

Complaint.

FEDERAL TRADE COMMISSION

v. .

FRED A. MALTBY AND CLARENCE W. MALTBY, AS INDIVIDUALS AND AS PARTNERS.

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

Docket 944—February 8, 1923.

SYLLABUS.

Where two taxicab concerns built up a large and valuable good will as the Yellow Cab Co., and Black & White Taxi Co., respectively; and thereafter a competing concern,

- (a) Caused its business to be listed and advertised in the local telephone directory as the "Yellow Bell Taxi Co.", "Yellow Ford Taxi Co.", and "Black & White Ford Taxi Co.", so that by reason of alphabetical arrangement its business as so named, listed, and advertised immediately preceded and/or followed the names of said concerns, and they were thereby deprived of a portion of the good will and patronage that should have accrued to them; and
- (b) For the purpose of preempting their use and with a tendency and capacity to mislead and deceive the public and thereby secure its patronage, caused its business also to be listed and advertised therein under a large number of other names, some of which were well and favorably known as those of taxicab companies operating in other cities:

Held, That such misleading adoption and use of trade names, and such false and misleading advertising, under the circumstances set forth, constituted unfair methods of competition.

COMPLAINT.

Acting in the public interest pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that Fred A. Maltby and Clarence W. Maltby, a copartnership, doing business under the name and style of Yellow Bell Taxi Company, and Yellow Ford Taxi Company, hereinafter referred to as Respondents, have been and are using unfair methods of competition in commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

PARAGRAPH 1. Respondents, Fred A. Maltby and Clarence W. Maltby, have for more than two years last past been engaged in the business of operating taxicabs for hire in the City of Washington, District of Columbia, both as a copartnership and as individuals, with their principal office and place of business in said City and Dis-

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trict. Respondents in the course and conduct of their said business have advertised and operated under a great number of trade names, more specifically set out hereinafter, among which is the "Arcade Taxi Service." In the course and conduct of their said business, respondents are in competition with other persons, partnerships and corporations similarly engaged.

PAR. 2. The Yellow Cab Company is a corporation created and existing under the laws of the State of Delaware, with its principal office and place of business in the City of Washington, District of Columbia, where it is engaged in operating taxicabs for hire in said City and District. Said Yellow Cab Company advertises its said business by means of advertisements and listings which it causes to be placed in the directory of the Chesapeake & Potomac Telephone Company, a telephone company rendering telephone service to the public in Washington City and the District of Columbia. The aforesaid cabs operated by the Yellow Cab Company are painted yellow, in conformity with said trade name, and bear upon the door the legend, "Yellow Cab Company." Since the commencement of its said taxicab business the said Yellow Cab Company has built up a large and valuable good will amongst the general public in the City of Washington, District of Columbia, for its said taxicabs.

PAR. 3. The Black & White Taxi Company is a corporation created and existing under the laws of the District of Columbia, with its principal office and place of business in the City of Washington, District of Columbia, where it is engaged in operating taxi cabs for hire in said City and District. Said Black & White Taxi Company advertises its said business by means of advertisements and listings which it causes to be placed in the directory of the Chesapeake & Potomac Telephone Company, a telephone company rendering telephone service to the public in Washington City and the District of Columbia. The aforesaid cabs operated by the Black & White Taxi Company are painted black and white and bear four monograms—one on each door, one on the back of the cab and one on the cow, which monogram consists of a black rimmed circle around which is inscribed the words, "Black & White Taxi." Since the commencement of its said taxi cab business, the said Black & White Taxi Company has built up a large and valuable good will amongst the general public in the City of Washington, District of Columbia, for its said taxi cabs.

PAR. 4. Respondents placed or caused to be placed certain advertisements and listings in the fall issue of said telephone directory of the Chesapeake & Potomac Telephone Company which was issued by

said Company about November 1, 1921, in which said respondents caused to be set out and advertised the names "Yellow Bell Taxi Company," and "Yellow Ford Taxi Company." Because of the alphabetical arrangement of said names, the said name, "Yellow Bell Taxi Company" appeared immediately above the name of the said Yellow Cab Company, hereinafter mentioned, and the name "Yellow Ford Taxi Company," appeared immediately below the said name "Yellow Cab Company" in the listings in said directory.

PAR. 5. Respondents, in the fall issue of the telephone directory of said Chesapeake & Potomac Telephone Company which was issued by said Company about November 1, 1921, placed or caused to be placed certain advertisements and listings in said telephone directory in which said advertisements and listings respondent caused to be set out and advertised the name of "Black & White Ford Taxi Company." Because of the setting out of the said name, "Black & White Ford Taxi Company" in the listings of said directory, the said name, "Black & White Ford Taxi Company" appeared immediately above the name of the "Black & White Taxi Company."

PAR. 6. Because of the adoption by respondents of the said names, "Yellow Bell Taxi Company" and "Yellow Ford Taxi Company," and because of the alphabetical arrangement of those said names as set out in paragraph 5 hereof, respondents have diverted from the said Yellow Cab Company a portion of the good will and patronage that should have accrued to it. Because of the adoption by respondent of the said name "Black & White Ford Taxi Company," and because of the alphabetical arrangement of said name as set out in Paragraph 5 hereof, respondents have diverted from the said "Black & White Taxi Company" a portion of the good will and patronage that should have accrued to it. Respondents, from time to time in the two years last past listed and advertised in said telephone directory of the said Chesapeake & Potomac Telephone Company, under some fifty-odd additional names set out next below and sought to preempt to themselves the use of these said names within the City of Washington and the District of Columbia, and to prevent other taxi cab companies from operating under or using any of these said names:

A-Bee Taxi,
Arcade Cab Service,
Arcade Taxi,
Arcade Taxicabs,
Arcade Taxi Service,
Bell Taxi,

Bell Taxicabs,
Bell Taxi Service,
Blue & Gray Taxi,
Blue Ribbon Taxi,
Bring-You-Back Taxi,
Brown & Black Taxi,

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Brown Taxi,	Packard Taxi Co.,
Cadillac Taxi Co.,	Park Taxi Co.,
Central Taxi Co.,	Park Taxi Service,
Checker Taxicab Co.,	Peoples Taxi,
Checker Taxi Co.,	Peoples Taxi Co.,
Circle Taxi Co.,	Quaker Taxi,
City Taxi Co.,	Quaker Taxi Co.,
Colonial Taxi Co.,	Red Checker Taxi Co.,
Columbia Hgts. Taxi Service,	Red Taxi,
Columbia Taxi,	Red Taxi Co.,
Continental Taxi,	Ring Taxi Co.,
Crown Taxi Co.,	Ritz Carlton Taxi Co.,
Ever-Ready Taxi Co.,	Star Taxi Co.,
Globe Taxi Co.,	Sunset Taxi Co.,
Gray Taxi Co.,	Tak-A-Cab Taxi Co.,
Hacks Taxi Co.,	Take-U-There Taxi Co.,
Home James Taxi Co.,	Twentieth Century Taxi Co.,
Hudson Taxi Co.,	Uneeda Taxi Co.,
Irving St. Taxi Co.,	White Taxi Co.
Keystone Taxi Co.,	

PAR. 7. A number of said names so listed by respondents are used by taxi cab companies operating in various other cities of the United States, and enjoy a large and valuable goodwill in said cities, and the use by respondents of said names in the manner hereinbefore set out has the tendency and capacity to mislead and deceive the public, who are familiar with the said names so adopted by respondents and used in other cities, into the belief that the said names listed and advertised by respondents, as aforesaid, are operated by the said taxicab companies and render a service similar to the service rendered by said companies in other cities and cause the public to patronize the taxi cab service of respondents in that belief.

PAR. 8. The acts and things done by respondents, and each of them, as hereinabove alleged, are false and misleading and prejudicial to the public and to the competitors of the respondents, and constitute unfair methods of competition in commerce in violation 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 respondents, Fred A. Maltby and Clarence W. Maltby, as individuals and as partners, charging them and each of them with the use of unfair methods of competition in commerce in violation of the provisions of said Act.

Said respondents having entered their appearance and filed their answer therein and having made, executed and filed an agreed stipulation as to the facts, in which it is stipulated and agreed by the respondents that the Federal Trade Commission shall take such stipulation as to the facts in this case in lieu of testimony and proceed forthwith upon such stipulation to make its findings as to the facts and such order as it may be prepared to enter therein without the introduction of testimony, the Federal Trade Commission has 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. Respondents, Fred A. Maltby and Clarence W. Maltby, and each of them, have for more than two years last past been engaged in the business of operating taxicabs for hire in the City of Washington, District of Columbia, with their principal office and place of business in said City and District. In the course and conduct of their said business they have advertised and operated under a great number of trade names among which is the "Arcade Taxi Service." In the course and conduct of their said business respondents are in competition with other persons, partnerships and corporations similarly engaged.

PAR. 2. The Yellow Cab Company is a corporation created and existing under the laws of the State of Delaware, with its principal office and place of business in the City of Washington, District of Columbia, where it is engaged in operating taxicabs for hire in said City and District. Said Yellow Cab Company advertises its said business by means of advertisements and lists which it causes to be placed in the directory of the Chesapeake & Potomac Telephone Company, a telephone company rendering telephone service to the public in Washington City and the District of Columbia. The aforesaid cabs operated by the Yellow Cab Company are painted yellow in conformity with said trade name and bear upon the door the legend "Yellow Cab Company." Since the commencement of its said taxicab business, the said Yellow Cab Company has built up a large and valuable good-will amongst the general public in the City of Washington, District of Columbia, for its said taxicab service.

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PAR. 3. The Black & White Taxi Company is a corporation created and existing under the laws of the District of Columbia, with its principal office and place of business in the City of Washington, District of Columbia, where it is engaged in operating taxicabs for hire in said City and District. Said Black & White Taxi Company advertises its said business by means of advertisements and listings which it causes to be placed in the directories of the Chesapeake & Potomac Telephone Company, a telephone company rendering telephone service to the public in Washington City, and the District of Columbia. The aforesaid cabs operated by the Black & White Taxi Company are painted black and white and bear four monograms,—one on each door, one on the back of the cab and one on the cowl, which monogram consists of a black rimmed circle around which is inscribed the words, "Black & White Taxi." Since the commencement of its said taxicab business, the said Black & White Taxi Company has built up a large and valuable good-will amongst the general public in the City of Washington, District of Columbia, for its said taxicab service.

PAR. 4. Prior and up to the 30th day of May, 1922, respondents placed or caused to be placed certain advertisements and listings in the fall issue of said telephone directory of the Chesapeake & Potomac Telephone Company which was issued by said Company about November 1, 1921, in which said respondents caused to be set out and advertised the names "Yellow Bell Taxi Company," and "Yellow Ford Taxi Company." Because of the alphabetical arrangement of said names, the said name, "Yellow Bell Taxi Company" appeared immediately above the name of the said Yellow Cab Company, hereinafter mentioned, and the name "Yellow Ford Taxi Company," appeared immediately below the said name "Yellow Cab Company" in the listings in said directory. That on or about the 30th day of May, 1922, the Supreme Court of the District of Columbia issued its injunction, Equity No. 40013, restraining the respondents herein from the use of the said names set out next above, and in compliance with said injunction respondents have ceased to use said trade names.

PAR. 5. Respondents, prior and up to October 7, 1922, placed or caused to be placed in the telephone directory of the Chesapeake & Potomac Telephone Company aforesaid, certain advertisements and listings in said telephone directory in which said advertisements and listings respondents caused to be set out and advertised the name of "Black & White Ford Taxi Company." Because of the setting out of the said name, "Black & White Ford Taxi Company" in the listings of said directory, the said name, "Black & White Ford Taxi

Company" appeared immediately above the name of the "Black & White Taxi Company." That on or about October 7, 1922, respondents voluntarily discontinued the use of the said trade names set out next above.

PAR. 6. Because of the adoption by respondents of the said names "Yellow Bell Taxi Company" and "Yellow Ford Taxi Company," and because of the alphabetical arrangement of those said names as set out in Paragraph Five hereof, respondents have diverted from the said Yellow Cab Company a portion of the good-will and patronage that should have accrued to it. Because of the adoption by respondent of the said name "Black & White Ford Taxi Company," and because of the alphabetical arrangement of said names as set out in paragraph 5 hereof, respondents have diverted from the said "Black & White Taxi Company" a portion of the good-will and patronage that should have accrued to it. Respondents from time to time in the two years last past up to on or about October 7, 1922, advertised in said directory of the said Chesapeake & Potomac Telephone Company under some fifty odd additional names as set out next below for the purpose of preempting to themselves the use of the said names, within the City of Washington, in the District of Columbia, and of preventing other taxicabs companies from operating under or using any of the said names.

A-Bee Taxi,	Columbia Hgts. Taxi Service,
Arcade Cab Service,	Continental Taxi,
Arcade Taxi,	Crown-Taxi Co.,
Arcade Taxicabs,	Diamond Taxi Co.,
Arcade Taxi Service,	Domino Taxi Co.,
Bell Taxi,	Ever-ready Taxi Co.,
Bell Taxicabs,	Globe Taxi Co.,
Bell Taxi Service,	Gray Taxi Co.,
Blue & Gray Taxi,	Green & White,
Blue Ribbon Taxi,	Hacks Taxi Co.,
Bring-You-Back-Taxi,	Home James Taxi Co.,
Brown & Black Taxi,	Hudson Taxi Co.,
Brown Taxi,	Irving St. Taxi Co.,
Cadillac Taxi Co.,	Keystone Taxi Co.,
Central Taxi Co.,	Packard Taxi Co.,
Checker Taxicab Co.,	Park Taxi Co.,
Checker Taxi Co.,	Park Taxi Service,
Circle Taxi Co.,	Peoples Taxi,
City Taxi Co.,	Peoples Taxi Co.,
Colonial Taxi Co.,	Quaker Taxi,

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Quaker Taxi Co.,	Sunset Taxi Co.,
Red Checker Taxi Co.,	Tak-a-Cab Co.,
Red Taxi,	Take-U-There Taxi Co.,
Red Taxi Co.,	Twentieth Century Taxi Co.,
Ring Taxi Co.,	Uneeda Taxi Co.,
Ritz Carlton Taxi Co.,	White Taxi Co.
Star Taxi Co.,	

On or about October 7, 1922, respondents ceased the use of certain of the trade names set out next above, and no longer advertises under said trade names, but advertises under the following:

Arcade Taxi,	Domino Taxi Co.,
Arcade Taxicabs,	Park Taxi Co.,
Arcade Taxi Service,	Peoples Taxi Co.,
Brown & Black Taxi,	Quaker Taxi Co.,
Brown Taxi,	Red Taxi,
Checker Taxi Co.,	Red Taxi Co.,
Columbia Taxi,	Ritz Carlton Taxi Co.,
Diamond Taxi Co.,	White Taxi Co.

PAR. 7. A number of said names so listed by respondents are used by taxicab companies operating in various other cities of the United States and enjoy a large and valuable good-will in said cities. The use by respondents of the said names in the manner hereinbefore set out has the tendency and capacity to mislead and deceive the public, who are familiar with the said names so adopted by respondents, which are used in other cities, into the belief that the said names listed and advertised by respondents as aforesaid are taxi companies operated by the said taxi companies in other cities and thereby cause and induce the public to patronize the said taxicab service of respondent's in such mistaken belief.

CONCLUSION.

The practices of respondents under the conditions and circumstances described in the foregoing findings as to the facts, are unfair methods of competition in 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 respondents and agreed statement of facts filed herein, and the

Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes",

It is now ordered, That the respondents, Fred A. Maltby and Clarence W. Maltby, their agents, representatives, servants and employees do cease and desist from directly or indirectly:

(1) Advertising or listing in the telephone book of the Chesapeake and Potomac Telephone Company, or in any other manner, or from operating their said taxicab business in the City of Washington, District of Columbia, under the names of:

(a) "Yellow Bell Taxi Company"

(b) "Yellow Ford Taxi Company"

(c) "Black and White Ford Taxi Company."

(2) Operating, advertising or listing the same taxicab business under more than one name.

It is further ordered, That the respondents, Fred A. Maltby and Clarence W. Maltby, shall within thirty (30) days after the service upon them of a copy of this order file with the Commission their answer in writing in setting forth in detail the manner and form in which they have complied with the order to cease and desist hereinbefore set forth.

Commissioner Thompson dissents.

