *."

7. *Held*, That defendant's course of conduct under the circumstances set forth does not constitute an unreasonable restraint of trade nor price discrimination the effect of which "may be to substantially lessen competition or tend to create a monopoly" so as to entitle plaintiff to relief under sec. 2. *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.* July 20, 1915, 224 Fed. 566, 571, 572; affirmed Nov. 10, 1915, 227 Fed. 46.

"RESTRAINT OF TRADE"—AS INVOLVED BY OR RESTING ON PATENT, TRADE NAME OR MARK, OR COPYRIGHT MONOPOLY, AND REFUSAL TO SELL.

See also *ante*, pars. 4–7; *post*, pars. 58–66, 112.

8. * * * "It is true that defendant has a monopoly on Cream of Wheat; but as heretofore stated, it is a lawful monopoly, ultimately resting on the plain truth that there can be nothing anywhere in the United States lawfully called Cream of Wheat without defendant's consent and approbation. In that substance (if legally it is a distinct substance) defendant has

[17] On resale price maintenance in general, and refusal to sell in connection therewith, see also annotations to Federal Trade Commission Act, *ante*, pars. 83–90, pp. 480–482.

ANNOTATIONS, SEC. 2—Continued.

"RESTRAINT OF TRADE"—AS INVOLVED BY OR RESTING ON PATENT, TRADE NAME OR MARK, OR COPYRIGHT MONOPOLY, AND REFUSAL TO SELL—*Continued.*

the monopoly of a creator, something which is not and never has been within the prohibition of any law, antitrust or otherwise. On the contrary, that monopoly is encouraged by patent, trade-mark and copyright statutes and the rules of unfair competition. Therefore, the implication of plaintiff's premise, that there is something inherently wrong in defendant's monopoly, is false and misleading."

9. "* * * 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 such 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.

10. "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."[28]

11. "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, 572, 573, 574.

[28] But *see post*, pars. 52, 88, *et seq.*

"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." [19]

See also *ante*, pars. 8–7, 11.

12. "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.

13. "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.

TRADE CLASSIFICATIONS — WHOLESALER AS DISTINGUISHED FROM JOBBER AND RETAILER.

14. Where defendant made it its trade policy not to sell to consumers or retailers, but to confine its sales exclusively to wholesalers, though it for a time made an exception in favor of a company operating a chain of stores selling directly to the public, *Held*, on suit by the latter to compel defendant to continue selling to it on the ground that defendant's course of conduct, which included the reservation of the right to refuse to supply dealers failing to observe its suggested resale prices, constituted a violation of the Sherman Antitrust Act, and of the Clayton Act, that complainant was not a wholesaler but a retailer, and that defendant might decline to deal with it for any reason it saw fit (see *ante*, pars. 4–11, and annotations to Federal Trade Commission Act, pars. 85–89, pp. 480–482.) On the former question, i. e., complainant's status, the court stated:

15. "* * * There is nothing unusual about such a course of business, and certainly it is

[19] On resale price maintenance in general and refusal to sell, as incidental thereto, see annotations to Federal Trade Commission Act, *ante*, pars. 83–90, pp. 480–482.

ANNOTATIONS, SEC. 2—Continued.

TRADE CLASSIFICATIONS — WHOLESALER AS DISTINGUISHED FROM JOBBER AND RETAILER—Contd.

no offense against common law, statutes, public policy, or good morals for a trader to confine his sales to persons who will buy from him in large quantities. A 'wholesaler' is one who buys in comparatively large quantities and who sells usually in smaller quantities but never to the ultimate consumer of an individual unit. He sells either to the 'jobber' (a sort of middleman) or to the 'retailer'; the latter being the one who sells to the consumer. The 'large' quantities bought by the wholesaler may vary greatly—from a fraction of a carload to many carloads; the character not of his buying but of his selling marks him as a wholesaler. If occasionally, in some particular business, this term loses somewhat of its original significance, such manifestly, as the record shows, is not the fact with the business now under consideration." *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.* Circuit Court of Appeals, November 10, 1915, 227 Fed. 46–48.

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

See also *ante*, par. 11; *post*, pars. 88–104.

16. "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 * * *.

17. "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.*, January 17, 1919, 256 Fed. 571, 574.

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

[*] See also *post*, pars. 52, 53.

Sec. 3. TYING OR EXCLUSIVE LEASES, SALES OR CONTRACTS.[a]

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.

ANNOTATIONS.

18–21. Applicability to agency.
22. Assignment of exclusive territory.
23–26. Construction — Limited to leases, sales, or contracts for sales and to lessees and purchasers.
27–32. Construction of leases, sales, or contracts.
33–44. Constitutionality — Patents previously granted.
45, 46. —— Retroactive effect on existing contracts.
47. Interstate commerce—Contracts of domestic concern receiving subject matter through interstate commerce.
48. —— Leases.
49, 50. —— —— Place of execution.
51. —— Place of act of infringement.
52, 53. Pleading—In general.
54. —— Interstate commerce—Averment of transaction in, conclusion of pleader.
55. —— Necessary parties.
56, 57. Tying or exclusive contracts or leases—Absence of express assent on part of lessee or covenantee.
58–63. —— By owner of patent—License to manufacture under, conditioned on purchase raw materials therefor from licensor (lessor).
64–66. —— By owner of secret process or formula, good will, and trade names or marks—Assignment of part of potential business.
67. —— Legality, presumption of.
68, 69. —— Monopolistic tendencies.
70–87. —— In particular cases.
88–104. "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."
105. Whether limited by section 2.
106–109. Whether retroactive.
Words and phrases—"Line of Commerce." (Reference to pars. 58–63.)
110, 111. —— "Understanding."
112. In general.

[a] On provisions of the Shipping Board Act, Packers and Stockyards Act, 1921, and Transportation Act, limiting the scope of the Clayton Act in certain cases, see second, third, and fourth paragraphs of the footnote on p. 483.

ANNOTATIONS, SEC. 3—Continued.

APPLICABILITY TO AGENCY.

See also *post*, pars. 27–32.

18. "* * * 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 * * *.