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

Date of order.	Docket No.	Respondents.	Commodities.	Charges.	Answer, stipulation, or trial.	Reasons for discontinuance or dismissal.
1922 June 1	735	Bartlett Manufacturing Co.	Clocks.	Misbranding and misrepresentations.	Answer.	"Respondent has gone out of business and its assets are in the hands of a duly appointed receiver in bankruptcy."
2	618	Eastern Road Machinery Co.	Road machinery.	Commercial bribery.	Answer and trial. .	"Respondent has gone out of business."
2	711	A. L. Bramble, trading under the name and style of A. L. Bramble & Co.	Ship chandlery supplies.	do.	do.	No reasons assigned.
3 5	860 599	H. W. Hebb Supply Co. International Fur Exchange, Funston Bros. & Co., F. C. Taylor Fur Co., and Mallory, Mitchell & Faust.	do. Furs.	do. Combining and conspiring to cut off, or restrict competitors' access to, source of supplies.	do. do.	Do. Respondents, with the exception of Mallory, Mitchell & Faust, an advertising agency, "are now out of business."
24	579	The Atlanta Wholesale Grocers, J. J. Barnes-Fain Co., Maret-Streater Co., A. McD. Wilson Co., Conley & Ennis, McCord, Stewart Co., McDaniel & Co., and J. N. Hirsch.	Grocery products.	Combining or conspiring to bring about less favorable terms to objectionable competitor.	Answer and trial. .	No reasons assigned. ¹
July 3	250	Borden's Farm Products Co., Inc.	Milk and milk products.	Acquisition of stock of competitor in violation of section 7 of the Clayton Act.	Answer and stipulation.	No reasons assigned. Commissioner Murdock dissents.
10	504	F. Hecht, Louis Friedheim, and T. I. Glynn, partners styling themselves F. Hecht & Co.; and T. I. Glynn Leather Co., Inc.	Leather.	Selling abroad by sample without conforming thereto in goods delivered.	Answer and trial. .	Failure of proof.
20	25	J. F. Hillerich & Son Co., now Hillerich & Bradsby Co.	Baseball bats.	Resale price maintenance; price discrimination in violation of sec. 2 of the Clayton Act.	Answer.	"A complaint having been issued herein by the Federal Trade Commission, including the charge of a violation of sec. 5 of the Federal Trade Commission Act declaring unlawful unfair methods of competition, by reason of the respondent * * * having adopted a policy of maintaining resale prices fixed by it, and the respondent having answered; and an order of the Commission in a proceeding brought by it

20	28	Ward Baking Co.....	Bread and cake.....	Resale price maintenance.....	do.....	Do.
20	30	Western Clock Co.....	Clocks.....	Resale price maintenance: price discrimination in violation of sec. 2 of the Clayton Act.	do.....	Do.
20	40	Colorado Milling & Elevator Co.....	Flour.....	Resale price maintenance.....	do.....	Do.
20	87	Crescent Manufacturing Co.....	Baking powder, spices, teas, coffees and flavoring extracts.	do.....	do.....	Do.
20	89	L. E. Waterman Co.....	Fountain pens.....	do.....	do.....	Do.
20	90	Cluett, Peabody & Co. (Inc.).....	Collars.....	do.....	do.....	Do.
20	91	Massachusetts Chocolate Co.....	Candy.....	do.....	Answer and stipulation.	Do.
20	141	The Evans Dollar Pen Co.....	Fountain pens.....	do.....	do.....	Do.
20	167	United Electric Co.....	Vacuum cleaners.....	Resale price maintenance: prices, rebates, or discounts conditioned on exclusive or tying contracts or dealings in violation of sec. 3 of the Clayton Act.	Answer.....	Do.
20	170	Kryptok Co., and Kryptok Sales Co.	Lenses.....	Resale price maintenance.....	do.....	Do.

against the Beechnut Co., for the same cause having meanwhile been taken to the United States Supreme Court for final determination, and further proceedings herein having been suspended to await its decision, and the Supreme Court having thereafter decided said Beechnut case and set forth the law therein in an opinion (January 3, 1922, 257 U. S. 441, 42 Sup. Ct. 150).

"Now, in view of said decision, and the lapse of time since the beginning of this proceeding,

"It is hereby ordered, That the complaint herein be, and hereby is, dismissed without prejudice to the commencement of another proceeding by the Commission against this respondent."

¹ For cease and desist order against other respondents in the same case, see 4 F. T. C., p. 466 et seq.

Cases in which orders for discontinuance or dismissal have been entered—Continued.

Date of order.	Docket No.	Respondents.	Commodities.	Charges.	Answer, stipulation, or trial.	Reasons for discontinuance or dismissal.
1922. July 20	171	Goodyear Tire & Rubber Co.....	Tires, inner tubes, and accessories pertaining to the use thereof.	Resale price maintenance, misleading and false claims of services rendered in connection with the sale of products, imposing oppressive requirements upon dealer customers, and exclusive or tying contracts or dealings; price discrimination in violation of section 2, and prices, discounts, or rebates conditioned on exclusive or tying contracts or dealings in violation of sec. 3 of the Clayton Act.	Answer.....	Do. (See pp 482, 483.)
20	173	D. M. Ferry & Co.....	Seeds.....	Resale price maintenance.....	do.....	Do.
20	182	Hoover Suction Sweeper Co.....	Vacuum sweepers.....	do.....	do.....	Do.
20	183	Vortex Manufacturing Co.....	Metal holders, paraffin cups, paraffin paper dishes, and similar products.	Resale price maintenance; prices and discounts conditioned on exclusive or tying contracts or dealings in violation of sec. 3 of the Clayton Act.	do.....	Do.
20	184	Enders Sales Co. (Inc.).....	Safety razors, and razor blades.	Resale price maintenance; price discrimination in violation of sec. 2 of the Clayton Act.	do.....	Do.
20	189	H. L. Hildreth Co.....	Candy.....	Resale price maintenance.....	do.....	Do.
20	196	De Miracle Chemical Co.....	Depilatories and other toilet specialties.	do.....	do.....	Do.
20	206	Marinello Co. of Wisconsin; Marinello Co. of Illinois; Marinello School of Chicago; and School of Cosmeticians.	Cosmetics, toilet articles, toilet preparations, and similar products.	Resale price maintenance; tying or exclusive contracts or dealings; prices, discounts, or rebates conditioned on exclusive or tying contracts or dealings in violation of sec. 3 of the Clayton Act.	do.....	Do.
20	213	American Thermos Bottle Co.....	Thermos bottles.....	Resale price maintenance; price discrimination in violation of sec. 2 of the Clayton Act.	do.....	Do.
20	217	Klaxon Co.....	Warning horns for automobiles and other vehicles.	Resale price maintenance; tying or exclusive contracts or dealings; prices, rebates, or discounts conditioned on exclusive or tying contracts or dealings in violation of sec. 3 of the Clayton Act.	do.....	Do.
20	218	Proctor & Gamble Co. and the Proctor & Gamble Distributing Co.	Soap, candles, oil, and glycerine.	Resale price maintenance; full line forcing.....	do.....	Do.
20	228	The De Laval Separator Co.....	Cream separators.....	Resale price maintenance; exclusive or tying contracts or dealings in violation of sec. 3 of the Clayton Act.	do.....	Do.

20	237	General Chemical Co.....	Baking powder.....	Resale price maintenance.....	do.....	Do.
20	240	Buffalo Specialty Co.....	Liquid veneer, tire fluids, and similar products.	Resale price maintenance; price discrimination in violation of sec. 2 of the Clayton Act.	do.....	(Same as Docket No. 25.)
20	269	American Graphophone Co.; Columbia Graphophone Co.; and Columbia Graphophone Manufacturing Co.	Talking machines and records therefor.	Resale price maintenance.....	do.....	Do.
20	272	Wm. Walke & Co.....	Soaps and toilet sundries.	do.....	Answer and hearing.	Do.
20	306	High Rock Knitting Co.....	Knit underwear.....	do.....	Answer.	Do.
20	342	Curtis & Company Manufacturing Co., and Curtis Pneumatic Machinery Co.	Compressors, outfits, tanks, pneumatic machinery and other automobile accessories.	Resale price maintenance; price discrimination and prices, rebates, or discounts conditioned on exclusive or tying contracts or dealings, in violation of secs. 2 and 3 of the Clayton Act, respectively.	do.....	Do.
20	405	J. H. Haney, W. A. McKey, and W. M. Dutton, copartners, doing business as J. M. Haney & Co.	Automobile tire pumps.	Resale price maintenance.....	do.....	Do.
20	414	Marshall Oil Co., trading as Tungsten Manufacturing Co.	Spark plugs.....	do.....	do.....	Do.
20	444	The Gates Rubber Co. and J. R. Hunt & Wm. H. Klinefelter, copartners, doing business as J. R. Hunt & Co.	Tires, fan belts, break linings, tire patches, and other automobile accessories.	do.....	Answer and stipulation.	Do.
20	500	Pennsylvania Salt Manufacturing Co.	Salt and lye.....	do.....	Answer.....	Do.
20	503	The Upjohn Co.....	Pharmaceutical supplies.	Resale price maintenance; cumulative quantity discounts based on aggregate of year's purchases.	do.....	Do.
20	512	The Ronald Press Co.....	Books and periodicals.	Resale price maintenance.....	do.....	Do.
20	519	Colgate & Co.....	Soaps, perfumes, and toilet preparations.	Resale price maintenance and guarantee against price decline.	do.....	Do.
20	524	The Sheets Elevator Co.....	Poultry feed and similar products.	Resale price maintenance.....	do.....	Do.
20	532	L. Richardson, H. Smith Richardson, and L. Richardson, jr., copartners, doing business under the name and style of The Vick Chemical Co.	Proprietary remedies and similar products.	do.....	do.....	Do.

CASES DISMISSED.

Cases in which orders for discontinuance or dismissal have been entered—Continued.

Date of order.	Docket No.	Respondents.	Commodities.	Charges.	Answer, stipulation, or trial.	Reasons for discontinuance or dismissal.
1922. July 24	353	Domestic Engineering Co., Inc.; H. W. Arnold and S. A. Long, doing business as Arnold & Long, Distributors; Ashelman Brothers, Inc.; W. W. Barnett, doing business as Barnett Ranch Lighting & Appliance Co.; P. M. Bratten, doing business as P. M. Bratten & Co.; H. R. Colby; Henry R. Colby and M. A. Bridge, jr., doing business as C. & B. Electric Co.; Collins & Moore, Inc.; E. A. Cox and Hugh J. Cooper, doing business as Cox & Cooper, Distributors; E. A. Cox and W. C. Dance, doing business as Cox & Dance, Distributors; Ivan L. de Jongh and W. L. Cochran, doing business as de Jongh & Cochran; The Del-Home Light Co., Inc.; Domestic Electric Appliance Co., Inc.; Domestic Electric Co., Inc. (incorporated in N. Y.); The Domestic Electric Co. (incorporated in Ga.); The Domestic Electric Co. (incorporated in Ala.); Electric Equipment Co., Inc. (incorporated in Okla.); Electric Equipment Co. (incorporated in Iowa); The Electric Farm Lighting Co., Inc.; George M. Foos; Paul D. Fuqua, doing business as East Tenn. Electric Co.; W. P. Galloway Co., Inc.; W. F. Gray; The H. & S. Electric Co., Inc.; Joseph Herzstam; Home Electric Co., Inc.; Home Electric Equipment Co.; Home Electric Light & Power Equipment Co., Inc.; Independent Electric Light & Power Co., Inc.; E. L. Kruse;	Private electric lighting plants and accessories pertaining thereto.	Resale price maintenance; and tying or exclusive contracts or dealings in violation of sec. 3 of the Clayton Act.	Answer.....	"A complaint having been issued herein by the Federal Trade Commission, including the charge of a violation of sec. 5 of the Federal Trade Commission Act declaring unlawful unfair methods of competition, by reason of the respondents, Domestic Engineering Co., Inc., et. al., having adopted a policy of maintaining resale prices fixed by it, and the respondents having answered; and an order of the Commission in a proceeding brought by it against the Beechnut Co., for the same cause having meanwhile been taken to the United States Supreme Court for final determination, and further proceedings herein having been suspended to await its decision, and the Supreme Court having thereafter decided said Beechnut case and set forth the law therein in an opinion. Jan. 3, 1922, 257 U. S. 441; 42 Sup. Ct. 150.] "Now, in view of said decision, and the lapse of time since the beginning of this proceeding. "It is hereby ordered, That the complaint herein be, and hereby is, dismissed without prejudice to the commencement of another proceeding by the Commission against these respondents."

		M. L. Lasley; S. O. Lindeman, doing business as Home Light & Power Co.; Modern Appliance Co., Inc.; W. H. Moulton; J. J. Munsell; Claude Nolan; R. E. Parsons; J. J. Pocock; Pringle Matthews Co., Inc.; G. F. Schornck; Stover Co., Inc.; Suburban Electric Development Co., Inc.; Suburban Lighting Corp.; R. F. Trant; R. F. Trant and J. L. Conover, doing business as Trant & Conover; E. L. Uncapher Co., Inc.; Charles E. Wagner, Inc.; and E. H. Walker.				
Oct. 21	515	The Heller & Merz Co.....	Dyestuffs and chemicals.	Commercial bribery.....	Answer and trial..	No reasons assigned.
21	905	Midvale Steel & Ordnance Co., Republic Iron & Steel Co., and Inland Steel Co	Iron and steel products.	Combining or merging or agreeing to combine or merge properties, with a dangerous tendency unduly to hinder and lessen competition and with an undue hindering and lessening of competition as a result if consummated, and with a dangerous tendency unduly to restrain trade and commerce and to create monopoly, and with the effect of unduly restraining trade and commerce, and tending to create a monopoly, if consummated, in that portion of the United States particularly served by the companies involved.		"A formal statement having been filed with the Commission by Chadbourne, Babbitt, and Wallace, attorneys for the respondents, stating that the proposed merger, consolidation, and combination charged in the complaint in this proceeding had been entirely abandoned and that all acts for the consummation of such merger, consolidation, and combination had been discontinued; <i>It is ordered</i> , That the complaint herein be, and the same is hereby, dismissed."
23	526	Louis Rosenthal, doing business under the name and style of United Chemical & Color Co.	Dyestuffs and chemicals.	Commercial bribery.....	Trial.....	No reasons assigned.
23	545	Samuel Abraham, doing business under the name and style of Abraham Bros.	Paints, varnishes and kindred products.	do.....	Answer and trial..	Do.
23	688	Reber Manufacturing Co.....	Hosiery.....	Misbranding and mislabeling.....	Answer.....	Respondent is not now engaged in business.
23	697	New York Hosiery Works.....	do.....	do.....	Stipulation.....	Do.
Nov, 4	556	G. H. Hammond Co.....	Oleomargarine and butterine	Exclusive or tying contracts or dealings in violation of sections 5 and 3 of the Federal Trade Commission and Clayton Acts, respectively.	Answer.....	No reasons assigned.
4	557	Morris & Co.....	do.....	do.....	do.....	Do.
4	558	Wilson & Co., Inc.....	do.....	do.....	do.....	Do.
6	499	The Bayer Co., Inc.....	Aspirin	False and misleading advertising.....	do.....	Do
6	662	Deep Wells Oil Co., George B. Mechem & Co., and George B. Mechem.	Oil stocks.....	do.....	do.....	Failure of proof.

CASES DISMISSED.

Cases in which orders for discontinuance or dismissal have been entered—Continued.

Date of order.	Docket No.	Respondents.	Commodities	Charges.	Answer, stipulation, or trial.	Reasons for discontinuance or dismissal.
1922. Nov. 22	761	Prest-O-Lite Co., Inc.....	Acetylene gas.....	Tying or exclusive contracts or dealings in violation of sections 5 and 3 of the Federal Trade Commission and Clayton Acts, respectively; resale price maintenance.	Answer and trial..	No reasons assigned.
1923. Jan. 3	517	The Franklin Import & Export Co., Inc.	Dyestuffs, chemicals, and similar products.	Commercial bribery.....	do.....	Do.
3	525	New York Color & Chemical Co.	do.....	do.....	do.....	Do.
4	395	Ida Davis, doing business under the trade name and style of David Davis Sons.	Sponges.....	Adulterating.....	do.....	Do.
4	794	Big Bear Oil Co., William G. Krepe Investment Co., & William G. Krepe.	Oil stocks.....	Advertising falsely and misleadingly.....	do.....	Failure of proof.
Jan. 30	339	The Pictorial Review Co. and Oklahoma Publication Co.	Magazines and periodicals.	Spying on or harassing competitors.....	Answer.....	No reasons assigned.
30	468	H. A. Metz & Co., Inc.....	Dyestuffs and chemicals.	Commercial bribery.....	Answer and trial..	Failure of proof.
30	528	Arkansas Distributing Co.....	Chemicals.....	do.....	do.....	No reasons assigned.
30	529	Max B. Kaesche, doing business under the name and style of F. Bredt & Co.	Dyestuffs and chemicals.	do.....	do.....	Death of respondent.
Feb. 3	831	The Excelsior Shoe Co.....	Shoes.....	Advertising falsely and misleadingly and misbranding.	do.....	No reasons assigned.
Feb. 5	891	Bethlehem Steel Corporation and Lackawanna Steel Co.	Iron and steel products.	Agreeing to a combination of properties and businesses, with a dangerous tendency unduly to restrain trade and commerce and with the effect of so doing if consummated, and with the intent to monopolize commerce in certain sections and communities and with the effect of so doing if consummated.	Answer.....	Dismissed without prejudice; no reasons assigned.

APPENDIX I.

ACTS OF CONGRESS FROM WHICH THE COMMISSION DERIVES ITS POWERS.

FEDERAL TRADE COMMISSION ACT.¹

[Approved Sept. 26, 1914.]

[PUBLIC—No. 203—63D CONGRESS.]

[II. 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 This act has been annotated up to July 1, 1921, and may be found, so annotated, in Volume III of the Commission's Reports. Reported decisions of the courts for the period covered by this volume (May 22, 1922, to Feb. 13, 1923) and arising under this act are printed in full in Appendix II hereof (see *infra*, p. 529 et seq.). Previously reported decisions will be found set forth in Appendix II of Volumes II, III, and IV of the Commission's Reports.

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

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

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

Term, seven years.
Chairman to be chosen by commission.
Pursuit of 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

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, 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."

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 and 3 of said report presenting the minority views respectively of Messrs. Stevens and Lafferty; report of Senator Newlands from the Committee on Interstate Commerce on Federal Trade Commission (June 13, 1914, 63d Cong., 2d sess., Rept. No. 597) and debates and speeches, among others, of Congressman Covington for (references to Congressional Record, 63d Cong., 2d sess., vol. 51), part 9, pp. 8840-8849; 9068; 14925-14933 (part 15); Dickinson for, part 9, pp. 9189-9190; Mann against, part 15, pp. 14939-14940; Morgan, part 9, 8854-8857, 9063-9064, 14941-14943 (part 15); Sims for, 14940-14941; Stevens of N. H. for, 9063 (part 9); 14941 (part 15); Stevens of Minn. for, 8849-8853 (part 9); 14933-14939 (part 15); and of Senators Borah against, 11186-11189 (part 11); 11232-11237, 11298-11302, 11600-11601 (part 12); Brandegee against, 12217-12218, 12220-12222, 12261-12262, 12410-12411, 12792-12804 (part 13), 13103-13105, 13299-13301; Clapp against, 11872-11873 (part 12), 13061-13065 (part 13), 13143-13146, 13301-13302; Cummins for, 11102-11106 (part 11), 11379-11389, 11447-11458 (part 12), 11528-11539,

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.

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

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

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

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

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); Lippitt 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), 13140-13148; Sutherland against, 11601-11604 (part 12), 12805-12817 (part 13), 12855-12862, 12980-12986, 13055-13056, 13109-13111; Thomas against, 11181-11185 (part 11), 11598-11600 (part 12), 12862-12869 (part 13), 12978-12980; Townsend against, 11870-11872 (part 12); and Walsh for, 13052-13054 (part 13).

See also Letters from the Interstate Commerce Commission to the chairman of the Committee on Interstate Commerce, submitting certain suggestions to the bill creating an Interstate Trade Commission, the first being a letter from Hon. C. A. Prouty dated Apr. 9, 1914 (printed for the use of the Committee on Interstate Commerce, 63d Cong., 2d sess.); letter from the Commissioner of Corporations to the chairman of the Committee on Interstate Commerce, transmitting certain suggestions relative to the bill (H. R. 15613) to create a Federal Trade Commission, first letter dated July 8, 1914 (printed for the use of the Committee on Interstate Commerce, 63d Cong., 2d sess.); brief by the Bureau of Corporations, relative to 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.)

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

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.

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.

Principal office in Washington, but Commission may meet elsewhere.

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

May prosecute any inquiry anywhere in United States.

Sec. 4. DEFINITIONS.

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

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

such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation" 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."

"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. "Acts to regulate commerce."

"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;² 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. "Antitrust acts."

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

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

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

¹ For text of Sherman Act, see footnote on pp. 503-505.

² 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 second paragraph of footnote on p. 489.

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

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

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.

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.

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-

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 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.

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.

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

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

Jurisdiction of Court exclusive.

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

Proceedings to have precedence over other cases.

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

Liability under antitrust acts not affected.

shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.³

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

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

Personal; or

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 office or place of business; or

at the principal office or place of business of such person, partnership, or corporation; or (c) by registering and

By registered mail.

mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or

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

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

Sec. 6. FURTHER POWERS.⁴

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

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

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

³ For text of Sherman Act, see footnote on pp. 503-505. As enumerated in last paragraph of sec. 4 of this act, see p. 403.

⁴ 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.

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

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

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

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts,⁵ to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

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

To transmit findings and recommendations to Attorney General.

(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 Acts⁵ by any corporation.

To investigate, on direction President or either House, alleged violations 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 Acts⁵ in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

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

(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.

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

⁵ For text of Sherman Act, see footnote on pp. 503-505. As enumerated in last paragraph of sec. 4 of this act, see p. 493.

Sec. 6. FURTHER POWERS—Continued.

To make reports 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 provide for the 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.

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,⁶ 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 com-

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.

mission 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.

Sec. 8. COOPERATION OF OTHER DEPARTMENTS AND BUREAUS.⁷

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 corporation subject to any of the provisions of this Act, and

⁶ For text of Sherman Act, see footnote on pp. 503-505. As enumerated in last paragraph of sec. 4 of this act, see p. 493.

⁷ 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.

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.^a

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

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

May require attendance of witnesses and production of evidence.

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

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 subpoena 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.

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

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

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 subpoena 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.

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

Disobedience thereafter punishable as contempt.

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.

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

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 investi-

Commission may order depositions at any stage.

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

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.

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

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.

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.

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.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena 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 subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Sec. 10. PENALTIES.*

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

SEC. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena 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.

* Provisions and penalties of secs. 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.

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

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

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,

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

Sec. 10. PENALTIES—Continued.

or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

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

Not affected by
this act.

SEC. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts⁹ or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.

Approved, September 26, 1914.

THE CLAYTON ACT.¹

[Approved 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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved

"Antitrust
laws."

⁹ For text of Sherman Act, see footnote on pp. 503-505. As enumerated in last paragraph of sec. 4 of this Act, see p. 493.

¹ This act has been annotated up to July 1, 1921, and may be found, so annotated, in Volume III of the Commission's Reports. Subsequent reported decisions for the period covered by this and the preceding volume (July 1, 1921, to Feb. 13, 1923) and bearing on the provisions of this act affecting the Commission are: *Canfield Oil Co. v. Federal Trade Commission*, 274 Fed. 571 (see opinion set forth in Appendix II of Volume IV at p. 542 et seq.); *Sinclair Refining Co. v. Federal Trade Commission*, 276 Fed. 686 (see opinion set forth in Appendix II of Volume IV at p. 552 et seq.); *Auto Acetylene Light Co. v. Prest-O-Lite Co., Inc.*, 276 Fed. 537; *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 840, 42 Sup. Ct. 360, and *United Shoe Machinery Corporation v. United States*, 258 U. S. 451, 42 Sup. Ct. 363; *Aluminum Co. of America v. Federal Trade Commission*, 284 Fed. 401 (see opinion set forth in Appendix II of this volume at p. 529 et seq.); *Standard Oil of N. J. et al. v. Federal Trade Commission*, 282 Fed. 81 (see opinion set forth in Appendix II of this volume at p. 542 et seq.); and *Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568 (see opinion set forth in Appendix II of this volume at p. 599 et seq.).

It should 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. 169, 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

July second, eighteen hundred and ninety²; 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,

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.

That Public No. 146, Sixty-seventh Congress, approved Feb. 8, 1922, permits, subject to the provisions set forth, associations of producers of agricultural products for the purpose of "preparing for market, handling, and marketing in interstate and foreign commerce such products * * *." (See also in this general connection the limitation imposed in connection with the appropriations for enforcing the Sherman Act as set forth in the following note:)

* 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, 1922, and 1923 (Sundry Civil Appropriation Act, July 19, 1919, ch. 24, 41 Stat. 208, Sundry Civil Appropriation Act, June 5, 1920, ch. 235, 41 Stat. 922, Sundry Civil Appropriation Act, Mar. 4, 1921, ch. 161, 41 Stat. 1411, and State, Justice, and Judiciary Appropriation Acts, June 1, 1922, ch. 204, sess. II, 42 Stat. 613, and Jan. 3, 1923, 42 Stat., respectively), were made contingent upon no part of the moneys being—

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

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

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

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand

Sec. 1. DEFINITIONS—Continued.

and for other purposes," approved February twelfth, nineteen hundred and thirteen; and also this Act.

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

dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

PERSON MONOPOLIZING TRADE GUILTY OF MISDEMEANOR—PENALTY.

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

COMBINATIONS IN TERRITORIES OR DISTRICT OF COLUMBIA ILLEGAL—PENALTY.

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

ENFORCEMENT.

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

either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Sec. 2. PRICE DISCRIMINATION.*

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

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

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 subpoenas 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.

* 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 pp. 502-503.

Sec. 2. PRICE DISCRIMINATION—Continued.

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

merce: *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.

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

Sec. 3. TYING OR EXCLUSIVE LEASES, SALES OR CONTRACTS.⁴

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.

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 laws⁵ may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect

⁴ 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 pp. 502-503.

⁵ For text of Sherman Act, see footnote on pp. 503-505. As enumerated in Clayton Act, see first paragraph thereof on pp. 502-504.

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.

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.

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 antitrust⁶ 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.

Prima facie evidence against same defendant in private litigation.

Consent judgments or decrees excepted.

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

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

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 laws⁶ 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

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.

⁶ For text of Sherman Act, see footnote on pp. 503-505. As enumerated in Clayton Act, see first paragraph thereof on pp. 502-504.

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

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.

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

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

SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

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

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

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.

* 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 pp. 502-503.

It should be noted also that corporations for export trade are excepted from the provisions of this section. (See p. 528, sec. 3.)

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

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

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws,⁸ nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Existing rights heretofore lawfully acquired not affected.

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

SEC. 8. That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000; and no private banker or person who is a director in any bank

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

* For text of Sherman Act, see footnote on pp. 503-505. As enumerated in Clayton Act, see first paragraph thereof on pp. 502-504.

* 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

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

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.

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

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.

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

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 pp. 502-503.

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

Class A director of Federal reserve bank excepted, and

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

The consent of the Federal Reserve Board may be procured before the person applying therefor has been elected as a class A director of a Federal reserve bank or as a director of any member bank.¹⁰

Consent may be secured before applicant elected director.

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.¹¹ 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 provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

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

How eligibility determined.

¹⁰ 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, 1918, ch. 120, and act May 26, 1920, ch. 206.

¹¹ For text of Sherman Act, see footnote on pp. 503-505. As enumerated in Clayton Act, see first paragraph thereof on pp. 502-504.

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

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.

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 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.

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

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

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

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

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

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

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

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.

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

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.

Carrier to report transactions hereunder to Interstate Commerce Commission.

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

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

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

Penalty.

Effective date extended to Jan. 1, 1921.

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

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.

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.¹²

Sec. 11. JURISDICTION TO ENFORCE COMPLIANCE. COMPLAINTS, FINDINGS, AND ORDERS. APPEALS. SERVICE.¹³

Jurisdiction as respectively applicable vested in—

Interstate Commerce Commission;

Federal Reserve Board; and

Federal Trade Commission.

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.

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:

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

¹² Above paragraph, sec. 501 of the Transportation Act, Feb. 28, 1920, ch. 91, 41 Stat. 456 at 409.

¹³ 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 pp. 502-503.

complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

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

Intervention may be permitted for good cause.

Transcript of testimony to be filed.

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

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

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 commis-

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.

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

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.

Petition by respondent to review order to cease and desist.

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.

sion or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

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.

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.

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.¹⁴

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

Liability under antitrust acts not affected.

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

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

Personal; or

At office or place of business; or

By registered mail.

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

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

SEC. 12. That any suit, action, or proceeding under the antitrust laws¹⁴ against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

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

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 subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or crimi-

¹⁴ For text of Sherman Act, see footnote on pp. 503-505. For Antitrust Acts as enumerated in Clayton Act, see first paragraph thereof on pp. 502-504.

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

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.

nal, arising under the antitrust laws¹⁵ may run into any other district: *Provided*, That in civil cases no writ of subpoena 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.

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

Deemed also that of individual directors, officers, etc.

SEC. 14. That whenever a corporation shall violate any of the penal provisions of the antitrust laws,¹⁵ 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.

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 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. Whenever it shall appear to the court before which any such proceeding may be pending that the ends

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

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

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.

¹⁵ For text of Sherman Act, see footnote on pp. 503-505. For Antitrust Acts as enumerated in Clayton Act, see first paragraph thereof on pp. 502-504.

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 subpoenas to that end may be served in any district by the marshal thereof.

Court may summon other parties.

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,¹⁰ 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:

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.

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.

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.

Sec. 17. PRELIMINARY INJUNCTIONS. TEMPORARY RESTRAINING ORDERS.

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

No preliminary injunction without notice.

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

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

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

¹⁰ For text of Sherman Act, see footnote on pp. 503-505. For Antitrust Acts as enumerated in Clayton Act, see first paragraph thereof on pp. 502-504.

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

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

jury 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 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.

Sec. 268 of Judicial Code repealed.

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

Sec. 266 not affected.

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

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

Except as provided in sec. 16 of this act.

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

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

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

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

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

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 purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute,

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

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—Contd.

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

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.

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

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.

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.

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

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

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,*

Trial if alleged contempt not sufficiently purged by return.

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

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

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.

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.

Sec. 25. PROCEEDINGS FOR CONTEMPT. LIMITATIONS.

Must be instituted within one year.

Not a bar to criminal prosecution.

Pending proceedings not affected.

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.

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

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

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.

Approved, October 15, 1914.

WEBB ACT.¹

[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."

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

"Trade within the United States."

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

"Association."

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

Sec. 2. That nothing contained in the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety,² 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

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

¹ With the exception of a reference thereto in the case of *United States v. United States Steel Corporation*, 251 U. S. 417 at 453, and in *Ex Parte Lamar*, 274 Fed. 160 at 171, this act appears as yet neither to have been involved in nor referred to in any reported case.

² For text of Sherman Act, see footnote on pp. 503-505.

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

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.

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.

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,³ 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,⁴ shall be construed as extending to unfair methods of competition used in export trade against competitors engaged in ex-

³ See *ante*, p. 502 et seq.

⁴ See *ante*, p. 489 et seq.

port 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.

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

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.

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.

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

Federal Trade Commission to investigate restraint of trade, artificial or intentional enhancement 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 management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

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."⁵

Approved, April 10, 1918.

⁵ See *ante*, p. 489 et seq.

APPENDIX II.

DECISIONS OF THE COURTS IN CASES INSTITUTED AGAINST OR BY THE COMMISSION.¹

ALUMINUM CO. OF AMERICA v. FEDERAL TRADE COMMISSION.²

(Circuit Court of Appeals, Third Circuit, June 1, 1922.
Rehearing denied November 22, 1922.)

No. 2721.

1. MONOPOLIES KEY No. 20—EFFECT OF CONVEYANCE OF BUSINESS TO ANOTHER CORPORATION, IN WHICH COMPETITOR PURCHASED STOCK, TO BE CONSIDERED WITH REFERENCE TO TENDENCY TO CREATE MONOPOLY.

Under Clayton Act, Par. 7 (Comp. St. Par. 8835g), relative to the purchase by a corporation engaged in commerce of stock in another corporation so engaged, where, by agreement between the C Company and the A Company, a third corporation was organized to take over part of the business of the C Company, and the A Company purchased stock therein, though it was not the corporation engaged in interstate commerce in which stock was acquired, the effect of the transaction with reference to its tendency to create a monopoly, as well as its tendency to lessen competition, must be considered.

2. MONOPOLIES KEY No. 20—STATUTE NOT DIRECTED TO ACQUISITION OF STOCK IN ONE CORPORATION BY ANOTHER, BUT TO EFFECT ON COMMERCE.

Clayton Act, Par. 7 (Comp. St. Par. 8835g), forbidding a corporation engaged in commerce to acquire stock in another

¹ The period covered coincides with that of this volume, namely, May 22, 1922, to Feb. 13, 1923. During this period, however, in addition to the opinions and decisions herewith reprinted, the Supreme Court of the District of Columbia handed down a written opinion as of Jan. 30, 1923, in the case of the Maynard Coal Co. v. Federal Trade Commission, sustaining a motion of the company to strike out the Commission's amended answer upon the ground that it raised no defense. This opinion will be reprinted together with the court's final decree in the case (the Commission having elected to stand upon its answer) as of Mar. 6, 1923, the date of said decree. (For a statement by the court of the facts in this proceeding, pending on appeal as of this writing before the Court of Appeals for the District of Columbia, in which the Commission was enjoined from requiring certain reports required by it, see opinion handed down Apr. 19, 1920, in connection with the granting of a preliminary injunction, reported in 3 F. T. C. at p. 555 et seq.). It should also be noted that during the period referred to the Supreme Court on June 5, 1922, denied a petition by the Beechnut Co. for a rehearing in the case of Federal Trade Commission v. Beech-Nut Packing Co., 257 U. S. 441 (see opinion also reported in 4 F. T. C. at p. 583 et seq.).

² Petition of the Aluminum Co. for a rehearing or modification of the court's order, denied Nov. 22, 1922. Petition by the company for writ of certiorari denied by the Supreme Court on Feb. 26, 1923, 261 U. S. 616 (43 Sup. Ct. 362).

corporation so engaged, where the effect is substantially to lessen competition, to restrain commerce, or tend to create a monopoly, is not directed to the mere acquisition of stock of one corporation by another, but to the effect of such acquisition on commerce.

3. MONOPOLIES KEY NO. 20—COMPETITION EXISTS BETWEEN CORPORATIONS IN SAME BUSINESS, THOUGH THERE IS A "SELLERS' MARKET."

Within Clayton Act, Par. 7 (Comp. St. Par. 8835g), relative to the purchase by a corporation of stock in another corporation having the effect of substantially lessening competition, competition exists between corporations selling the same class of goods, though there is a "sellers' market," or condition of affairs under which sellers do not have to compete for trade, but where the trade competes for the sellers' products.

4. MONOPOLIES KEY NO. 20.—COMPETITION HELD LESSENERED WHEN ONLY COMPETITOR IN CERTAIN GOODS AND ONE OF TWO COMPETITORS IN OTHERS ELIMINATED.

Competition was substantially lessened, within Clayton Act, Par. 7 (Comp. St. Par. 8835g), by a stock acquisition which eliminated from the sheet aluminum trade a company's only competitor in the manufacture and sale of wide sheets, and one of its only two competitors in the manufacture of sheets of any width.

5. MONOPOLIES KEY NO. 20.—LESSENERED OF COMPETITION WITH CORPORATION OTHER THAN ONE WHOSE STOCK WAS ACQUIRED HELD TO HAVE EVIDENTIAL BEARING.

Where, by agreement between the A Company and the C Company, a third company, in which the A Company acquired stock, was organized to take over part of the C Company's business, though the stock acquired was not that of the C Company, the lessening of competition with the C Company had an evidential bearing on the question whether the transaction tended to create a monopoly, within Clayton Act, Par. 7 (Comp. St. Par. 8835g).