19. "If nothing but a sale were involved, I might support complainant's contention that defendant has violated the Clayton Act by preventing its wholesale dealers from selling the Pictorial Review through dealers and boys; * * *."

20. "* * * 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.

21. "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.

22. Where the owner of a product sold under a trademark 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*, February 7, 1916, 229 Fed. 224.

CONSTRUCTION—LIMITED TO LEASES, SALES OR CONTRACTS FOR SALES, AND TO LESSEES AND PURCHASERS.

23. "The words 'lease,' 'sale,' 'contract for sale,' 'lessee,' and 'purchaser,' being the words used, and no other relation than lease and sale being mentioned, there is no expressed purpose in the clause quoted to make it cover any other subject than leases, sales, or contracts for sales, and to embrace no other persons than lessees and purchasers. The words are so clear they require no construction, and to needlessly construe, in order to broaden the scope of the statute,

whether done by the Trade Commission in administering, or by this court in supervising the administration of, the statute, would be for either or both such agencies to write into the statute what Congress has not expressly written. Not only has no ground been shown for contending that by necessary implication the statute covered other subjects than leases, sales, contracts for sales, or other persons than lessees and purchasers, but the Supreme Court had in *Motion Picture Patents Co.* v *Universal Film*, 243 U. S. 518, 37 Sup. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959, quoted below, indicated its view that the clause in question was passed to meet a clearly defined controversy which concerned leases and sales. The case of *Henry* v. *Dick*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, involved the sale of a patented machine, and the decision upheld a sales condition that other than supplies made by the seller should not be used in its operation by the buyer. Such being the adjudged law of the land, the Supreme Court, in *Motion Picture Patents Co.* v. *Universal Film*, 243 U. S. 518, 37 Sup. Ct. 421 (61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959), not only overruled that case but changed the decided law, saying:

24. "'It is obvious that the conclusions arrived at in this opinion are such that the decision in *Henry* v. *Dick Co.*, 224 U. S. 1, must be regarded as overruled.' But in doing so that court suggested, as we have said, its view that Congress, in passing the quoted section of the Clayton Act, had done so in order to meet the decision in *Henry* v. *Dick, supra*; the opinion stating, 'We are confirmed in the conclusion which we are announcing by the fact that since the decision of *Henry v. Dick Co.*, 224 U. S. 1, the Congress of the United States, the source of all rights under patents, as if in response to that decision, has enacted a law making it unlawful for any person engaged in interstate commerce "to lease or make a sale or contract for sale of goods * * * machinery, supplies or other commodities, *whether patented or unpatented*, for use, consumption or resale, * * * or fix a price charged therefor * * * on the condition, agreement or understanding that the lessee or purchaser thereof shall not use * * * the goods, * * * 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.' 38 Stat. 730.

25. "And in that connection it will be noted that in the dissenting opinion in *Henry* v. *Dick* (see 224 U. S. 50, 32 Sup. Ct. 381, 56 L. Ed. 645, Ann. Cas. 1913D, 880) the Chief Justice, with two Justices concurring, suggested the very congressional action which, we submit, was afterwards embodied in the Clayton Act, stating that their dissent would—

"'serve to make it clear that if evils arise their continuance will not be caused by the interpretation now given to the statute, but will result from the inaction of the legislative de-

ANNOTATIONS, SEC. 3—Continued.

CONSTRUCTION—LIMITED TO LEASES, SALES OR CONTRACTS FOR SALES, AND TO LESSEES AND PURCHASERS—Continued.

partment in failing to amend the statute so as to avoid such evils.'

26. "That, shortly after this decision was rendered, Congress passed the clause in question, gives additional weight to the view that Congress—

"'as if in response to that decision, has enacted a law making it unlawful for any person engaged in interstate commerce "to lease or make a sale or contract for sale of goods," etc.'" *Curtis Publishing Co.* v. *Federal Trade Commission*, March 2, 1921, 270 Fed. 881, 904–906. (See case in this volume, p. 579 at pp. 606, 607.)

CONSTRUCTION OF LEASES, SALES, OR CONTRACTS.

See also *ante*, pars. 18–21.

27. "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.

28. "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 without reference to its characterization by the parties themselves." *Standard Fashion Co.* v. *Magrane-Houston Co.*, March 9, 1918, 254 Fed. 493, 495.

29. *Held*, that a contract in substance one of sale, though called one of agency, containing a provision that the convenantee undertakes 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.

30. "* * * we turn to the second question, namely: Did the present contract 'lease or make a sale or contract for the sale of goods'? * * * Turning, then, to this present contract of the Curtis Company * * * we note, first, that the agreement, which is entitled a 'District agency agreement,' is in form and verbiage an appointment by a publisher of an agent, and an agent for limited territory and for a mutually optional time, for the purpose of (a) selling and (b) distributing its magazines. Now, there are no words in the contract which purport or contemplate the sale of such magazines, and there is express provision, if (a) a sale, or (b) a distribution, to third parties, is not effected, the magazines consigned are to be returned to the publisher. Indeed, the nature of the transaction,

the necessary haste to get the magazines into the hands of the boys at once, shows of itself that there was no reason for transferring title by sale. It was not the handling of commodities of which sales would naturally be made. It was a contract for distributing and speeding up deliveries of an article whose whole value depended on the haste with which it passed from the agent's possession. * * * All of these and other details that might be cited evidence that the relation created by this contract, and by its expressed terms meant to be created, was one of agency, and that there is an entire absence in the contract of any terms or words usual or requisite to effecting or evidencing a sale, as well as of circumstances inviting or necessitating a sale.

31. "We have not overlooked the fact that the contract provides for the maintenance by the agent in the hands of the publisher of an advance sum of money sufficient to indemnify the publisher for all magazines forwarded. But in our judgment this deposit can not, in view of the right of return, be regarded as a payment, but rather as an indemnity to secure payment, for all copies the agent does not return. * * * Nor is the fact to be overlooked that the contract, taken as a whole, could not be satisfied by the mere fact of sale to a buyer, for, if the transaction ended with a sale by the publisher, the whole spirit and purpose of the contract would be lost, which is that the distributing agent should distribute to the boys and the boys distribute to their personal customers.

32. "The subject of the contract is a large quantity of magazines, and the object of the contract is not to vest ownership of them in the other party to the contract, but to pass those magazines by the use of other agencies into the hands of the public. And the object of placing these magazines in the hands of the public is not alone to get from the real buyer of the magazine its comparatively small price, but by placing it in the hands of a vast number of buyers to thereby enable the publisher to obtain that advertising patronage which is the financial mainstay of all such periodical publications. It has therefore seemed to us that the unique character of the subject matter of this contract, the object the publisher had in view, and the phraseology, conditions, and obligations of this contract, unite to make the contract one of consignment to a distributing agent, who was furthering the business of his principals, and not one of a buyer, who thereby acquires title for his own individual purposes." *Curtis Publishing Co.* v. *Federal Trade Commission*, March 2, 1921, 270 Fed. 881, 906–908. (See case in this volume, p. 579 at pp. 607–609.)

CONSTITUTIONALITY—PATENTS PREVIOUSLY GRANTED.[*]

33. "* * * 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

[*] On patent or trade-mark monopoly as heretofore involved under this Act, see *ante*, pars. 8–11, 22; *post*, pars. 58–66.

ANNOTATIONS, SEC. 3—Continued.

CONSTITUTIONALITY—PATENTS PREVIOUSLY GRANTED — Continued.

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.

34. "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' * * *."

35. "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. * * *"

36. "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.

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

38. "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. * * *."

39. "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. * * *"

40. "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. * * *"

41. "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. * * *"

42. "* * * 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.'"

43. "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 lawmakers. * * *"

44. "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 31, 1920, 264 Fed. 138, 147–152, 154.

——RETROACTIVE EFFECT ON EXISTING CONTRACTS.

45. "* * * 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. * * *

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

INTERSTATE COMMERCE[38]—CONTRACTS OF DOMESTIC CONCERNS RECEIVING SUBJECT MATTER THROUGH INTERSTATE COMMERCE.

47. "Federal Trade Commission and Clayton Acts have no application to a contract between a domestic oil company

[38] See also *ante*, annotations to Federal Trade Commission Act, pars. 39–43, pp. 462, 463, and *post*, par. 54.

ANNOTATIONS, SEC. 3—Continued.

INTERSTATE COMMERCE—CONTRACTS OF DOMESTIC CONCERNS RECEIVING SUBJECT MATTER THROUGH INTERSTATE COMMERCE—Continued.

and a domestic partnership engaged in the garage business," under the terms of which the oil company lent the partnership a gasoline pump in consideration, among other things, of the latter agreeing not to use said pump for any other product than the lender's, "claimed by the garage partners, when sued under it, to have been against public policy and in restraint of trade, though the gasoline involved was brought to plaintiff oil company's place of business by interstate commerce." (Quotation from syllabus.) *Quincy Oil Co.* v. *Sylvester*, March 7, 1921, 130 N. E. 217 (Mass.).

—— LEASES.

48. "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.

—— —— PLACE OF EXECUTION.

49. 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.

50. "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.*, March 31, 1920, 264 Fed. 138, 158.

—— PLACE OF ACT OF INFRINGEMENT.

51. "Inasmuch as 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.

PLEADING—IN GENERAL.[34]

52. "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.

53. "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 monopoly in interstate commerce."[35] *United States* v. *United Shoe Machinery Co.*, June 6, 1916, 234 Fed. 127, 150.

—— INTERSTATE COMMERCE—AVERMENT OF TRANSACTION IN, CONCLUSION OF PLEADER.

54. "Relative to leases of shoe machinery being transactions in the course of interstate commerce, which alone are made unlawful by Clayton Act, October 15, 1914, paragraph 3 (Comp. St., par. 8835c), the allegation of answer merely that they were made in the course of such commerce is a conclusion of the pleader." (Quotation from syllabus.) *Witherell & Dobbins Co.* v. *United Shoe Machinery Co.*, Circuit Court of Appeals, November 9, 1920, 267 Fed. 950.

—— NECESSARY PARTIES.

55. "The contract here involved covered the arrangements made by common carriers for moving the Georgia fruit crop during the season which was to begin 23 days after entry of the order to cease and desist. The previous year the crop amounted to 7,600 cars of peaches, and it had to be, and was, moved within a few weeks. To the action here complained of [contracts under the terms of which the company agreed to furnish refrigerator cars and refrigerator service, and the railroad agreed to pay the charges stipulated, patronizing the company exclusively, with respect to their requirements for such cars and service] and in which the contract was in part held to be illegal, the carriers were not parties. The carrier's consideration for the contract consisted of two promises, viz, first, that it would

[34] See also *ante*, annotations to Federal Trade Commission Act, par. 52–55, p. 466.

[35] See also *ante*, par. 17.

ANNOTATIONS, SEC. 3—Continued.

PLEADING—NECESSARY PARTIES—Continued.

take all its requirements of refrigerator cars from petitioner; and second, that it would pay icing charges and also three-fourths of 1 cent per mile run on the lines of the carrier, which was the usual charge (50 I. C. C. R., p. 660). Inasmuch as the exclusive clause covered the only agreement in the contract to use any cars, the destruction of that clause destroyed the mutuality of the contract and it could not be enforced. [Citing cases.] Such being the effect of the finding and order, the carriers were necessary parties. *U. S.* v. *U. S. Shoe Machinery Co.*, 247 U. S. 32, 60." *Fruit Growers Express, Inc.*, v. *Federal Trade Commission*, June 16, 1921, 274 Fed. 205, 206.

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

56. "* * * 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.

57. "* * * 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.

——BY OWNER OF PATENT—LICENSE TO MANUFACTURE UNDER, CONDITIONED ON PURCHASE RAW MATERIALS THEREFOR FROM LICENSOR (LESSOR).

See also *ante*, pars. 8–11; *post*, par. 112.

58. Plaintiff sues to enjoin defendant from interfering with its contracts with third parties. Said contracts bound such third parties to purchase all materials for the manufacture of an article, the patents on which were owned by plaintiff in consideration of a license from plaintiff, to such third parties to manufacture such article.