6. MONOPOLIES KEY NO. 20—MAY BE CREATED BY STOCK ACQUISITION NOT LESSENERED COMPETITION WITH CORPORATION WHOSE STOCK IS ACQUIRED.

A "monopoly" can be created, within Clayton Act, Par. 7 (Comp. St. Par. 8835g), by acquisition of stock in another corporation, when the effect is not to lessen competition with such corporation, if its effect is to end competition existing elsewhere.

7. MONOPOLIES KEY NO. 20—CORPORATION WHOSE STOCK WAS PURCHASED HELD "ENGAGED IN COMMERCE," AND POTENTIALLY ENGAGED IN COMPETITION WITH PURCHASER.

Where the A Company and the C Company, a competitor, agreed that a third company, in which the A Company was to acquire stock, should be organized and purchase the aluminum rolling mill and rolling mill business of the C Company, and the new company paid for such business from the proceeds of

monthly calls on the other companies' stock subscriptions during a period when it was operating the newly acquired plant, it was "engaged in commerce," and potentially engaged in competition with the A Company, when the latter company's stock was acquired, within the meaning of Clayton Act, Par. 7 (Comp. St. Par. 8835g).

8. MONOPOLIES KEY NO. 20—CORPORATION TEMPORARILY SUSPENDING MANUFACTURE HELD NEVERTHELESS ENGAGED IN COMMERCE.

Where a corporation purchased a going business in the manufacture and sale of sheet aluminum, and engaged in such business, it did not cease to be engaged in commerce, within Clayton Act, Par. 7 (Comp. St. Par. 8835g), by temporarily suspending the rolling of sheets, while changing from an old mill to a new one.

9. MONOPOLIES KEY NO. 20—MOTIVE OF ACQUISITION OF STOCK IN ANOTHER CORPORATION HELD IMMATERIAL.

Under Clayton Act, Par. 7 (Comp. St. Par. 8835g), the effect of a corporation's acquisition of stock in another corporation as substantially lessening competition, restraining commerce, or tending to create a monopoly, and not the motive for the transaction, is the question for the court, and it is immaterial that the object of the transaction was not to evade the statute, but to increase production and maintain reasonable prices.

(The syllabus is taken from 284 Fed. 401.)

Petition for Review from Federal Trade Commission.

Petition by the Aluminum Company of America to review an order of the Federal Trade Commission. Order sustained.

George B. Gordon, S. G. Nolin, and Gordon & Smith, all of Pittsburgh, Pa., for petitioner.

Francis W. Treadway and Treadway & Marlatt, all of Cleveland, Ohio, for Cleveland Metal Products Co.

Edward L. Smith, Wm. H. Fuller, and Adrien F. Busick, all of Washington, D. C., for respondent.

Before Buffington, Woolley, and Davis, Circuit Judges, Buffington, J., dissenting.

WOOLLEY, *Circuit Judge*:

This is a petition of Aluminum Company of America for review of an order of the Federal Trade Commission commanding that corporation, on a finding that it had violated section 7 of the Clayton Act, 38 Stat. 730, to divest itself of all its stockholdings in the Aluminum Rolling Mills Company, another corporation.

The relevant facts, shortly stated, are these:

The Aluminum Company of America (to which we shall refer as the Aluminum Company) is the dominant

factor in the aluminum industry. Its business, and that of its subsidiaries, extends to the production and sale of crude or pig aluminum and of aluminum ingots; the production and sale of sheet aluminum rolled from ingots; and the manufacture and sale of articles fabricated from sheets.

During the time covered by this controversy the Aluminum Company produced one-half of the pig aluminum and aluminum ingots made in the world and all that was made in the United States. Its ingot output was 150,000,000 pounds a year. In the domestic field, one substantial competitor—the Southern Aluminum Company, of French affiliation, with a capital of \$8,000,000—arose before the war; but during the war it succumbed to financial difficulties and its properties were purchased by the Aluminum Company.

Pig aluminum and aluminum ingots are used for two general purposes, namely; for casting articles and for rolling sheets. From aluminum sheets many things are made, among them kitchen utensils and automobile bodies. The Aluminum Company and its subsidiaries produce one-half of all the sheet aluminum made in the world and, prior to the war, they produced all of the sheet aluminum made in the United States.

In March, 1915, the Cleveland Metal Products Company—of which we shall have more to say presently—built a mill for rolling sheet aluminum of a width of 60 inches and entered the trade in competition with the Aluminum Company, and its subsidiaries.

In 1916 the Bremer-Waltz Corporation became a competitor of the Aluminum Company and its subsidiaries in the manufacture of sheet aluminum 30 inches wide. In 1919 this concern sold a part of its physical assets, including its rolling mill, to the Aluminum Goods Manufacturing Company, of whose stock the Aluminum Company owns thirty-six per cent.

In 1916 the United States Smelting & Aluminum Company became a competitor of the Aluminum Company and its subsidiaries in sheet aluminum of the width of 30 inches.

Thus during the time in question the Aluminum Company had no domestic competitors in the manufacture of aluminum ingots and but three competitors in the manufacture of aluminum sheets, two of narrow sheets, and one of broad sheets, the difference in width of sheets being a factor in the breadth of the sheet market, for only broad sheets are used in the manufacture of automobile bodies.

Prior to 1913 there were two corporations doing business in the City of Cleveland, the Cleveland Metal Products Company and the Cleveland Foundry Company, which were owned by the same people. The Cleveland Metal Products Company (hereafter referred to as the Cleveland Company) was engaged in the manufacture of

enameled steel cooking utensils, and the Cleveland Foundry Company (hereafter dropping out of the case) was engaged in the manufacture of oil stoves with aluminum parts. These corporations were merged in January, 1917, under the name of the former.

In 1913 the Cleveland Company contemplated the extension of its steel cooking utensils business by adding aluminum cooking utensils. With this in view it took up the matter of rolling its own sheet aluminum from which to fabricate its cooking utensils and stove parts. Its first step was to investigate the sources of raw material. It knew that aluminum ingots could be purchased from the Aluminum Company, the sole domestic source. Its president, however, went abroad and found that aluminum ingots could be purchased in Europe. Being assured of an ingot supply from the foreign source, the president returned to America and, on his report, the Cleveland Company began the erection of a plant. This plant was completed in 1915 at a cost of \$227,000. In order to roll sheets for its own use at a low cost, the mill was constructed on a scale larger than the company's own needs. Its capacity was 250,000 pounds of sheet aluminum a month, of which later the company used twenty-seven per cent in the manufacture of its products and sold seventy-three per cent on the market. Recourse to the foreign market having been cut off by the war, the Cleveland Company obtained ingots from the Aluminum Company, the only available source. From sheets sold on the market (not from sheets used in its own business), the Cleveland Company earned net profits of \$23,000 for the six months ending December 31, 1915; \$219,000 for the year 1916; and \$52,000 for the year 1917. Profits in these substantial amounts were due, it is explained, to several causes: One was that the demand for sheet aluminum arising from the war exceeded the supply; another, that the market price for sheets was fixed by extensive time contracts of the Aluminum Company at a point considerably below what the trade was willing to pay for spot deliveries, and that the Cleveland Company, declining to make time contracts, was able to sell its product at the higher figures.

When the United States entered the war and was about to fix the price of sheet aluminum (which it did in March, 1918), prices of the upper level began to recede toward those of the lower level, and the Cleveland Company found that the "spread" or difference between the cost price of ingots, fixed by the Aluminum Company, and the selling price of sheets likely to be fixed by the Government, was not sufficient to cover the cost of converting ingots into sheets. Therefore, with a market responding to this situation, the Cleveland Company incurred losses of \$14,000 a month for the first two months of 1918, with a prospect of continuance. This condition of actual and

impending losses was made more acute by the fact that the Cleveland Company had outstanding a contract with the Aluminum Company for the purchase of ingots running into the future. The Cleveland Company asked the Aluminum Company to relieve it from its contract. The Aluminum Company declined. There followed interviews, discussions, negotiations between the officers of the two companies, and eventually the development of a plan to meet the difficulty. This plan contemplated the organization of a new corporation, to be known as "Aluminum Rolling Mills Company," and its capitalization at \$1,000,000, of which \$600,000 was to be issued; the sale by the Cleveland Company of its rolling mill and sheet business to the new corporation at a figure somewhat above the cost of the mill; subscription by the Cleveland Company for \$200,000 and by the Aluminum Company for \$400,000 of the capital stock of the new corporation; and the organization of the new corporation and the operation of the mill by the Aluminum Company. This plan was carried out with an assurance to the Cleveland Company that its needs for sheet aluminum would be cared for at market prices. This is the transaction which the Federal Trade Commission found to be violative of section 7 of the Clayton Act.

The findings of the commission were based solely on section 7 of the Clayton Act (hereafter referred to as "the section"). Hence, this is the only law involved in the case. The applicable provision of the section is as follows:

"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. * * *"

The Aluminum Company, maintaining under recent decisions that it is for the courts, not for the commission, ultimately to determine, as matter of law, what acts "lessen competition," "restrain commerce," or "tend to create a monopoly" within the meaning of the section, *Federal Trade Commission v. Gratz*, 253 U. S. 421; *Curtis Publishing Company v. Federal Trade Commission*, 270 Fed. 881; *Standard Oil Company v. Federal Trade Commission*, 273 Fed. 478, challenges the commission's order on several grounds. All are based on the proposition of law, arising from the power of Congress to enact laws controlling interstate commerce, that before there can be a violation of the section both the corporation acquiring stock and the corporation whose stock is acquired must at the time be engaged in interstate commerce.

Taking up the events in the order of their occurrence, the Aluminum Company's first contention is that this requirement of the section is not met by the phase of the transaction relating to the Cleveland Company because, although that corporation was engaged in interstate commerce, it was not the stock of that corporation which the Aluminum Company acquired. While this is literally true we can not thus summarily drop the Cleveland Company out of the case. The Cleveland Company was one of two actors in the transaction whose effect on trade the commission found violated the section. Therefore, we must inquire, as did the Aluminum Company in its briefs, into the effect of the transaction on commerce, not with reference to lessening of competition alone but with reference as well to its tendency to create monopoly.

Clearly, the object to which the section is directed is not the mere acquisition of stock of one corporation by another. It is the "effect" of such acquisition upon commerce. Our first inquiry, therefore, is whether in this case the effect was substantially to lessen competition between the two corporations. The Aluminum Company meets the issue of lessened competition as it bears on the two phases of the transaction, one between itself and the Cleveland Company and the other between itself and the Rolling Mills Company.

As between itself and the Cleveland Company, the Aluminum Company contends there never was competition during the three years the latter concern was rolling and selling sheets, because, it maintains, under the exceptional conditions arising from war, there was always a sellers' market; that is, a market where, as we understand it, sellers do not have to compete for trade, but where the trade competes for sellers' products. It is hard to believe that Congress intended that violations of section 7 of the Clayton Act should be determined according to market movements and that the section may be violated when stock acquisition is made on a buyers' market and not violated when a like acquisition is made on a sellers' market. We are of opinion that the finding of the commission that there was competition between the Aluminum Company and the Cleveland Company during the period in controversy is supported by the testimony.

The next question is whether the testimony shows that this competition was substantially lessened by the stock acquisition which followed. As the transaction eliminated the Cleveland Company from the sheet trade, manifestly it put an end to competition between that corporation and the Aluminum Company and its subsidiaries. The "effect" of a transaction which ended competition between the Aluminum Company and its one competitor in the manufacture and sale of wide sheets and ended competition between it and one of only two

independent competitors in the manufacture of sheets of any width, was inevitably to lessen competition, and to lessen it substantially. Still, the Aluminum Company says the law was not violated because the substantial lessening of competition was not between the corporation whose stock was acquired and the corporation which acquired the stock. This also is true; but, as everyone agrees, the transaction had two parts; one between the Aluminum Company and the Cleveland Company, by which competition between them was ended; the other between the Aluminum Company and the Rolling Mills Company. Violation of the section does not turn alone on a substantial lessening of competition. It turns in the disjunctive, on the tendency of the transaction "to create a monopoly." For these reasons we are of opinion that the lessening of competition with the Cleveland Company has an evidential bearing on the next question, whether the acquisition of the stock of the Rolling Mills Company by the Aluminum Company tended to create a monopoly. Obviously, while the ending of competition with the Cleveland Company and the acquisition of the stock of the Rolling Mills Company were parts of one transaction, these parts were interdependent and were so intimately related that one can not be considered without the other.

Passing from the phase of the transaction with the Cleveland Company, which, though engaged in commerce, was not the corporation whose stock was acquired, and coming to the phase where a new corporation was created whose stock, it is contended, was acquired before it began rolling sheets and delivering them in commerce, the Aluminum Company advances the proposition that the latter phase of the transaction does not come within its interpretation of the section that before the law can be violated both the corporation acquiring stock and the corporation whose stock is acquired must at the time be engaged in interstate commerce. In other words, the Aluminum Company maintains that the new corporation at the time its stock was acquired had not begun business and, therefore, could not have been "engaged * * * in commerce." From this premise the Aluminum Company draws the conclusion that the latter phase of the transaction did not violate the section. Continuing argumentatively it maintains that after the stock acquisition, and when later the new corporation embarked in commerce, it created commerce where none before existed, the effect of which was to increase, not to restrain, commerce; and, as there was no competition between the Aluminum Company and the new corporation at the time of the acquisition of its stock, necessarily "the effect of such acquisition" could not be to lessen competition where none existed. It seems to us that in this defense the Aluminum Company stands on a ledge

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

But the lessening of competition is not the only effect of the acquisition by one corporation of stock of another which Congress sought to avoid. It intended as well to prevent a transaction "where the effect" may "tend to create a monopoly," which is the effect which the commission found in the acquisition of the stock of the Rolling Mills Company. A monopoly can be created by a transaction of stock acquisition when the effect is not to lessen competition with the corporation whose stock is acquired if the effect is to end competition existing elsewhere, *United States v. New England Fish Exchange*, 258 Fed. 732, 746; as, for instance, the ending of competition with the Cleveland Company. This is for the reason that the lessening of competition and a tendency to monopoly are not always synonymous. There may be a lessening of competition between two corporations in a stock transaction that does not tend to monopoly. But, curtailing this discussion, we are not prepared to admit the premise from which the Aluminum Company deduces its conclusion. In other words, we do not find that at the time the Aluminum Company acquired the stock of the Rolling Mills Company, the latter was not engaged in commerce and was not, potentially, engaged in competition with the Aluminum Company, for these reasons:

Prior to February 17, 1918, the Cleveland Company had been engaged in competition with the Aluminum Company. On that day it agreed with the Aluminum Company to organize, and later there was organized, a third corporation, which was to purchase, and later did purchase, the aluminum rolling mill and also the "aluminum rolling mill business" of the Cleveland Company. This finding of the commission is sustained by the record which includes an agreement between the two old corporations for sale by the Cleveland Company to the new corporation not of its rolling mill alone but its accounts receivable, and providing also for the delivery to the new corporation of a list of the Cleveland Company's customers scattered through many States, and for the taking over by the new corporation of all "unfilled orders" for aluminum sheets on the books of the Cleveland Company.² The "business" thus sold by the Cleveland Com-

² Record pp. 750, 151, 511, 512, 520 to 644, 645, 649, 653, 654, 655, 660, 661, 673, 674, 696 to 707, 711 to 718, 194.

pany and purchased by the new corporation was that of a going concern consisting of the manufacture and sale of sheet aluminum in commerce and in competition with the Aluminum Company. Settlement with the Cleveland Company for the purchase of these assets was not made at the time with money acquired by the new corporation from previous sale of its stock, but was made by six notes given by the new corporation payable monthly, and the notes were met from the proceeds of six monthly calls upon the Cleveland Company and the Aluminum Company to meet their stock subscriptions. During the period through which these payments were being made and stock subscriptions were being paid, the new corporation had begun the operation of the newly acquired plant and continued its operation until the mill was moved to a new location. Later, during the change from the old mill to the new, doubtless the rolling of sheets was suspended. Yet it does not follow that the relation of the new corporation to the trade which it had purchased and in which it had been engaged was also suspended, and that, in consequence, the new corporation was not engaged in commerce within the meaning of the section. Having purchased trade upon which to start, and having started upon the trade it had purchased, the new corporation was, we think, truly engaged in commerce at the time of the stock acquisition.

In addition to the several defenses made by the Aluminum Company there is much in the record to the effect that the need of aluminum for purposes of war and the assistance rendered the allied Governments and our own Government by increasing production and maintaining reasonable prices entered into the transaction. For these reasons and others it is persuasively urged that the arrangement was not a device intended to get around the Clayton Act but was a plain business transaction having the twofold object of relieving one party from a difficult business situation and enabling the other party to meet more effectively the demands of war. With these matters, we surmise, we have no present concern. They have to do with the motive for the transaction. We have to do only with the "effect" of the transaction; and with its effect only as it may "substantially lessen competition * * * or restrain commerce, * * * or tend to create a monopoly." As we are not called upon to determine whether the Aluminum Company is a monopoly within the definition of the Antitrust law, we limit our decision to the question whether, within the policy of the Clayton Act, the transaction comes within the definition of the section. In this we are of opinion that it does, and that its effect upon actual competition as well as in destroying potential competition in a way later to make actual competition impossible was substantially to lessen competition between the corporation whose stock

was acquired and the corporation making the acquisition; and second, that, without regard to whether its effect was substantially to lessen competition between these two corporations, the stock acquisition did, in effect, "tend to create a monopoly."

Being of opinion that the findings of the Federal Trade Commission are supported by the testimony, its order is sustained.