The injunction was resisted on the ground, among others, that the contract violated section 3. The court, on motion for a preliminary injunction, declined to sustain this contention and granted the relief sought, stating in part:

59. "It appears from the affidavits that 82 licenses identical in terms and conditions with the license to the Eisemann Company were granted by the plaintiff to gear manufacturers in the United States, and that this number constitutes more than a majority of the gear manufacturers of this country. It likewise appears that gears differing in composition and design, but supplying in whole or in part the want now filled by the Conrad gears, were being made and used in large numbers before the Conrad gears were put upon the market. The plaintiff's license agreement does not contain any condition that the licensee shall not make, use, or deal in the gears of any competitor or competitors of the plaintiff. The license agreement may not, therefore, be held unlawful as tending to create a monopoly in gears. If the Conrad gear has supplanted other gears, as to which there is no evidence, the cause for such supremacy lies outside the contract, and consequently does not bring the contract in conflict with either the statute or public policy.

60. "Again, as the gear material is unpatented, it may be assumed that there was, prior to the grant of the Conrad patents, a 'line of commerce' in such material; but, if the patents are valid, only of course for purposes other than for gears. Yet the license agreement contains no condition that the licensee may not make or deal in the materials for use as ingredients of articles other than gears or use or deal in such articles when made. The patents, if valid, added a new use for the material, but left the field of prior uses of the material and of articles other than gears made therefrom unaffected. The license agreement may not, therefore, if the patents are valid, be held unlawful as tending to create a monopoly or to substantially lessen competition in the line of commerce of making, using, or selling articles made of fibrous material and a binder or laminations of cloth, and a phenolic condensation product, and the like, or articles other than gears made from such material. A contrary result would probably follow if the patents are not valid.

61. "But, assuming the patents to be valid, has the manufacture of gears under the Conrad patents created a new 'line of commerce' within the meaning of the Clayton Act, namely, the supplying of material for making Conrad gears, and if so, may the effect * * * of the license agreement be to substantially lessen competition or tend to create a monopoly therein? Whether the making and sale of the materials to go into the Conrad gears is a 'line of commerce' within the meaning of the Clayton Act is under the evidence before the court not free from doubt and no opinion will now be expressed thereon. Assuming, however, that that would constitute such 'line of commerce,' and that the patents are valid, is the contract a lawful one? Revised Statutes, section 4884 (Comp. St. 9428), provides that:

ANNOTATIONS, SEC. 3—Continued.

PLEADING—NECESSARY PARTIES—Continued.

take all its requirements of refrigerator cars from petitioner; and second, that it would pay icing charges and also three-fourths of 1 cent per mile run on the lines of the carrier, which was the usual charge (50 I. C. C. R., p. 666). Inasmuch as the exclusive clause covered the only agreement in the contract to use any cars, the destruction of that clause destroyed the mutuality of the contract and it could not be enforced. [Citing cases.] Such being the effect of the finding and order, the carriers were necessary parties. *U. S.* v. *U. S. Shoe Machinery Co.*, 247 U. S. 32, 60." *Fruit Growers Express, Inc.*, v. *Federal Trade Commission*, June 16, 1921, 274 Fed. 205, 206.

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

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ANNOTATIONS, SEC. 3—Continued.

TYING OR EXCLUSIVE CONTRACTS OR LEASES—BY OWNER OF PATENT—LICENSE TO MANUFACTURE UNDER, CONDITIONED ON PURCHASE RAW MATERIALS THEREFOR FROM LICENSOR (LESSOR)—Continued.

'Every patent shall contain * * * grant to the patentee, his heirs, or assigns, for the term of 17 years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States and the territories thereof.'

62. "A patent gives to the patentee the right not only to prevent others from making the patented article, but also to prevent others from making any ingredient or part of such patented article with intent that such ingredient or part shall be used in the patented article, for as a patentee may maintain a suit for infringement against a person making such patented article, so may he also maintain a suit for contributory infringement against a person making and selling the ingredients or parts for use in the patented article. The right to make the parts and material entering into the patented article, and to exclude others from making them, if such parts and material are unpatented as in this case, would seem to be an inevitable adjunct of the patent and a part of the patent monopoly. There is no evidence in this case that the patentee or his assignee, the plaintiff, ever surrendered this monopoly to the public. I do not see, therefore, that the effect of granting a license to manufacture the Conrad gears, but reserving to the licensor the right to continue to make the gear material, was to surrender to the public the licensor's monopoly to make the material entering into such gears, or to create a 'line of commerce' within the meaning of the Clayton Act.

63. "Nor do I see how the effect of reserving such right to the licensor may be to lessen competition that never existed or tend to create a monopoly that was complete in the licensor before the contract was made. This tentative conclusion is, I think, in accord with *Wallace* v. *Homes*, 9 Blatch. 65, 29 Fed. Cas. 74, and not in conflict with *Motion Picture Co.* v. *Universal Film Co.*, 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959; for as I understand the latter case, the question there decided is radically different from the one now under consideration. Furthermore, the trend of the Motion Picture Company Case is not manifest in *U. S.* v. *United Shoe Mach. Co.*, 247 U. S. 32, 38 Sup. Ct. 473, 62 L. Ed. 968, and it is not clear that the latter case did not modify the former. It is thus seen that if the making and selling of material for Conrad gears is a 'line of commerce,' within the meaning of the Clayton Act, which is not decided, that the validity of the contract depends upon the validity of the patents—not the admission of validity made by the licensee, but upon their actual validity." *Westinghouse Electric & Mfg. Co.* v. *Diamond State Fibre Co.*, March 27, 1920, 268 Fed. 121, 125, 126.

—— BY OWNER OF SECRET PROCESS OR FORMULA, GOOD WILL, AND TRADE NAMES OR MARKS—ASSIGNMENT OF PART OF POTENTIAL BUSINESS.

See also *ante*, pars. 8–11; *post*, par. 112.