BUFFINGTON, *Circuit Judge*, dissenting:

This case involves the construction of the first clause of section 7 of the act of October 15, 1914, and its application to the facts disclosed by the proofs. That act, being "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," was supplementary to existing laws against unlawful restraints and monopolies. The paragraph in question is: "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."

These plainly expressed provisions contemplate the existence of two corporations which are competitors in the same line of business, and one of them, with the view to substantially lessening competition, or creating a monopoly, buying the whole or a part of the stock of its competitor. That two existing competing corporations were the subjects of the clause, is shown plainly by its terms. The offending buying corporation is aptly described as being in business, by the words "No corporation engaged in commerce," and the other corporation is described as being in like manner engaged in commerce by the words "another corporation engaged *also* in commerce," and that the two corporations thus described were each actually engaged in competition of a substantial character is evidenced by the fact that the stated object of the law was to prevent the two corporations engaged in commerce from doing a thing "the effect of which was to *substantially lessen* competition," or which tended "to create a monopoly of any *line of commerce*." Moreover, the word "acquire" is an apt one to describe the buying by one corporation of the stock of another competing corporation, as will be seen by reference to the proviso in the third paragraph that "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*," and also by refer-

ence to section 11 of the act, where the remedy against the stock acquiring corporation is "to cease and desist from such violations and *divest* itself of the stock held." Such divesting would restore the competitive corporation to its former competing status.

Clearly, such was the situation to which this section was directed, but lest the stock of two or more corporations thus engaged in competition, should be bought up not by one another, but by a holding company which was not engaged in commerce, the next paragraph was added, which provided: "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." A study of this latter paragraph clearly shows it contemplated two sorts of corporations, viz: One class engaged in competitive commerce with each other, viz: "Two or more corporations engaged in commerce," the acquisition of whose shares "may be to substantially lessen competition between such corporations," or "to restrain such commerce in any section or community," or "tend to create a monopoly of any line of commerce." The other or stock-acquiring class of corporation, was not described as engaged in commerce, but was described without any limitation by the inclusive words, "No corporation shall acquire," etc., thus clearly referring to a mere holding corporation.

In my judgment, the first quoted clause of section 7 was a case unlike the present, where there was not only no competing corporation buying a competing company's stock, but where there were no elements or purpose of oppression, bad faith, increase of product price, diminution of output, or any other of the vicious earmarks of monopoly or lessening of competition, and where indeed, the uncontradicted evidence is that the whole transaction was influenced by a patriotic war purpose to increase the supply of aluminum, which the Government was then largely absorbing for war requirements at its own fixed price. The business problem which confronted those concerned in the transaction was simply this: The Cleveland Foundry Company, whose major business was making stamped steel and enameled vitreous utensils, built in 1915 a mill to roll aluminum sheets for its own use. When the abnormal war demand for aluminum stopped, the mill began to lose five hundred dollars a day. This necessitated either mill abandonment or mill enlargement. At this point, I remark that if the Aluminum Company

of America, which furnished the Cleveland Company with aluminum ingots, desired to lessen competition or to broaden the monopoly of rolling aluminum sheets, all it had to do was to do nothing and allow the losing mill to drop out of business. On the other hand, if it desired to continue the mill as an ingot consumer and to increase the production of aluminum sheets, its only course was to enlarge the mill and increase its production. Such enlargement the Cleveland Company, after its disastrous venture, was unwilling to make itself, but was willing to contribute a minor part if the Aluminum Company would contribute the major part of the funds to enlarge.

What was really done was that the Aluminum Company formed a new company, and by taking the major stock thereof made the new company a subsidiary company of its own, the Cleveland Company becoming a minority stockholder, its mill being taken in part payment for such minority stock. Such was the simple business proposition; a losing plant, enlargement, and increased production, the Aluminum Company forming a subsidiary to take over and enlarge the business and the Cleveland Company contributing the mill and the minority of the money needed to effect enlargement. In point of fact, the situation was in no respect different than it would have been had the Aluminum Company bought the losing mill from the Cleveland Company and itself furnished the entire funds to capitalize the new subsidiary company. In my judgment, the present situation did not fall within the terms of either of the quoted paragraphs, was not an acquisition of stock such as the act contemplated, or one over which jurisdiction was conferred on the Trade Commission by the act. Nor does the construction which is thus given the act create a remediless situation, for, manifestly, if wrong was done, if this transaction was a subterfuge to lessen competition or to create a monopoly, the existing trust laws would have applied. And, indeed; the District Court of the United States for the Western District of Pennsylvania having theretofore taken jurisdiction of a bill filed by the United States against the Aluminum Company of America, the Attorney General by proper proceeding in that case could have, and can now prevent that company taking this step if it tended to lessen competition or create a monopoly. And this prior, general, and effective jurisdiction of courts over such matters Congress recognized when it created a Trade Commission of defined and limited power by providing in the act: "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," and at the same time making it clear "That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided."

Being of opinion the case was one to which the limited jurisdiction of the Trade Commission was not extended by the act of Congress, I respectfully record this my dissent.

**STANDARD OIL CO. OF NEW JERSEY ET AL. v.
FEDERAL TRADE COMMISSION.***

(Circuit Court of Appeals, Third Circuit. July 14, 1922.)

Nos. 2599, 2609, 2632.

- 1. TRADE-MARKS AND TRADE-NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—PRACTICE OF LOANING EQUIPMENT TO RETAILERS HELD TO AFFECT PUBLIC SO AS TO AUTHORIZE PROCEEDINGS UNDER TRADE COMMISSION ACT.**

If the practice of wholesale dealers in gasoline in loaning or leasing without rental to many thousands of retailers, throughout a territory comprising more than half the population of the United States, equipment for the storage, measurement, and delivery of gasoline, on their agreement to use it exclusively for the storage and handling of gasoline purchased from the wholesaler, is illegal, it so affects the public as to authorize proceedings under Federal Trade Commission act, paragraph 5 (Comp. St., par. 8836e), providing for a proceeding when it shall appear to the commission that such a proceeding would be to the interest of the public.

- 2. TRADE-MARKS AND TRADE-NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—LOANING OF GASOLINE STORAGE EQUIPMENT TO RETAILERS FOR USE ONLY IN STORING LENDER'S GASOLINE HELD NOT UNFAIR COMPETITION.**

The loan or lease without rental by wholesalers to retailers of equipment for the storage, measurement, and delivery of gasoline on the retailer's agreement to use it solely for gasoline purchased from the lender, but without any agreement not to purchase gasoline from others, does not constitute unfair competition under Trade Commission act, paragraph 5 (Comp. St.,

* Affirmed in *Sinclair Refining Co. et al. v. Federal Trade Commission*, April 9, 1923, 261 U. S. 463, 43 Sup. Ct. 450.

par. 8836e), and Clayton Act, paragraph 3 (Comp. St., par. 8835c), as to the public, other wholesalers, retailers, or manufacturers of such equipment.

3. MONOPOLIES KEY No. 10—SCOPE OF CLAYTON ACT DEFINED.

The Clayton Act seeks to reach monopolies in their incipency and stop their growth, but is not intended to reach every remote lessening of competition, or every dim or uncertain tendency to monopoly, or any possible lessening of competition, or possible creation of monopoly, but only acts which probably lessen competition substantially and actually tend to create a monopoly.

4. MONOPOLIES KEY No. 12 (2)—LEASE OF MACHINERY ON AGREEMENT NOT TO HANDLE COMPETITORS' GOODS TO BE CONSIDERED BY ITS EFFECT AS WELL AS BY ITS TERMS.

Under Clayton Act, paragraph 3 (Comp. St., par. 8835c), declaring it unlawful to lease machinery, etc., on the agreement or understanding that the lessee shall not use or deal in the goods, etc., of competitors of the lessor, where the effect may be to substantially lessen competition or tend to create a monopoly, such a tying contract is to be construed, not by its terms alone, but by its effect as well.

(The syllabus is taken from 282 Fed. 81.)

Petitions for Review from Federal Trade Commission.

Original petitions by the Standard Oil Co., by the Gulf Refining Co., and by the Maloney Oil & Manufacturing Co. to set aside orders of the Federal Trade Commission. Orders set aside and complaints dismissed.

James H. Hayes and Chester O. Swain, both of New York City, for Standard Oil Co.

W. J. Guthrie, of Pittsburgh, Pa., for Gulf Refining Co.

Herbert B. Fuller, of Cleveland, Ohio, for Maloney Oil & Manufacturing Co.

E. W. Burr and Adrien F. Busick, both of Washington, D. C., for Federal Trade Commission.

Before Woolley and Davis, Circuit Judges, and Morris, District Judge, Morris, J., dissenting in part.

WOOLLEY, *Circuit Judge*:

In these proceedings we are asked to review and set aside three orders of the Federal Trade Commission commanding the petitioning corporations forever to cease and desist from a practice found by the commission to violate section 5 of the act creating the Federal Trade Commission (38 Stat. 717, 719) and section 3 of the Clayton Act (38 Stat. 730, 731). The applicable provisions of these statutes are, in the first, "That unfair methods of competition in commerce are * * * unlawful," and in the second, "That it shall be unlawful for any person engaged in commerce * * * to lease

* * * or make a sale * * * of goods, * * * machinery, * * * or other commodities * * * on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, * * * machinery, * * * or other commodities of * * * competitors of the lessor or seller, where the effect of such lease or sale, * * * or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

These are three of a large number of cases involving the same practice. They were tried in three groups. The testimony in one group bore most directly on gasoline marketing in States along the Atlantic seaboard. In another it related particularly to business done by companies within the State of Ohio. In the third it concerned business farther west. As the testimony in all cases was in the main identical, the 12 comprising the eastern group (which includes the cases at bar) were combined and heard together.

The testimony discloses a practice which has been widely pursued in the eastern part of the United States by corporations refining and marketing gasoline. It consists of what is practically a loan, or technically a lease without rental, by a wholesaler to a retailer, of equipment for the temporary storage, measurement, and delivery of gasoline to the consuming public. The practice extends mainly to the retailer whose place of business is referred to as a "curb filling station." The leased equipment is known as a "curb pump outfit" and comprises a sunken tank for the storage of gasoline and a pump of familiar design by which gasoline is drawn from the tank and delivered to motor vehicles. The retailer is the proprietor of the station and is generally engaged in some other business. Typical of his class are keepers of country stores, residents in hamlets and at crossroads, and farmers. The practice does not relate to retail stations owned and managed by the refining and marketing companies themselves. These are the more elaborate affairs, also familiar to the public and generally known as "service stations." Proprietors of garages comprise an intermediate class of retailers to whom the practice in some measure extends.

The practice held by the commission to offend against the statutes is found wholly within the terms of the leasing contracts. The form of the contract is important in two respects: First, in what the wholesaler requires the retailer to do; and second, in what it does not require him to do. The form of contract used by the Standard Oil Company is identical in substance with contracts used by the other petitioners. Paraphrased, it is as follows:

Reciting by preamble that the retailer is now purchasing gasoline from the wholesaler for sale to its customers

and has requested it to install on his premises equipment for the better storage and handling of the gasoline so purchased, and that in compliance with his request the wholesaler is about to make the installation; it is agreed between them that the "equipment shall be used solely for the storage and handling of motor gasoline purchased by the" retailer from the wholesaler. Then follow undertakings by the retailer that he will maintain the equipment in good condition at his own cost; that he will not encumber or remove it or permit it to be seized or taken in execution; and that he will indemnify the wholesaler from liability for injuries occasioned by leakage, fire, or explosion of gasoline. The contract concludes with four provisions for its termination: First, upon the use of the equipment by the retailer for any other purpose than the storage and handling of gasoline purchased from the wholesaler; second, upon the retailer's failure for 30 days to purchase gasoline from the wholesaler; third, upon the sale of the premises by the retailer; and fourth, by either party upon 5 days' notice in writing to the other party; with the right of the wholesaler in any event to enter upon the premises and remove the equipment.

Having stated what the contract requires the retailer to do, the things which it does not require of him are equally important. The first is he is not required to pay any license fee, rental, or other thing for the use of the equipment; nor is he restricted in his business to the equipment covered by the contract. On the contrary, he may use other equipment leased by competing wholesalers or purchased by himself. Nor does the contract expressly tie him to the wholesaler's products. He may freely deal in gasoline or other petroleum products purchased from competing wholesalers. He may not, however, use the equipment of the contract for storing and handling a competitor's gasoline.

In justification of their practice the petitioners maintain that the curb pump outfit is a natural development of the oil industry. In this industry the distribution and marketing of petroleum products more or less volatile and therefore more or less dangerous has always been a serious problem. The petitioners point out that for many years kerosene and other less volatile oils have been sold to retailers in barrels or direct to householders in cans. The barrels and cans being the property of the wholesaler are returned when the contents are removed. When the market for gasoline and more volatile oils developed, the wholesaler for safety shipped them to the retailer in steel barrels or drums. These also remained the property of the wholesaler and were returned when empty. With the marvelous increase of motor vehicles in all sections, urban and rural, there came a corresponding necessity for wider distribution of gasoline. Distribution from large central reservoirs to dis-

tant places by barrels and drums was no longer practicable. Then curb filling stations were established and curb pump outfits were installed whereby gasoline is delivered by tank trucks to many smaller centers and there stored and sold. These centers grew in number as the demand spread. At first this demand was met by one station and one outfit. As the demand increased stations and outfits were multiplied, the purpose of the practice, the petitioners claim, being to increase business by making easy and convenient the sale of gasoline to the public everywhere. But outfits cost money and the little storekeeper and the farmer by the roadside could not be induced, and frequently were not able, to invest capital in the purchase of an outfit. The result was that outfits were purchased by the wholesaler and loaned or leased to the retailer at practically no cost to him, yet upon the terms with respect to their use which we have detailed.

The view which the Federal Trade Commission takes of this practice is quite different. Its conclusions based on its findings of fact are that the installation of one outfit either supplies the needs of the retailer or meets the demand of his locality, and that, in consequence, the retailer has neither economic means nor personal desire to permit the installation of more than one outfit on his premises; that the contract for an outfit has the effect of tying the retailer to the products of the one wholesaler so long as one outfit meets the local demand and of substantially lessening competition by enabling the wholesaler to monopolize first one retailer and then, as the contracts are multiplied, to monopolize many thousand retailers, and eventually the whole territory in which they reside. Finding this practice of the petitioners violative of the laws referred to, the commission entered the orders to cease and desist here under review.

On this statement of facts we shall discuss the practice as it bears on four classes of interested parties. The first of these is the public.

The Federal Trade Commission act, in so far as proceedings thereunder are founded on a public interest, provides: " * * * 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, * * *." (38 Stat. 719, sec. 5.)

See *F. T. C. v. Gratz*, 253 U. S. 421.

The petitioners challenge the authority of the Federal Trade Commission to institute and prosecute these proceedings on two grounds as affecting the public interest. The first is, that the complaints do not allege facts necessary to show that public interest is involved. Upon taking this position, there arose an issue whether public

interest is a matter to be found by the Federal Trade Commission preliminary to the issuance of its complaints or is a fact to be alleged in the complaints and proved like any other fact. This question, in view of the record, is purely academic, because whether public interest is to be regarded as a consideration moving the commission to action or a jurisdictional fact to be pleaded and proved in support of its action, the fact of public interest in these cases is abundantly established.

The law of unfair competition in its modern conception regards as its chief concern the effect of forbidden acts upon consumers. The Congress in passing the Clayton Act and denouncing tying contracts and leases obviously had in mind the public as the principal sufferer therefrom. It is true, as said by Judge Denison in *Steers v. United States*, 192 Fed. 1, in speaking of the Sherman Antitrust Act (26 Stat. 209), that the theory of injury to the public lies at the bottom of the statutes and is directed against things which tend to deprive the public of the advantages which flow from free competition. Having denounced methods of business which are unfair and which substantially lessen competition and tend to create a monopoly, it is clear that in a case of this kind the public is within the protection of these statutes. If under these statutes the practice is illegal, then in truth the public, which pays the bill, is the main sufferer. As the practice extends to many thousand retailers and comprehends many million transactions through territory comprising more than half of the population of the United States, it is idle to say that the public has not an interest. Therefore, on this contention we think the petitioners have wholly failed to grasp the principle and purpose of the statutes and are entirely wrong in their contention.

The next contention of the petitioners, however, is very different. It squarely meets the issue of public interest and is to the effect that the evidence fails to show that the public has been injured. With this we agree. Postponing discussion of the effect of the practice upon competition and monopoly, we do not find that the practice has increased the cost of distribution or has enhanced the price of gasoline to the public. On the contrary, it has decreased the cost of distribution. Whether the price to the public has been reduced, we can not say. Clearly, the public has found an advantage in the practice, both in the matter of convenience and in the certainty of getting the precise make of gasoline advertised on the globe of the pump. On the other hand, if the orders of the commission commanding the petitioners to cease and desist from the practice and thereafter to lease outfits to retailers only on remunerative rentals stand, the inevitable result will be that the number of curb filling stations will be reduced, thereby lessening the con-

venience to the public; or the rental charged the retailer for the outfit will be covered by fixing wholesale prices so as to allow him a larger profit. In the readjustment the public doubtless will undergo its usual experience of paying higher prices.

The second class of parties interested in or affected by the practice is that of oil refiners or wholesalers, including both the petitioning wholesalers—the leading actors in the practice—and their wholesale competitors. The parts played by the members of this class depend for their legality upon the scope and purpose of the two statutes involved.

The first paragraph of each of the orders of the commission does not deal with the restrictive clause of the contract; it deals solely with the leasing of outfits for a nominal rental or for no rental at all. One question decided by the commission and here under review is whether this feature of the contract is an unfair method of competition within section 5 of the Federal Trade Commission act. Interpreting this section, the Supreme Court, in *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427, said:

“The words ‘unfair method of competition’ are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.”

Therefore in determining, as matter of law, whether leasing of gasoline outfits without rentals is an unfair method of competition, we shall inquire whether the method is characterized by oppression of competitors or is against public policy because of its dangerous tendency unduly to hinder competition or create monopoly. So also under the Clayton Act, by force of which the commission framed the second paragraph of each of its orders denouncing the restrictive clause of the contract, we shall, upon the authorities given below, make a similar inquiry with reference to the effect of the practice in lessening competition and creating a monopoly. To make clear the principle upon which we shall examine the testimony and decide these cases, it may be well to observe that the Clayton Act, which is a part of the scheme of laws against unlawful restraints and monopolies, does not wait for its operation until monopolies have been created and restraints of trade established, but seeks to reach them in their incipency and stop their growth.

Yet, in thus avoiding an objectionable effect by removing the cause, the Congress did not intend the statute to reach every remote lessening of competition or every dim and uncertain tendency to monopoly. It intended rather that the commission, and ultimately the courts, should inquire not whether a given practice may possibly lessen competition, or possibly create a monopoly, but whether it probably lessens competition—and lessens it substantially—and whether it actually tends to create a monopoly. *The Standard Fashion Company v. Magrane-Houston Company*, 258 U. S. 346, 42 Sup. Ct. Rep. 360. Though differing somewhat from other laws, as we have indicated, the Clayton Act, nevertheless, deals with matters within the realm of monopoly. Therefore in determining whether given acts amount to unfair methods of competition within the meaning of the Federal Trade Commission act, or substantially lessen competition and tend to create a monopoly within the meaning of the Clayton Act, the only standard of legality with which we are acquainted is the standard established by the Sherman Act in the words “restraint of trade or commerce” and “monopolize, or attempt to monopolize,” and by the courts in construing the Sherman Act with reference to acts “which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade,” and “restrict the common liberty to engage therein.” *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 224 Fed. 566, 573; affirmed 227 Fed., 46; *United States v. American Tobacco Co.*, 221 U. S. 106, 179; *United States v. Patten*, 226 U. S. 525, 541; *Eastern States Lumber Assn. v. United States*, 234 U. S. 600, 613, 614; *Standard Oil case*, 221 U. S. 1; *Standard Fashion Company v. Magrane-Houston Company*, 258 U. S. 346, 42 Sup. Ct. Rep. 360.

Applying this standard to the trade practice here involved, the first question, that of unfair method of competition, relates to the leasing of outfits without rentals.

Is this phase of the practice oppressive upon competitors and does it tend to create a monopoly? Concededly, a lease of a curb pump outfit without rental gives a wholesaler a trade advantage over its competitors. This alone is not unlawful, for such advantage is the object of all competition and is attained whenever one sells another goods of greater excellence or at lower prices than goods offered by others. Does this trade advantage contain the seeds of monopoly? It admittedly leaves competitors free to install competing outfits in the same locality and in all other localities. It also leaves every competitor free to place its outfit with the same retailer if it can prevail upon him by the ordinary competitive inducements of better goods, lower prices, and easier terms of credit. That the practice imposes upon a competitor the invest-

ment of more capital is an argument which would apply with equal force—and with equal infirmity—to competition based on superiority of goods and liberality of credit.

Under the Federal Trade Commission act declaring unfair methods of competition unlawful—as the act stood before the passage of the Clayton Act—a loan of a curb-pump outfit without return or a lease without rental did not, we think, tend to create a monopoly, and accordingly, was not, in our opinion, an unfair method of competition.

But the Clayton Act, when it came along, bore upon another phase of the contract, namely, upon the clause which restricts the use of the leased outfit to the product of the wholesaler, thereby, the commission found, lessening competition and tending to create a monopoly. Such a clause of a contract, commonly known as a tying contract, is to be construed not by its terms alone but by its effect as well. The act looks particularly to the consequences. In the *United Shoe Machinery Corporation case*, 258 U. S. 451, 42 Sup. Ct. Rep. 585, the Supreme Court said:

“While the clauses enjoined do not contain specific agreements not to use the machinery of the competitor of the lessor, the practical effect of these drastic provisions is to prevent such use. We can entertain no doubt that such provisions as were enjoined are embraced in the broad terms of the Clayton Act, which cover all conditions, agreements, or understandings of this nature. That such restrictive and tying agreements must necessarily lessen competition and tend to monopoly is, we believe, equally apparent * * *. This system of ‘tying’ restrictions is quite as effective as express covenants could be and practically compels the use of the machine of the lessor except upon risks which the manufacturer will not willingly incur.”

The point of similarity between the *United Shoe Machinery Corporation case* and the cases at bar is that, in both, the offending clauses did not expressly provide against the use of machinery or equipment of competitors. The difference between the contract clauses in the two cases is that as certain machinery of the *United Shoe Machinery Corporation* was essential to the lessee in his business, the practical effect of the clauses in that contract, although not specifically prohibiting the use of the machinery of a competitor, was absolutely to prevent its use, while the clause of the contract in the cases under consideration related to but one kind of machine or equipment, and extended to a situation which did not impose upon the lessee the necessity of obtaining something from the lessor which was indispensable in his business, the clause, in consequence, did not have the practical effect of preventing the use of equipment of a competitor.

Also, the cases at bar are distinguished from the *Standard Fashion Company v. Magrane-Houston Company*, 258 U. S. 346, 42 Sup. Ct. Rep. 360, by the fact that the contract in that case contained an express agreement that the retailer should not sell or permit to be sold on his premises any other make of patterns. Here was a restrictive covenant which by its terms came within the third section of the Clayton Act. In discussing this clause the Supreme Court approved an observation in the opinion of the Circuit Court of Appeals, as follows:

"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. Even in the larger cities to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business."

It has been suggested that this expression is apposite to the leasing contract here under discussion. But we think the cases are distinguished by the important fact that there the dealer was restricted by the contract to the sale of patterns of one manufacturer. This eliminated from his business all other patterns and tied him to the patterns of the contract. Here he is restricted in the use of the leased outfit to the storage and delivery of gasoline purchased from the lessor, but he is not limited to the use of one outfit, nor is he hampered in the sale of gasoline and other products of other manufacturers. The contract leaves every competitor free to persuade the retailer to install an additional outfit or to replace the outfit already installed by one of its own, and permits the retailer to yield if he chooses. While the effect of the restrictive clause of the contract in these cases may make competition somewhat more difficult because of the inclination of a satisfied retailer to stand by his wholesaler until another comes along and offers him something better, we are of opinion that the clause does not thereby lessen competition between wholesalers to the extent contemplated by the statute and that a tendency to monopolize the wholesale trade has not been disclosed.

"That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial." *Standard Fashion Company v. Magrane-Houston Company*, 258 U. S. 346, 42 Sup. Ct. Rep. 360; *Standard Oil Co. v. F. T. C.*, 273 Fed. 478; *Canfield Oil Co. v. F. T. C.*, 274 Fed. 571; *Sinclair Refining Co. v. F. T. C.*, 276 Fed. 686.

The third class of parties interested in the practice is that of retailers.

Many retailers buy and own curb-pump outfits. With these we have nothing to do except to note that by the practice of leasing outfits competition with them is greatly increased. We are concerned only with the retailer who has not money enough to purchase an outfit, or, having money, does not care to risk it. What happens? If his locality promises trade, one of the many wholesalers will supply him with an outfit without cost and without risk to him. The only condition imposed is that he shall not store and deliver through the outfit gasoline of any other wholesaler. The tying element in the transaction, if any there be, is the one arising from human nature and business sense, namely, that the retailer will install no other outfit so long as he is satisfied with the quality and price of the wholesaler's gasoline and so long as one outfit serves his trade. The contract leaves him perfectly free to deal in all petroleum products made by competing wholesalers. He is at liberty to install by lease or purchase as many other outfits as he may choose and to sell through them as many brands of gasoline as he may desire. The leasing contract, being terminable by him at will on brief notice, permits him to change outfits at will, replacing one by another as often in the course of wholesalers' competition as he is induced to do so. The retailer, regarded in the aggregate, is an actor in the practice, who by reason of his number, place, and interest causes competition between wholesalers to be increased rather than lessened. If the practice is abridged or abolished the retailer's risk is increased and his number diminished, and, correspondingly, competition is lessened. Certainly the retailer's part in the practice violates neither of the statutes. Nor, for the reasons given, can we think he is monopolized by the wholesaler, or the territory in which many retailers do business under the practice is monopolized.

The fourth class of parties claiming an interest in the practice is that of manufacturers of curb-pump outfits. Of these there are a half dozen or more in the country, in none of which the petitioning corporations have an interest. The petitioning corporations do not manufacture pump outfits themselves but purchase them from manufacturers like anyone else. The commission found as a fact that having purchased outfits, the petitioning corporations then leased them in competition with manufacturers engaged in the sale of like equipment in commerce, and upon this finding drew the conclusion—

"That the practices of leasing such devices at a nominal rental * * * is an unfair method of competition in interstate commerce as against the competitors of respondents engaged in the manufacture of such devices, and in the sale of the same for profit, in the territory wherein the respondent leases such devices * * *."

After the manufacturer has sold equipments to the respondents without condition or limitation, and has

turned them loose in commerce, we are at a loss to see just how he can be heard to complain that the equipment so sold and paid for is being leased by the owners on terms which make it difficult for him to sell like equipments to others. As there is involved here no question of fraud, deception, good conscience, or even business ethics, we should hesitate to follow business transactions to this length and determine whether conduct so remotely related to the original transaction of purchase is an unfair method of competition.

Having given these cases full and deliberate consideration, we are of opinion that, while the evidence supports some of the commission's findings of fact as distinguished from the conclusions drawn from them, it does not establish the offenses laid in the complaints and founded on the statutes, and, accordingly, does not sustain the orders based thereon. Therefore, we are constrained to set aside the orders and direct that the complaints be dismissed.

MORRIS, *District Judge*, concurring in part and dissenting in part:

The operative parts of the order of the commission here attacked are that the respondent forever cease and desist from:

"1. * * * leasing pumps or tanks or both and equipment for storing or handling petroleum products in furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of same after making due allowance for depreciation * * *"

"2. Entering into contracts or agreements with dealers in its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipment, the same shall be used only for storing or handling the products of respondent, * * *"

The first paragraph of the order is directed only to the method of competition whereby the petitioners lease pumps and tanks to retailers at a nominal rental and is concerned not at all with the restrictive or tying clause of the lease. Divorced from the tying clause, leasing the pumps at a nominal rental is, in my opinion, a practice "never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression," nor is that practice against public policy as declared by the Sherman and Clayton Acts and, consequently, is not an unfair method of competition within section 5 of the Trade Commission act as interpreted by the Supreme Court in *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427, even though the leasing of the pumps at a nominal rental may, perhaps, have a

tendency to lessen competition either in the sale of pumps or in the sale of gasoline at wholesale. I am, therefore, in full accord with the views expressed by the majority of the court with respect to the first paragraph of the commission's order.

The second paragraph of the order rests upon section 3 of the Clayton Act. While section 5 of the Trade Commission act provides "if it shall appear to the commission that a proceeding by it * * * would be to the interests of the public, it shall issue," etc., no similar provision is found in the Clayton Act. In proceedings under that act public interest is as conclusively presumed as in a criminal proceeding and needs to be neither alleged nor proved. Consequently, as I see it, the petition for review presents with respect to the second paragraph of the order two questions only: First, whether the leases here involved are "on the condition, agreement, or understanding that the lessee * * * shall not use or deal in the goods, * * * merchandise, * * * or other commodities of a competitor of the lessor," and, if so, then, second, whether "the effect of such lease, * * * condition, agreement, or understanding may be to substantially lessen competition or tend to create monopoly in any line of commerce," both within the meaning of section 3 of the Clayton Act. The leases contain the following provision:

"That the said equipment shall be used solely for the storage and handling of motor gasoline purchased by the party of the second part from the party of the first part for the purpose aforesaid."

While the foregoing clause does not contain a specific agreement not to use or deal in the gasoline of a competitor of the lessor, yet the clause falls within the terms of the Clayton Act if its practical effect is to prevent such use. *United Shoe Machinery Corp'n. et al. v. The United States*, 258 U. S. 451. Whether the practical effect of the restrictive agreement is to prevent the lessee from using or dealing in the gasoline of a competitor must be determined from the findings of the commission and the evidence adduced before it, for under section 11 of the Clayton Act its findings of fact are conclusive, if supported by the testimony. One of the findings of the commission, supported by the testimony, is "that a small number of retail dealers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, handle similar products of respondent's competitors, but a large majority of the retailers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, require and use in their business only a single-pump outfit."

With respect to the one-pump retailer the restrictive clause in the leases in question is as effective in prevent-

ing the lessee from using or dealing in the gasoline of a competitor of the lessor as if the lease expressly so provided. True, the lessee may terminate the lease at the time and under the conditions mentioned therein, but that fact does not enable the tying clause to elude the prohibition of section 3 of the Clayton Act, for that section operates with respect to short-term leases and leases at will in like manner and with like force as it does with respect to long-term leases or, for that matter, leases in perpetuity. The legality or illegality of the tying clause is dependent not at all upon the duration of the lease or the manner in which it may be terminated. It is likewise true that the lessee has the right to install another pump of his own or a pump of a competitor, but as his business does not warrant or require more than one pump he has not installed more than one and, consequently, his right is not a practical one but a mere abstract right. The result, in my opinion, is that in practice the restrictive clause of the leases in question has prevented and prevents a "single pump" lessee from using or dealing in gasoline of a competitor of the lessor just as effectively as if the lease had expressly so provided. Consequently, the lease falls within the prohibition of section 3 of the Clayton Act if the effect of such lease "may be to substantially lessen competition or tend to create a monopoly" in selling gasoline at wholesale.

Whether its effect may be to substantially lessen competition or tend to create a monopoly is our second question for consideration. The leases are now in force. The fact that they may be terminated at some future time is not relevant to the issue now under consideration. What has already been said shows that "a large majority of the retailers" require for use in their business only a single-pump outfit and the practical effect of the restrictive covenant of the lease under which they operate is to prevent such large majority from using or dealing in the gasoline of competitors of their respective lessors. Thereby free competition among the wholesalers of gasoline has been and now is restricted not with respect to an insignificant number of retailers but with respect to a large majority thereof and as effectually as if the leases were in perpetuity and as if they expressly prohibited the lessee from using or dealing in the gasoline of the competitors of the respective lessors.

The petitioners have set up as a reason for the reversal of the commission's order the excellence of the pump as a means for storing and delivering gasoline. But the com-

mission has not attacked the pump. On the contrary, it admits the pump's many advantages and great utility. It denies, however, the right of the petitioners to make unlawful contracts with respect thereto or otherwise to use it as a means of stifling competition. The petitioners further urge that the restrictive clause is the only method by which they are enabled to use and adequately protect their trade-mark. Even if this contention were supported by the evidence it would be ineffective, for the petitioners are not at liberty to violate the law of the land whatever proper result may be the consequence of their so doing. The evidence, however, discloses that many pumps are owned by retailers, yet there is no evidence that the name of the gasoline being sold through such pumps is not exhibited in the same manner as it is on the leased pumps. Nor is there any evidence that in such cases the gasoline of one wholesaler has been sold as the gasoline of another. These last contentions of the petitioners are, in my judgment, wholly irrelevant to either of the two issues presented with respect to section 3 of the Clayton Act.

Again, the petitioners contend that by means of the leases in question the number of retailers has been substantially enlarged and competition thereby increased rather than lessened. If it be a fact that by means of the leases the number of retailers has been increased, such increase was beyond question due to the nominal rental and not to the tying clause, and the tying clause is none the less invalid even though accompanied by other clauses that are valid. Furthermore, each increase obtained by the nominal rental was simultaneously monopolized by the tying clause and competition thereby lessened and not increased.

Although not differing from the majority of the court as to the legal principles by which the correctness of the second paragraph of the commission's order should be tested, yet I find myself not in full accord with their ultimate decision, for the only conclusion that I am able to reach by applying those principles of law to the facts of these cases is that the effect of the restrictive covenant has been, now is, and so "may be" to substantially lessen competition; that the practical effect of that covenant is to prevent the "one pump" retailer from using or dealing in the gasoline of a competitor of his lessor and that, consequently, all "one pump" leases are in violation of section 3 of the Clayton Act and invalid.

MISHAWAKA WOOLEN MANUFACTURING CO.
v. FEDERAL TRADE COMMISSION.

Commission's order in 1 F. T. C. 506 requiring petitioner to cease and desist from using systems of price maintenance therein set forth, affirmed, upon the authority of *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441, and petition for writ of certiorari denied by the Supreme Court with the understanding that the Commission will modify its order so that the same may be no broader than said decision.

(Circuit Court of Appeals, Seventh Circuit. September 13, 1922.)¹

No. 2773.

Before Baker, Evans, and Page, Circuit Judges.

Per Curiam:

This is a proceeding to revise an order of the Federal Trade Commission. In its order the Commission found that the petitioner's methods of controlling prices in the retail trade were unfair.

Inasmuch as the record shows that the condemned practices were substantially identical with those involved in *Federal Trade Commission v. Beech-Nut Packing Company*, 257 U. S. 441, we approve the finding of the Commission upon the authority of that decision.

The petition is accordingly dismissed.

(Supreme Court of the United States. January 8, 1923.)²

No. 720.