64. Sued to enforce a contract made by its predecessor, in which said predecessor, owner of a valuable secret process or formula for making a beverage, theretofore confined to the *fountain* trade, and of a valuable good will, and trade names and marks in connection with its product, gave exclusive rights for the *bottling* business in a large territory to complainant's predecessors, and the right to use its trade names and marks in connection therewith, in return for their undertaking, among other things, to carry on such business in the territory in question and take all their syrup from it, defendant contended that the contract was void under the law of Georgia, the Sherman Act, and the Clayton Act. The court stated, in declining to sustain this contention:

65. "It is next contended by the defendant that, if the contract be construed as it is now construed by the court, it is void under the law of Georgia, the Sherman Act, and the Clayton Act. In this connection it should be observed that the effect of the contract was not a merger or consolidation of businesses theretofore existing in severalty, but was the complete severance of the bottling business from the business of supplying soda fountains with the syrup, while the result which the defendant seeks under statutes intended to prevent monopoly would give to the defendant a complete and exclusive monopoly of both the fountain business and the bottling business. The accomplishment of this result through the instrumentality of the antimonopoly statutes would, indeed, be unique. That of necessity there is competition between the bottled drink and the fountain drink can not be seriously questioned. The contract did not fix a price for the bottled drink. It did not fix a price for the fountain drink. The defendant may sell its fountain syrup for such price as it pleases subject to the inevitable result, if it raises its price too high, that the demand for the fountain drink will decrease, and that for the bottled drink increase. The converse would, of course, be true, should the price of the bottled drink greatly exceed that of the fountain drink.

66. "The defendant points out certain covenants * * * to show that the contract is in restraint of trade. It cites *Floding* v. *Floding*, 137 Ga. 531, 73 S. E. 729, and other cases, to show that the courts of Georgia refuse to recognize an agreement not to operate the same business in a territory very large in area as being in [un?]-reasonable restraint of trade. But such cases have no analogy to the case at bar, where the effect of the contract was not to transfer the whole business of the vendor, but only an incidental and potential business arising out of the main business of the vendor. It is unnecessary to analyze the several covenants pointed out as being in unreasonable restraint of trade. Those covenants at most operate as a partial and not as a gen-

ANNOTATIONS, SEC. 3—Continued.

TYING OR EXCLUSIVE CONTRACTS OR LEASES—BY OWNER OF SECRET PROCESS OR FORMULA, GOOD WILL, AND TRADE NAMES OR MARKS—ASSIGNMENT OF PART OF POTENTIAL BUSINESS—Continued.

eral restraint, and are 'merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party,' or were covenants necessary to protect the Georgia corporation in its retained business. Such provisions are valid. *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; *John D. Park & Sons Co.* v. *Hartman*, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135. I find in the contract nothing having an effect or intended to have an effect to defeat or lessen competition or to encourage or tend to create a monopoly, nor do I find anything therein that may be said to be in unreasonable restraint of trade." *The Coca-Cola Bottling Co.* v. *The Coca-Cola Co.*, November 8, 1920, 269 Fed. 796, 813, 814.

—— LEGALITY, PRESUMPTION OF.

67. "* * * 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.*, Circuit Court of Appeals, June 28, 1919, 259 Fed. 793, 802.

—— MONOPOLISTIC TENDENCIES.

68. "The Commission justifies the order complained of by looking to the future rather than at the present, * * *"

"The Commission looking forward sees in the present highly competitive business of the various wholesalers a seed which will in time produce the fruit condemned in *Patterson* v. *United States*, 222 Fed. 599, * * *."

69. "It may be admitted that one function of the Trade Commission is to discern and suppress such practices in their beginning; but a thing exists from its beginning, and it is not a conclusion of law from any facts here found that a system [referring to petitioners' system, condemned by the Commission, of leasing oil tanks and pumps for a nominal rental in consideration of the lessee using the lessor's product exclusively in connection therewith] which at present is keenly competitive, extremely advantageous to the public, and, in the opinion of a majority of the competent witnesses economical, is at present unfair to anyone or unfair because tending to monopoly. A tendency is an inference from proven facts, and an inference from the facts as found by the Commission is a question of law for the court. As a matter of law there is at present no violation of the Trade Commission statute; therefore the first of

respondent's contentions can not be sustained." *Standard Oil Co. of New York* v. *Federal Trade Commission*, May 11, 1921, 273 Fed. 478, 481, 482. (See case in this volume, p. 622 at pp. 626, 627.)

——IN PARTICULAR CASES.

See also *post*, par. 112.

70. *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*, January 16, 1915, 219 Fed. 755, 756.

71. 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 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 defend-

ANNOTATIONS, SEC. 3—Continued.

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

ants, 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.

72. "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.*, November 9, 1915, 227 Fed. 507, 508, 509.

73. 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 machinery 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:

74. "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.

75. "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.

76. "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. * * *

77. "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.

78. "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 peculiarities of the particular business to which the contract relates * * *."

79. "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 customers 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.

80. "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.)

81. *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.

82. That provisions in said leases to the effect that the

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

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.

83. 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.*, March 31, 1920, 264 Fed. 138, 165–169.

84. Plaintiff sues to enjoin defendant from interference with its contracts with third parties. Said contracts bound such third parties to purchase all materials for the manufacture of an article, the patents on which were owned by plaintiff, in consideration of license from plaintiff to such third parties to manufacture such article. The injunction was resisted on the ground, among others, that the contract violated section 3. *Held*, That such contention can not be sustained. (See *ante*, pars. 58–63.) *Westinghouse Electric & Mfg. Co.* v. *Diamond State Fibre Co.*, March 27, 1920, 268 Fed. 121.

85. Sued to enforce a contract made by its predecessor, in which said predecessor, owner of a valuable secret process or formula for making a beverage, theretofore confined to the *fountain* trade, and of a valuable good will, and trade names and marks in connection with its product, gave exclusive rights for the *bottling* business in a large territory to complainant's predecessors, and the right to use its trade names and marks in connection therewith, in return for their undertaking, among other things, to carry on such business in the territory in question and take all their syrup from it, defendant contended that the contract was void under the law of Georgia, the Sherman Act, and the Clayton Act. *Held*, That such contention can not be sustained. (See *ante*, pars. 63–66.) *The Coca-Cola Bottling Co.* v. *The Coca-Cola Co.*, November 8, 1920, 269 Fed. 796.