Per Curiam:

The petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is denied. The Solicitor General, in his brief for the Federal Trade Commission, concedes that the order affirmed by the Circuit Court of Appeals is broader than the decision in *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441, 42 Sup. Ct. 150, 56 L. Ed. 314, 19 A. L. R. 882, which the Circuit Court of Appeals followed in dismissing the petition for the Woolen Manufacturing Co. The court denies the application for writ of certiorari herein, assuming that the Federal Trade Commission will modify its order accordingly, and without prejudice to an application for that purpose by the petitioner.

¹ Reported in 283 Fed. 1022. Appearances: Alexis C. Angell and Henry E. Bodman, of Detroit, Mich., for petitioner. Adrien F. Busick, of Washington, D. C., for respondent.

² Reported in 260 U. S. 748, 43 Sup. Ct. 247. Appearances: Henry E. Bodman, of Detroit, Mich., for petitioner.

FEDERAL TRADE COMMISSION v. P. LORIL-
LARD CO.¹

SAME v. AMERICAN TOBACCO CO., INC.¹

(District Court, S. D. New York. October 3, 1922.)

1. COMMERCE KEY NO. 48—FEDERAL TRADE COMMISSION ACT RE-
LATES TO INTERSTATE COMMERCE ONLY.

Federal Trade Commission Act Sept. 26, 1914 (Comp. St. Par. 8836a-8836k), was enacted under the power conferred on Congress by the commerce clause of the Constitution, and the Commission has no authority in respect to intrastate commerce or transactions.

2. CONSTITUTIONAL LAW KEY NO. 48—TO BE CONSTRUED SO AS TO
AVOID DOUBT OF CONSTITUTIONALITY.

A statute must be construed, if fairly possible, so as to avoid any doubt of its constitutionality.

3. TRADE-MARKS AND TRADE-NAMES AND UNFAIR COMPETITION
KEY NO. 80½, NEW, VOL. 8A KEY-NO. SERIES—POWERS OF
FEDERAL TRADE COMMISSION.

A resolution of the Senate directing the Federal Trade Commission to investigate and report the tobacco situation as to the domestic and export trade, etc., but without reference to any alleged violation of law, is not within the provision of Federal Trade Commission Act, Par. 6 (Comp. St. Par. 8836f), authorizing the Commission on direction of the President or either House of Congress to investigate and report the facts relating to any alleged violation of the antitrust acts by any corporation, nor within the provision of section 9 (section 8836i), vesting District Courts with jurisdiction to issue writs of mandamus to compel compliance with the provisions of the act or any order of the Commission made in pursuance thereof, and in the investigation under said resolution neither the Commission nor the court has authority to compel a private corporation to produce its books and papers for inspection and the making of copies thereof.

4. SEARCHES AND SEIZURES KEY NO. 7.—LIMITATION OF POWER OF
TRADE COMMISSION.

While the Federal Trade Commission may make investigations, its visitatorial power over private corporations must keep within the restrictions of the Fourth Constitutional Amendment. Congress could not grant, and did not intend to grant, to the Commission, an unlimited power of inquisition or an unlimited right of access to books and papers of private parties, not engaged in any public service or of search without basis of some facts tending to establish a charge of wrongdoing.

(The syllabus is taken from 283 Fed. 999).

¹ Writ of error to Supreme Court allowed on January 2, 1923.

Petitions for mandamus by the Federal Trade Commission against the P. Lorillard Company, and against the American Tobacco Company, Inc. Denied.

William Hayward, U. S. Atty., of New York City, and W. H. Fuller, Chief Counsel for Federal Trade Commission, of Washington, D. C. (A. S. Barnes, of New York City, of counsel), for petitioner.

William D. Guthrie and William B. Bell, both of New York City (Bernard Hershkopf, of New York City, of counsel), for respondent P. Lorillard Co.

John Walsh, of Washington, D. C., and Junius Parker, of New York City (Jonathan H. Holmes, of New York City, of counsel), for respondent American Tobacco Co., Inc.

MANTON, Circuit Judge:

These cases were argued together and will be considered in one opinion.

The petitioner in each of the above-named proceedings was granted an alternative writ of mandamus commanding the respondent to show cause why a peremptory writ should not issue directing that immediately it forthwith deliver into the possession of the Federal Trade Commission the accounts, books, records, documents, memoranda, papers, and correspondence of the respondent for inspection and examination and for the purpose of making copies thereof. The petition upon which the alternative writ was granted sets forth that on the 16th of September, 1921, a complaint was filed with the Federal Trade Commission against the respondent. The complaint alleged that the respondent in the conduct of its interstate commerce was indulging in practices which were in violation of the provisions of the Act of Congress of September 26, 1914 (38 Stat. 717) in that the respondent was using certain methods of business practices resulting in unfair competition, and that it was regulating and fixing or attempting to regulate and fix the prices at which the commodities sold by it should be resold by those to whom it had sold them, and was cooperating, aiding, and abetting others to successfully formulate and carry out a scheme or combination pursuant to which the resale prices of respondent's commodities should be fixed and maintained by those to whom respondent had previously sold its products or commodities. Further, that the Senate of the Congress of the United States by a resolution directed the Federal Trade Commission to investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference as to the market price to producers of tobacco and the market price for manufacturing tobacco and the price of leaf tobacco

exported, and to report to the Senate as soon as possible the result of such investigation. Petitioner then sets forth that at various times between September 29, 1921, and November 5, 1921, authorized agents of the petitioner, in its behalf, demanded of the respondent to produce and furnish to them at respondent's offices certain specified documentary evidence or written data, correspondence, and other paper writings which were then and there in the possession, custody, and control of the respondent so that copies thereof or parts thereof might be made. And the respondent, complying with the demands and pursuant to its duty, under the provisions of the Federal Trade Act, did produce for inspection and examination of petitioner's agents certain of the data commanded, but in violation of provisions of the Federal Trade Act, it refused to produce for inspection and examination "certain documentary evidence, records, correspondence, and writings herein specified which were then and there in respondent's possession, custody, and control, and it refused to permit copies thereof to be made by petitioner." And it sets forth that it is necessary in the prosecution of its duty that such inspection and examination be granted to the petitioner's agents and that it is hindered in the performance of its duty and in the exercise of its power by the refusal of the respondent to grant such examination and inspection. Its prayer for relief is that "all papers and telegrams received by the American Tobacco Company (or P. Lorillard Company) from all of its jobber customers located in different points throughout the United States and also copies of all letters and telegrams sent by the American Tobacco Company (or P. Lorillard Company) to such jobbers during the period of January 1, 1921, to December 31, 1921, inclusive" be turned over for examination and inspection. Each respondent resists the application for a peremptory writ, contending that the Federal Trade Commission is asserting authority which it does not possess in seeking to make an unlimited and unrestricted inspection with the right to copy all of the correspondence with its jobber customers, and that the Senate resolution directing the Federal Trade Commission to make the investigation referred to grants no authority for unlimited and unrestricted search with the right to copy the correspondence. It further contends that Secs. 5, 6, and 9 of the Federal Trade Commission Act give no such authority of unlimited and unrestricted search and examination, and it is said that any such construction or interpretation of the Federal Trade Commission Act would be in contravention of the Fourth Amendment of the Constitution guaranteeing the right of the people to be secure in their papers and effects against unreasonable searches and seizures and that no warrant shall issue but upon probable cause supported by oath or affirmation. Thus the question is presented

whether Congress can delegate visitorial powers under the commerce clause of the Constitution over private corporations engaged in interstate commerce to the extent of granting unlimited and unrestricted examination and inspection with the right to copy.

By the Act of Congress of September 26, 1914, the Federal Trade Commission was created a body corporate. Its purposes were defined by the statute creating it and its duties and powers and administration are referred to in Secs. 5, 6, and 9. It is provided by Sec. 9 of the Act 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 Sec. 6 of the Act provides:

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

The Constitution provides (Art. 1, Sec. 8, Cl. 3) that Congress shall have power to regulate commerce with foreign nations and among the several States.

Each respondent is conceded to be a private corporation engaged in selling tobacco and its products and is engaged in interstate and intrastate commerce. This investigation was commenced “For the purpose of ascertaining the facts relating to respondent’s business.” The business of each of the respondents is very extensive, its letters, papers, and other documents making it a business of thousands of letters per month. The affidavits submitted by the respondents set forth a mass of correspondence and other documentary evidence which, if the petitioner prevails in its alleged right to “full and complete access to any and all documentary evidence in the possession and control of the respondent,” would, it is alleged, handicap the respondent in its business and entail considerable expense and difficulties. Much of the correspondence relates to transactions bearing upon intrastate commerce only. As to such of the correspondence as bear upon intrastate commerce, the petitioner is not entitled to examination, inspection, or copying any part thereof. The commerce clause of the Constitution granting power to the Congress to legislate as to the commerce permits only of legislation which has to do with interstate commerce. The Federal Trade Act forbids unfair practices in reference to the commerce of an interstate character only. *Ward Baking*

Co. vs. Federal Trade Comm., 264 Fed. 330. The commerce clause of the Constitution vested in the Congress "a full and complete power to regulate commerce among the several States, for the strong arm of the national government may be put forth to brush away all obstacles to interstate commerce." *In re Debs.*, 158 U. S. 564. And "Constitutional privileges do not change but their operation extends to new matters as modes of business and the habits of life of the peoples vary with each succeeding generation. The power is the same but it operates to-day upon modes of interstate commerce unknown to the fathers and will operate with equal force upon any new modes of such commerce which the future may develop." *Gibbons vs. Ogden*, 22 U. S. 1. The power of Congress to legislate embraces power not only to regulate and control that which is wholly interstate but also that which even though intrastate affects the free flow of interstate commerce. *Minn. Rate Cases*, 230 U. S. 352. To regulate is the power to enact legislation directly affecting interstate commerce. *United States vs. Adair*, 152 Fed. 737. The Constitution having granted to the Congress plenary power to regulate or control commerce among the States, Congress may delegate such duties to investigate and learn conditions to a permanent administrative body.

The validity of the Interstate Commerce Commission Act granting to that commission the power to investigate facts relating to interstate transportation was considered in *Interstate Commerce Commission vs. Brimson*, 154 U. S. 447. It has been held that the visitorial power of the Federal Government provided for in the act, over private corporations, must be restricted to activities of an interstate commerce character. *Hale vs. Henkel*, 201 U. S. 43; *Interstate Commerce Comm. vs. Goodrich Co.*, 224 U. S. 194; *United States vs. Basic Products Co.*, 260 Fed. 472. We must presume that the Congress did not intend by this legislation to invade the field reserved under the Constitution to the several States by interfering with transactions in intrastate commerce. "The statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States vs. Jim Fuey Moy*, 241 U. S. 394; see also *United States vs. D. & H. Co.* 213 U. S. 366.

The resolution of the Senate provided that "the Federal Trade Commission be and is hereby directed to investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference to the market price to producers for tobacco and the market price for manufactured tobacco and the price of leaf tobacco exported, and report to the Senate as soon as possible the result of such investigation."

This resolution has not the mandatory effect of statutory enactment with reference to the commerce clause of the Constitution, and the present application for the writ must rest upon the command of Sec. 9 of the Federal Trade Commission Act, wherein jurisdiction is granted to the District Courts of the United States "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." The resolution of the Senate does not come within the terms of the authority conferred by the statute in question. Under Sec. 6 power is conferred upon the Commission "upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust acts by any corporation," but the language of this statute makes it necessary for one of the Houses of Congress to adopt a resolution for a direction to investigate, and the reporting of such investigation must be for alleged violation of the antitrust acts. The quotation from the resolution of the Senate fails to indicate that it is founded upon any violation or alleged violation of the antitrust law. It does not indicate that the Senate intended that any antitrust law violation should be investigated by the Commission. If so, an apt expression to that effect could have been used. It can not, therefore, be concluded that it was intended in the language used to investigate any violations of the antitrust acts by any corporation. In any case the power of the Federal Trade Commission can not be broader than what Congress did or could delegate. The analogy of the cases arising under the powers of the Interstate Commerce Commission with that of the Federal Trade Commission's powers is pertinent. This was referred to in *Beechnut Packing Co. vs. Federal Trade Comm.*, 264 Fed. 885. A comparison of the statutes particularly setting forth the procedure under the two acts shows the similarity. In each any person may be compelled to appear and depose and produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission. Both commissions are required to make findings and proceedings before them, and the findings must be based upon the testimony given.

In the Harriman case (211 U. S. 407) Justice Holmes said:

"The Commission * * * is given power to require the testimony of witnesses 'for the purpose of this Act.' The argument for the Commission is that the purposes of the Act embrace all the duties that the Act imposes and the powers that it gives the Commission; that one of the purposes is that the Commission shall keep itself informed as to the manner and method in which the

business of carriers is conducted, as required by Section 12; that another is that it shall recommend additional legislation * * * and that for either of these general objects it may call on the courts to require any one whom it may point out to attend and testify if he would avoid the penalties for contempt.

"We are of the opinion, on the contrary, that the purposes of the Act for which the Commission may exact evidence embrace only complaints for violation of the Act and investigations by the Commission upon matters that might have been made the object of complaint. As we have already implied, the main purpose of the Act was to regulate the interstate business of carriers, and the secondary purpose, that for which the Commission was established, was to enforce the regulations enacted. These, in our opinion, are the purposes referred to; in other words, the power to require testimony is limited, as it usually is in English-speaking countries, at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law. * * *

"If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts, so far as candor permits."

The Interstate Commerce Commission deals with quasi-public corporations. But the phrase of the Federal Trade Commission Act considered, in view of the language in the *Harriman* case, would indicate that the right to procure information in its investigations under the provisions of Sec. 6 would not grant the unlimited search and inspection of correspondence with the right to copy the same in the absence of some specific complaint which would point out the materiality to that complaint of the particular correspondence and papers sought to be obtained.

Reading Secs. 5, 6, and 9, I do not think that Congress intended at the time of the enactment of this law to go beyond the well-recognized principles of limitations with reference to searches and seizures guarded against by the Fourth Amendment of the Constitution. It is better to deduce the intention that information should only be extracted by the procedure long established in the courts in conformity with the Constitutional guarantee against unlawful and unreasonable searches and seizures and the right of people to be secure in their papers and effects therefrom. The Fourth Amendment provides:

"The right of the people to be secure in their * * * papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

This command of the Constitution, properly interpreted, is a prohibition against Congress granting powers to the Commission for unlimited searches and seizures of letters and documents. The act makes plain the duty of the Commission to gather, compile, and publish for use in its proceedings what may be voluntarily offered or submitted in response to request or demand. It may also make investigation independently, but the exercise of visitatorial power over private corporations must keep within the restrictions of the Fourth Amendment. "Neither branch of the legislative department, still less any merely administrative body established by the Congress, possesses or can be vested with a general power of making inquiry into the private affairs of the citizen." *Interstate Commerce Comm. vs. Brimson*, 154 U. S. 478.

As was said by Mr. Justice Brewer in *In re Pacific Ry. Comm.*, 32 Fed. 241:

"There is no doubt that Congress may authorize a commission to obtain information upon any subject which, in its judgment, it may be important to possess * * * But in its inquiries it is controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters."

It is the duty of the Court to so construe the Act as to save the statute from Constitutional infirmity. *Knight's Templar Indemnity Co. vs. Jarman*, 187 U. S. 197; *U. S. vs. D. & H. Co.*, 213 U. S. 407; *Harriman vs. Interstate Commerce Comm.*, 211 U. S. 407.

Section 6 (b) grants to the Commission the right to require corporations coming within its jurisdiction to make reports concerning their affairs and thus to furnish to the Commission such information as it may require. And subdivision (a) of Sec. 6 calls upon the corporations in question to report upon specific matters as provided in subdivision (b). If the corporations fail in reporting or the reports are false, the Commission is entitled, upon properly showing the probable cause, to demand due disclosures and access to the inspection of any specific, necessary, and relevant papers, excluding such papers as may be privileged. In other words, there must appear to be some reasonable cause for a search such as a definite complaint charging a specific wrong and thus presenting an inquiry which would have reasonable and readily ascertainable limits. Such a construction of subdivisions (a) and (b) of Sec. 6 would effectuate the intent of Congress, and the procedure can be kept within Constitutional limits. *United States vs. L. & N. R. R.*, 236 U. S. 318; *Veeder vs. United States*, 252 Fed. 414. Such a construction would seem to be in accord with the discussions in the Senate when this legislation was enacted. (See 51 Congressional Records, part 13, 63rd Congress, Second Session, pp. 12747, 12800, 12806-11, 12918, 12927.) It was not intended to grant an unlimited power of inquisi-

tion or an unlimited right of access to books and papers of private parties not engaged in any public service or a search without basis of some facts tending to establish a charge of wrongdoing.

It is now well established that a corporation is entitled to invoke the guarantees of the Fourth Amendment against unreasonable searches and seizures in as full a measure as would a person or partnership. *Silverthorne Lumber Co. vs. United States*, 251 U. S. 385; *Coastwise Lumber Co. vs. United States*, 259 Fed. 847.

In the papers submitted on this application there is no showing of the existence of probable cause. The relief prayed for is in general terms and includes all papers and telegrams received by each respondent from its jobber customers located in different points throughout the United States and copies of all letters and telegrams sent by each respondent to such jobbers during the period from January 1, 1921, to December 31, 1921, inclusive. Such general demands made in other warrants of law, such as a subpoena duces tecum, have been condemned as not giving a reasonably accurate description of the papers wanted, either by date, title, substance, or subject to which they relate. *Ex Parte Brown*, 72 Mo. 83; *Carson vs. Hawley*, 82 Minn. 204.

In *Boyd vs. United States*, 116 U. S. 616, the court quoted with approval Judge Camden's language in *Entick v. Carrington and Three Other King's Messengers*, 19 Howell's State Trials, 1029, wherein he said:

"Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye can not by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society."