86. Where a corporation competitively engaged in refining

crude petroleum, buying and selling gasoline, and in transporting and marketing such products, and also engaged in leasing pumps, tanks, and other equipment for the storage and handling of petroleum products in competition with manufacturers and sellers of such equipment, to its retail customers, of whom relatively very few required more than a single-pump outfit in the conduct of their business, leased to such retailers pumps, tanks, and equipment at a nominal rental, not affording it a reasonable profit on its investment, upon the condition that they should use the same only for the purpose of storing and handling its products, a practice not followed by many competitors, having for its purpose the furtherance of the corporation's petroleum business, and resulting in loss of customers by competitors; but where, in the opinion of the court, competition between the distributors or loaners was very keen, the practice was extremely advantageous to the public, and was regarded by many distributors as a profitable form of advertising and of keeping before the consuming public their trade-mark, borne by the equipment leased or loaned by them, the court observing in this connection that the distribution of another manufacturer's product therefrom would be dishonest: *Held*, That such leases, under the circumstances set forth, did not violate section 3. *Standard Oil Co. of New York* v. *Federal Trade Commission*, May 11, 1921, 273 Fed. 478. (For order similar to that reversed, see 2 F. T. C. 346 at 350. See case in this volume at p. 622.)

87. Commission's order in *Fruit Growers Express, Inc.*, 2 F. T. C. 369, in which the Commission found that contracts entered into between the company and the railroads, under the terms of which contracts the company agreed to furnish refrigerator cars and refrigerator service, and the railroads agreed to pay the charges stipulated and to patronize the company exclusively, with respect to their requirements for the cars and service involved, reversed in *Fruit Growers Express* v. *Federal Trade Commission*, June 16, 1921, 274 Fed. 205, on the ground that jurisdiction under section 11 was in the Interstate Commerce Commission and on the ground that the pleading was defective in that the railroads had not been joined as necessary parties. (See *ante*, par. 55, and *post*, par. 120, p. 527. See case at p. 628 of this volume.)

"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."

See also *ante*, pars. 74–79.

88. "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

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.

a real, as opposed to an imaginary or fanciful lessening of competition, was intended.

89. "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.

90. "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.

91. "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.*, March 9, 1918, 254 Fed. 493, 499. (District Court.)

92. "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.]

93. "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."

94. "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.*, Circuit Court of Appeals, June 28, 1919, 259 Fed. 793, 795, 796.

95. "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."

96. "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. * * *." Anderson, Circuit Judge, in *Standard Fashion Co.* v. *Magrane Houston Co.*, Circuit Court of Appeals, 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.

97. "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.].

98. "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).

99. "'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 save an otherwise objectionable regulation or the reverse, but because knowledge of intent may help the court to interpret facts and to predict consequences.'"

100. "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'" (pp. 799, 800, 801).

101. "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

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.

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 language differs materially from the language 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."

102. "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 * * *."

103. "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'?

104. "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.*, March 31, 1920, 264 Fed. 138, 161–163.

WHETHER LIMITED BY SECTION 2.

105. "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.

WHETHER RETROACTIVE.

106. "Counsel for defendant earnestly insists that, even if Congress so intended, the statute can not be construed to ap-

ply 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*, February 20, 1915, 227 Fed. 124, 126; *United States* v. *United Shoe Machinery Co.*, November 9, 1915, 227 Fed. 507, 510.

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

108. "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 * * *."

109. "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.*, March 31, 1920, 264 Fed., 138, 171, 174, 175.

WORDS AND PHRASES—"LINE OF COMMERCE."

See *ante*, pars. 58–63.

——"UNDERSTANDING."

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

111. "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.

112. 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[25a] may sue therefor in any district court

[25a] For text of Sherman Act, see footnote on pp. 483–485. As enumerated in Clayton Act, see first paragraph thereof on pp. 482, 483

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

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.*, December 9, 1915, 228 Fed. 209.

American Sea Green Slate Co. v. *O'Halloran*, December 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.

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

Baran v. *Goodyear Tire & Rubber Co.*, July 29, 1918, 256 Fed. 570.

Sampliner v. *Motion Picture Patents Co.*, Circuit Court of Appeals, December 11, 1918, 255 Fed. 242, 243.

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 [25a] 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 testimony 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

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,

[25a] For text of Sherman Act, see footnote on pp. 483–485. As enumerated in Clayton Act, see first paragraph thereof on pp. 482, 483.

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.

pending proceeding by the United States under antitrust laws.

DECISIONS.

Buckeye Powder Co. v. *Du Pont Powder Co.*, December 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.

Charles A. Ramsay Co. v. *Associated Bill Posters of U. S. & C.*, September 30, 1919, 272 Fed. 323, 328; December 23, 1920, 271 Fed. 140.

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

SEC. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws[25a] 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 individual members of such organizations 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.

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.

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.

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

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.

Langenberg Hat Co. v. *United Cloth Hat & Cap Makers*, June 1, 1920, 266 Fed. 127, 129.

Colyer v. *Skeffington*, June 23, 1920, 265 Fed. 17, 62.

Buyer v. *Guillan*, Circuit Court of Appeals, February 2, 1921, 271 Fed. 65, 69.

Duplex Press Co. v. *Deering*, January 3, 1921, 254 U. S. 443, 469, 474.

[25a] For text of Sherman Act, see footnote on pp. 483–485. As enumerated in Clayton Act, see first paragraph thereof on pp. 482, 483.

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 competitions, 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.

Purchase solely for investment excepted.

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.

Formation of subsidiary corporations for immediate lawful business also excepted.

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

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

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* On provisions of the Shipping Board Act, Packers and Stockyards Act, 1921, and Transportation Act, limiting the scope of the Clayton Act in certain cases, see second, third, and fourth paragraphs of the footnote on p. 483.

It should be noted also that corporations for export trade are excepted from the provisions of this section. See p. 530, sec. 3.

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.

Existing rights heretofore lawfully acquired not affected.

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,[20a] nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

ANNOTATIONS.

113–116. Acquisition of stock, etc.—In particular cases.
117. Whether retroactive.

ACQUISITION OF STOCK, ETC.—IN PARTICULAR CASES.

113. "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 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.

114. "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.

[20a] For text of Sherman Act, see footnote on pp. 483–485. As enumerated in Clayton Act, see first paragraph thereof on pp. 482, 483.

ANNOTATIONS, SEC. 7—Continued.

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

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. 8, 1920, 254 U. S. 77.)

115. "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*, October 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 November 8, 1920, 254 U. S. 77.)

116. Section referred to but not passed on in *Venner* v. *Pennsylvania Steel Co.*, Circuit Court of Appeals, June 30, 1916, 233 Fed 407, 409, involving proposed acquisition of assets of one corporation by another corporation, alleged to violate the act; (supplementary bill) April 18, 1918, 250 Fed. 292.

WHETHER RETROACTIVE.

117. Section assumed not intended to be. *Hyams* v. *Calumet & Hecla Mining Co.*, January 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.[n]

Not to serve more than one bank, banking association, or trust

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

[n] By the last paragraph of the Act of Sept. 7, 1916, amending the Federal Reserve Act, ch. 461, 39 Stat. 752 at 756, it is provided that the provisions of sec. 8 shall not apply to "A director or other officer, agent or employee of any member bank" who may, "with the approval of the Federal Reserve Board be a director or other officer, agent or employee of any" bank or corporation, "chartered or incorporated under the laws of the United States or of any State thereof, and principally engaged in international or foreign banking, or banking in a dependency or insular possession of the United States," in the capital stock of which such member bank may have invested under the conditions and circumstances set forth in the Act.

On provisions of the Shipping Board Act, Packers and Stockyards Act, 1921, and Transportation Act, limiting the scope of the Clayton Act in certain cases, see second, third, and fourth paragraphs of the footnote on p. 483.

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.

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 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

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.

Class A director of Federal reserve bank excepted, and

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

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.

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.

Consent may be secured before applicant elected director.

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.[28]

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.

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.[28a] The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, 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 provi-

How eligibility determined.

[28] 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 15, 1916, ch. 120, and act May 26, 1920, ch. 206.

[28a] For text of Sherman Act, see footnote on pp. 483–485. As enumerated in Clayton Act, see first paragraph thereof on pp. 482, 483.

sions 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.

ANNOTATIONS.

INTERLOCKING DIRECTORATES—ABSENCE OF COMPETITIVE FEATURES.

118. "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 principle opposed to the suppression of competition, as, for instance, the underlying principle 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 October 15, 1914, ch. 323, 38 Stat. L. 732, section 8 [Comp. Stat. sec. 8835h]) * * *." *City of Holland* v. *Holland City Gas Co.*, Circuit Court of Appeals, February 13, 1919, 257 Fed. 679, 685.

IN GENERAL.

119. Provisions of section disregarded as not then operative. *Hyams* v. *Calumet & Hecla Mining Co.*, Circuit Court of Appeals, January 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 whole or in part, or willfully or knowingly converts the

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

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.

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

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

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

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.

DECISIONS.

Colyer v. *Skeffington*, June 23, 1920, 265 Fed. 17, 62.

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

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.

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

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

managers thereof, if the bidder be a corporation, or of 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.

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.

Penalty.

Effective date extended to Jan. 1, 1921,

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, nineteen hundred and fourteen, shall become and be effective is hereby deferred and extended to January first, nineteen hundred and twenty-one: *Provided*, That such extension shall not apply in the case of any corporation organized after January twelfth, nineteen hundred and eighteen.[29]

Except as to corporations organized after Jan. 12, 1918.

[29] Above paragraph, sec. 501 of the Transportation Act, Feb. 28, 1920, ch. 91, 41 Stat. 456 at 499.

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

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.

[*] On provisions of the Shipping Board Act, Packers and Stockyards Act, 1921, and Transportation Act, limiting the scope of the Clayton Act in certain cases, see second, third, and fourth paragraphs of the footnote on p. 483.

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

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

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

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.

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.

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

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 or board to cease and desist from a violation charged 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 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 certify and 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.

Jurisdiction of Court of Appeals exclusive.

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.

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

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.[30a]

Liability under antitrust acts not affected.

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

Personal; or

At office or place of business; or

By registered mail.

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

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

[30a] For text of Sherman Act, see footnote on pp. 483–485. As enumerated in Clayton Act, see first paragraph thereof on pp. 482, 483.

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.

ANNOTATIONS.

WORDS AND PHRASES—"WHERE APPLICABLE TO COMMON CARRIERS."

120. The words "where applicable to common carriers" in section 11 of the Clayton Act must mean that where the facts involve common carriers, or the business of common carriers, then the jurisdiction is solely in the Interstate Commerce Commission. The action complained of [contracts under the terms of which the company agreed to furnish refrigerator cars and refrigerator service, and the railroad agreed to pay the charges stipulated, and to patronize the company exclusively, with respect to their requirements for such cars and service] involved common carriers and tended to very greatly affect their business. Respondent was therefore without jurisdiction." *Fruit Growers Express, Inc.*, v. *Federal Trade Commission*, June 16, 1921, 274 Fed. 205, 207. (See case in this volume, p. 628 at p. 630.)

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

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

SEC. 12. That any suit, action, or proceeding under the antitrust laws[80a] 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.

DECISIONS.

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

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

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

Frey & Son, Inc., v. *Cudahy Packing Co.*, Circuit Court of Appeals, April 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.*, April 18, 1918, 250 Fed. 292, 297.

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

Ben C. Jones & Co. v. *West Publishing Co.*, March 5, 1921, 270 Fed. 563, 566.

[80a] For text of Sherman Act, see footnote on pp. 483–485. As enumerated in Clayton Act, see first paragraph thereof on pp. 482, 483.

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[80a] 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,[80a] 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 constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be 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.

Deemed also that of individual directors, officers, etc.

A misdemeanor.

Penalty, fine or imprisonment, or both.

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 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 pro-

District attorneys, under direction of Attorney General, to institute proceedings.

Proceedings may be by way of petition setting forth the case, etc.

[80a] For text of Sherman Act, see footnote on pp. 483–485. As enumerated in Clayton Act, see first paragraph thereof on pp. 482, 483.

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 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 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.

After due notice, Court to proceed to hearing and determination as soon as may be.

Pending petition instituting proceeding Court may make temporary restraining order or prohibition.

Court may summon other parties.

DECISIONS.

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

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

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,[30a] 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.

Open to any person, firm, etc., on same conditions and principles as other injunctive relief by courts of equity against threatened conduct that will cause loss or damage.

Preliminary 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.

[30a] For text of Sherman Act, see footnote on pp. 483–485. As enumerated in Clayton Act, see first paragraph thereof on pp. 482, 483.

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

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.*, January 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.*, April 18, 1918, 250 Fed. 292.

Colyer v. *Skeffington*, June 23, 1920, 265 Fed. 17, 62.

General Investment Co. v. *Lake Shore & M. S. Ry. Co.*, Circuit Court of Appeals, December 8, 1920, 269 Fed. 235, 237, 238, 241.

Geddes v. *Anaconda Mining Co.*, January 24, 1921, 254 U. S. 590, 593.

Duplex Press Co. v. *Deering*, January 3, 1921, 254 U. S. 443, 469, 474.

Sec. 17. PRELIMINARY INJUNCTIONS. TEMPORARY RESTRAINING ORDERS.

No preliminary injunction without notice.

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

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

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 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

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

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

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.

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

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. 263 of Judicial Code repealed.

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.

Sec. 266 not affected.

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, April 19, 1919, 258 Fed. 346, 349.

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

King v. *Weiss & Lesh Mfg. Co.*, Circuit Court of Appeals, June 11, 1920, 266 Fed. 257, 259.

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

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 security 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.

Except as provided in sec. 16 of this act.

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 rea-

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

Sec. 19. ORDERS OF INJUNCTION OR RESTRAINING ORDERS—REQUIREMENTS—Continued.

sonable 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.

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

DECISIONS.

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

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

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

King v. *Weiss & Lesh Mfg. Co.*, Circuit Court of Appeals, June 11, 1920, 266 Fed. 257, 260.

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 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.

Not to issue unless necessary to prevent irreparable injury.

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 pur-

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

pose 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.

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.*, September 5, 1916, 236 Fed. 964, 970–972.

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

Duplex Printing Co. v. *Deering*, April 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.*, March 22, 1918, 250 Fed. 890, 892, 893.

United States v. *Norris*, December 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.*, December 27, 1919, 263 Fed. 171, 185, 186, 187.

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

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

Langenberg Hat Co. v. *United Cloth Hat & Cap Makers*, June 11, 1920, 266 Fed. 127. 129.

King v. *Weiss & Lesh Mfg. Co.*, Circuit Court of Appeals, June 11, 1920, 266 Fed. 257, 258, 260.

Herket & Meisel Trunk Co. v. *United Leather Workers I. U.*, November 26, 1920, 268 Fed. 662, 667.

Duplex Press Co. v. *Deering*, January 3, 1921, 254 U. S. 443, 469, 471, et seq.

Buyer v. *Guillan*, Circuit Court of Appeals, February 2, 1921, 271 Fed. 65, 69.

Birmingham Trust & Savings Co. v. *Atlanta B. & A. Ry. Co.*, March 26, 1921, 271 Fed. 743, 745.

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 States 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 return, 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,* 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

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

Trial if alleged contempt not sufficiently purged by return.

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

for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

If body corporate, attachment for sequestration of its property.

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

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

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

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the 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 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.

Penalty, fine or imprisonment, or both.

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

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

DECISIONS.

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

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

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

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

DECISIONS—continued.

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.

Jennings v. *United States*, Circuit Court of Appeals, Feb. 17, 1920, 264 Fed. 399, 405.

Sec. 23. EVIDENCE. APPEALS.

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.

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.

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

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. 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.

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.

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

U. S. v. *Cohen*, October 28, 1920, 268 Fed. 420, 425.

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.

ANNOTATIONS TO ACT AS A WHOLE.

RESALE PRICE MAINTENANCE.[a]

See also *ante*, pars. 4–15.

121. 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.

IN GENERAL.

122. 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; *General Investment Co.* v. *Lake Shore M. S. Ry. Co.*, Circuit Court of Appeals, December 8, 1920, 269 Fed. 235, 237, 238.

123. 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.

124. Act, as a whole, referred to, in a more or less general way, incidentally, or in passing, in *United States* v. *Rintelen*, June 29, 1916, 233 Fed. 793, 799; *Linde Air Products Co.* v. *Morse Dry Dock & Repair Co.*, March 1, 1917, 239 Fed. 909, 927; *Standard Fashion Co.* v. *Magrane Houston Co.*, Circuit Court of Appeals, June 28, 1918, 251 Fed. 559; *United States* v. *Colgate & Co.*, October 29, 1918, 253 Fed. 522, 525, 527; and *Sears, Roebuck & Co.* v. *Federal Trade Commission*, Circuit Court of Appeals, April 29, 1919, 258 Fed. 307, 311.

[a] 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, and *ante*, annotations to Federal Trade Commission Act, pars. 83–90, pp. 480–482.

WEBB ACT.[32]

[Approved Apr. 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."

"Trade within the United States."

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.

"Association."

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.

"TRADE WITHIN THE UNITED STATES."

On interstate commerce, see annotations to Federal Trade Commission Act, pars. 39–43 (pp. 462, 463), and annotations to Clayton Act, pars. 47–51 (pp. 497–499):

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

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

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

[32] The Reports have been checked for annotations through 273 Fed. 768 (Part 3, Advance Sheets, issued as of Sept. 1, 1921), and 41 Sup. Ct. 625, which disposes of all cases decided at the October term, 1920 (last decisions handed down on June 6, 1921).

hundred and ninety,[82a] 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.

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,[83] 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,[84] shall be construed as extending to unfair methods of competition

[82a] For text of Sherman Act, see footnote on pp. 483–485.
[83] See *ante*, p. 516.
[84] See *ante*, p. 439 et seq.

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

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 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

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

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

District attorneys to prosecute for recovery of forfeiture.

expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

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

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 mangement 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.

May recommend readjustment in case of violation.

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

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

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."[88]

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. 343, 354, 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 Government in said suit.

[88] See *ante*, p. 439 et seq.