To grant the relief prayed for by the petitioner would be to permit an unreasonable search and seizure of papers in violation of the Fourth Amendment. It was not the intention of Congress to grant such unlimited examination and inspection by the legislation in question, nor, indeed, did Congress have authority to do so under the commerce clause of the Constitution. It would be unreasonable and unjust to accede to the demands of the petitioner, and the application for the peremptory writ of mandamus against the respondents American Tobacco Company and P. Lorillard Company is denied.

GUARANTEE VETERINARY CO. ET AL. v. FEDERAL TRADE COMMISSION.

(Circuit Court of Appeals, Second Circuit. November 6, 1922.)

No. 8.

1. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—THREE ANALYSES HELD TO SUSTAIN FINDING OF COMMISSION THAT PRODUCT DID NOT CONTAIN ADVERTISED INGREDIENTS.

Where three analyses of samples of a product, one of which was furnished by the seller and the other two purchased in the open market, all showed that the product lacked 10 of the 16 ingredients stated in the advertisements thereof, and there was no evidence to the contrary, nor offer to submit other samples for further analysis, the finding of the Commission that the product, some of which was admittedly shipped in interstate commerce, did not contain the advertised ingredients, was sustained by the presumption that the samples analyzed were fair samples, so as to be conclusive under Federal Trade Commission act, par. 5 (Comp. St., par. 8836e).

2. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—EVIDENCE HELD TO SUSTAIN FINDING ADVERTISEMENT GOVERNMENT HAD ADOPTED PRODUCT WAS FALSE.

The Federal Trade Commission's finding that an advertisement that the Government had adopted the product advertised was false was sustained by proof that the only purchase of the product by the Government was permission given by the Government to the manufacturer of the product to substitute some of it for the manufacturer's own product, marketed under another name, which had been sold to the Government.

3. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—VOLUNTARY DISCONTINUANCE OF PRACTICE DOES NOT PREVENT COMMISSION FROM ISSUING ORDER.

The fact that the company had discontinued the publication of a false advertisement that the Government had adopted its product before the complaint was filed against it before the Federal Trade Commission, does not deprive the Commission of authority to command the company to desist from such advertisement, since it is not obliged to assume that the false publication would not be resumed.

4. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—COMMISSION HAS DISCRETION AS TO THE ORDER AGAINST COMPANY USING FALSE ADVERTISEMENT.

Where the testimony showed conclusively that a company had published advertising matter containing false and misleading

statements, which it circulated in several states, and that it sold its product in interstate commerce, it was a proper exercise of the Commission's discretion to command the company to desist from publishing such advertisement.

5. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION
KEY NO. 801, NEW, VOL. 8A KEY-NO. SERIES—MANAGER OF
COMMON-LAW TRUST CAN NOT COMPLAIN HE WAS MADE A
PARTY.

Even though the manager of a common-law trust, which was engaged in unfair competition in interstate commerce, was not individually engaged in such commerce, and was not a necessary party to proceedings against the company before the Federal Trade Commission, he can not complain that he was made a party.

(The syllabus is taken from 285 Fed. 853.)

Petition to Review Order of the Federal Trade Commission.

Proceeding under the Federal Trade Commission against the Guarantee Veterinary Company and George L. Owens. On petition by the company to revise an order of the Commission commanding it to desist from certain advertising. Order affirmed.

Will H. Krause, of Washington, D. C., for petitioners.

W. H. Fuller and I. E. Lambert, both of Washington, D. C., for respondent.

Before Rogers and Manton, Circuit Judges, and Augustus N. Hand, District Judge.

ROGERS, *Circuit Judge*:

This proceeding brings before us for review an order entered by the Federal Trade Commission directing the petitioners to desist from certain unfair methods of competition.

The Guarantee Veterinary Company is an association in the form of a common-law trust, and has its principal office and place of business in the city of Chicago in the State of Illinois. George L. Owens is the controlling and managing trustee. They are engaged in the sale of salt in the form of blocks for the use of live stock under the brand name "Sal-Tonik" in the several States of the United States.

It appears that the Federal Trade Commission, proceeding under the act of September 26, 1914, commonly known as the Federal Trade Commission act (38 Stat. 717, c. 311), on September 2, 1919, issued a complaint against the petitioners in which it averred that they are engaged in interstate commerce in the sale of salt in the

form of blocks for the use of live stock under the brand of "Sal-Tonik" in direct competition with other persons, copartnerships, and corporations also engaged in the sale of block salt for the use of live stock; that in connection with the sale of said "Sal-Tonik" blocks they had been publishing and distributing advertising matter containing false and misleading statements concerning the said "Sal-Tonik" blocks. And the complaint alleged that among the false and misleading statements which the petitioners put forth in their advertising matter were representations and implications to the effect that the "Sal-Tonik" blocks contained certain medicinal ingredients; that they operated a number of factories in various parts of the United States, the total product of one of which was purchased and thereby indorsed by the Quartermaster's Department of the United States Army, and that the petitioners owned and operated certain large and expensive machinery necessary for the manufacture of the said "Sal-Tonik" blocks; and that all of this was designed to and did mislead the purchasing public into the belief that the petitioners' product possessed certain unique and beneficial characteristics and tended to secure for the product an undue preference over the product of competitors.

The complaint was duly served upon the petitioners, who filed their answer thereto on October 11, 1919.

Notice of the taking of testimony was given, and testimony was taken on September 9, 1920, and on December 15, 1920. On June 8, 1921, the Commission filed its findings as to facts and conclusion and on the same day entered the order to cease and desist.

On July 18, 1921, the petitioners filed their exceptions and on December 13, 1921, the Commission filed modified findings and a modified order.

The Commission has made the following findings of fact:

"One. That the respondent, the Guarantee Veterinary Company, is an association in the form of a trust, having its principal office and place of business in the city of Chicago, State of Illinois, of which the respondent, George L. Owens, is the controlling and managing trustee, and that the respondents are now and for more than two years last past have been engaged in the sale of salt in the form of blocks, for the use of live stock, under the brand name 'Sal-Tonik,' in and among the several States of the United States and the District of Columbia, in direct competition with other persons, copartnerships, and corporations also engaged in the sale of block salt for the use of live stock.

"Two. That during the years 1918 and 1919 the respondents printed and caused to be circulated, in and

throughout the various States of the United States, circulars in which it stated that its product, Sal-Tonik, contained the following ingredients: Sulphate of iron (redried), carbonized peat, charcoal, tobacco, quassia, sulphur, gentian, pure salt, chloride of magnesia, Epsom salts, Glauber's salts, bicarbonate of soda, oxide of iron, mineralized humoides, American wormseed, Levant wormseed, capsicum (red pepper); when in truth and in fact respondent's product, Sal-Tonik, did not contain all of said ingredients, and did not contain carbonized peat, charcoal, tobacco, quassia, sulphur, gentian, mineralized humoides, American wormseed, Levant wormseed, or capsicum (red pepper).

"Three. That prior to the organization of the respondent, Guarantee Veterinary Company, in the year 1918, the respondent, George L. Owens, caused to be organized the Guarantee Swine Veterinary Company, a corporation organized under the laws of South Dakota, and the Guarantee Serum Company, a corporation organized under the laws of Iowa, in both of which corporations the respondent, George L. Owens, was the largest stockholder, and of which he was the controlling manager and president.

"Four. That said Guarantee Serum Company was owned and operated by said Guarantee Swine Veterinary Company; that later the word 'Swine' was dropped from the corporate name and the owning and operating company became the Guarantee Veterinary Company, Incorporated; that said Guarantee Veterinary Company, Incorporated, succeeded to all property, assets, and rights of both the said Guarantee Serum Company and the said Guarantee Swine Veterinary Company, and that later the assets and rights of the said Guarantee Veterinary Company, Incorporated, were assigned or surrendered to the Guarantee Veterinary Company, a common-law trust; that George L. Owens was the principal stockholder and president of the Guarantee Serum Company, the Guarantee Swine Veterinary Company, and the Guarantee Veterinary Company, Incorporated, and is the controlling and managing trustee of the Guarantee Veterinary Company, a common-law trust; and that all of these corporations and the trust and George L. Owens, first as president and later as trustee, caused to be manufactured and sold, and are now causing to be manufactured and sold, in interstate commerce the article known and designated Sal-Tonik.

"Five. That during all the time of the existence of the said Guarantee Serum Company, the said Guarantee Swine Veterinary Company, the said Guarantee Veterinary Company, Incorporated, the said Guarantee Veterinary Company, a common-law trust, George L. Owens,

as the principal stockholder and president of the first three named corporations and as trustee for the last named, a common-law trust, was advertising and representing or causing to be advertised and represented to customers and dealers in said Sal-Tonik that their product, Sal-Tonik, contained substantially the following ingredients: Sulphate of iron (redried), carbonized peat, charcoal, tobacco, quassia, sulphur, gentian, pure salt, chloride of magnesia, Epsom salts, Glauber's salts, bicarbonate of soda, oxide of iron, mineralized humoides, American wormseed, Levant wormseed, capsicum (red pepper); when in truth and in fact respondent's product, Sal-Tonik, did not contain all of said ingredients, and did not contain carbonized peat, charcoal, tobacco, quassia, sulphur, gentian, mineralized humoides, American wormseed, Levant wormseed, or capsicum (red pepper).

"Six. That during the years 1918 and 1919 respondents advertised in the Cooperative Manager and Farmer (Commission's Exhibit No. 10), a magazine published at Minneapolis, Minn., which had a general circulation through the medium of the mails and other distributing agencies in and throughout various States and Territories of the United States and the District of Columbia, and also by circulars prepared and printed by respondents which they caused to be circulated throughout various States and Territories of the United States and District of Columbia, the following:

"U. S. Government adopts Sal-Tonik.—The Quartermaster's Department of the U. S. Army has adopted Sal-Tonik and purchased our entire southern output for use in the U. S. Cavalry. * * *

"The U. S. Army used Sal-Tonik, as is shown by a letter which appears below, written by the assistant veterinarian of the U. S. Army at Camp Johnston.
* * *

"CAMP JOSEPH E. JOHNSTON, FLA.,

"January 25, 1919.

"GUARANTEE VETERINARY COMPANY,

"Chicago, Illinois.

"To whom it may concern:

"While acting as 2d Lt., Vet. U. S. A., Auxiliary Remount Depot No. 333, Camp Joseph E. Johnston, Florida, I had the opportunity of recognizing the value of Sal-Tonik. Large numbers of animals were kept in corrals in the camp, and naturally much sickness would be expected; however, I noticed that where the animals had access to Sal-Tonik they improved in flesh and vitality. There was a very small percentage of digestive disturbances, such as indigestion, colic, impactions, and diseases of systemic origin.

“‘Having recognized the value of Sal-Tonik I highly recommend it as an efficient medicinal salt of superior quality.

“‘ (Signed) J. F. SWAIN,
 “‘2d. Lt., Vet. U. S. A., Auxiliary Remount
 “‘Depot 333, Camp Joseph E. Johnston.’

“That the Palestine Salt & Coal Co., of Palestine, Texas, made salt blocks for respondents, the respondents furnishing the medical ingredients and the Palestine Salt & Coal Co. furnishing the labor and salt. That the Quartermaster Department of the U. S. Army purchased in the month of December, 1917, 1,200 blocks of Sal-Tonik at Palestine, Texas, from the Palestine Salt & Coal Co., who were agents for the respondents, and that this one purchase was the only purchase of the respondent's product made by the United States Government.

“That the U. S. Government did not adopt Sal-Tonik.

“That Mr. J. F. Swain was not assistant veterinarian of the U. S. Army at Camp Johnston, and at the time the above letter was written he was not a 2d lieutenant in the U. S. Army, nor was he located at Camp Joseph E. Johnston, Fla.”

After making the above findings as to the facts the Commission made the following conclusion:

“That the methods of competition set forth in the foregoing findings as to the facts are, under the circumstances set forth, unfair methods of competition 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.’”

Thereupon it issued the following order:

“It is ordered that the respondents, Guarantee Veterinary Co., and George L. Owens, trustee, their officers, agents, servants, and representatives, do cease and desist, directly or indirectly—

“From publishing or causing to be published or circulated throughout the various States of the United States, the Territories thereof, the District of Columbia, and foreign countries, advertisements, circular letters, or other printed matter whatsoever wherein it is falsely stated, set forth, or held out to the general public that the respondents' product, Sal-Tonik, contains carbonized peat, charcoal, tobacco, quassia, sulphur, gentian, mineralized humoids, American wormseed, Levant wormseed, or capsicum (red pepper), or any other ingredients, medical or otherwise, if said Sal-Tonik does not then, in fact, contain each and all of the ingredients which are stated in the advertisement to enter into its composition;

“From publishing and circulating or causing to be published and circulated throughout the various States

of the United States, the Territories thereof, the District of Columbia, and foreign countries, advertisements, circulars, folders, letters, or any other printed or written matter whatsoever, wherein it is falsely stated, set forth, or held out to the public:

"(1) That the United States Government, or any department, branch, or agency thereof, has adopted respondents' product, Sal-Tonik.

"(2) That respondents have sold their entire southern output to the United States Government or to any department, branch, or agency thereof.

"From using as an advertisement of their product, Sal-Tonik, a certain letter, dated January 25, 1919, and signed by J. F. Swain, purported to be at the time of signature a second lieutenant in the United States Army, at Camp Joseph E. Johnston, Florida.

"It is further ordered, that the respondents, the Guarantee Veterinary Co. and George L. Owens, trustee, shall within 60 days after the service upon them of a copy 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."

The Federal Trade Commission act, in section 5, provides that "The findings of the Commission as to the facts, if supported by testimony, shall be conclusive." (38 Stat. 720.) We have, therefore, examined the transcript of record, which has been filed in this court, for the purpose of determining whether the testimony before the Commission supports the findings.

It appears that the Guarantee Veterinary Company admitted in its answer that it was engaged in interstate commerce. It, however, asserts that no proof was ever made that any Sal-Tonik claimed to have been analyzed ever moved in interstate commerce, or that said blocks were made either for or by the Guarantee Veterinary Company, or George L. Owens, nor was it shown or proven that any competitors ever made or sold any medicated salt block, nor was it shown that George L. Owens individually was ever engaged in interstate commerce at any time.

The transcript of record shows that the petitioners prepared and sent out to prospective customers in various States, in the latter part of the year 1918 and the earlier part of the year 1919, an advertising circular which stated that "Sal-Tonik contains the following ingredients:

"Sulphate of iron (redried), carbonized peat, charcoal, tobacco, quassia, sulphur, gentian, pure salt, chloride of magnesia, Epsom salts, Glauber's salts, bicarbonate of soda, oxide of iron, mineralized humoides, American wormseed, Levant wormseed, capsicum (red pepper)."

The statement contained in the circular sustains that part of finding No. 1 as to the advertising circulars which the petitioners circulated setting forth the ingredients of the product Sal-Tonik.

It also appears from the transcript that three different analyses were made of the petitioners' product. The first in June, 1916, from a sample furnished by the petitioners; the second in February, 1919, from a sample purchased on the open market, which was the product of petitioners; and the third in December, 1919, from a sample purchased on the open market, which also was the product of petitioners. This last analysis was made by the acting chief chemist of the United States Department of Agriculture—an expert chemist in the Department of Agriculture who had studied and compared all three of these analyses testified that they did not show any of the following ingredients: Carbonized peat, charcoal, tobacco, quassia, sulphur, gentian, mineral humoides, American wormseed, Levant wormseed, capsicum (red pepper). He further testified that "Sal-Tonik" was just salt with its impurities and coloring matter.

The petitioners advertised in their circulars that sixteen ingredients entered into the manufacture of their blocks of "Sal-Tonik," and the chemical analyses proved show no trace of ten of them. This is an excerpt from the testimony:

"Question. Mr. Murray, is it not a fact that this product is merely salt with a little coloring matter?"

"Answer. Essentially that; nearly all salt contains more or less impurities, and this is colored distinctly red by the iron oxide.

"Question. And that is about all this product is, just salt with its impurities and coloring matter?"

"Answer. Essentially that; yes.

"Question. That is what the different analyses show?"

"Answer. The impurities would be a little greater than you would get in first-class table salt. The Bureau of Chemistry's analysis shows two per cent of sodium sulphate. That is much more than you would get in good table salt."

The petitioners contend, however, that the "Sal-Tonik" blocks might contain all the ingredients as advertised, and yet all the ingredients might not appear in any of the different analyses which were introduced in evidence by the Commission. This might be possible but is not probable. The three analyses which were introduced in evidence stand undisputed and uncontradicted. The petitioners might have submitted samples of their product for analysis and offered evidence to rebut that produced before the Commission, but they did not choose to do so. The presumption is that the testimony presented is true, no proof having been introduced to over-

come it. There is no evidence to show that the specimens taken for analysis were not fair or typical ones, and the question whether the ingredients which were not detected upon the chemical analysis were in some other part of the block from which the specimen was not taken and failed to be detected on account of improper mixing is one of fact on which the decision of the Commission should be followed.

The petitioners object to finding of fact No. 6. An examination of the transcript, however, satisfies us that the finding is supported by the testimony. It appears conclusively that Swain, the writer of the letter set forth in the finding, never was assistant veterinarian at Camp Joseph E. Johnston and that he had not been at the camp since December 11, 1918. That he had been discharged from the Army long before the letter of January 25, 1919, was written, and that he was not at that time connected with the Army in any way also is beyond question.

The circumstances connected with the purchase of "Sal-Tonik" by the Government are disclosed in a letter written to the Guarantee Veterinary Company by the Palestine Salt & Coal Company, dated January 23, 1917, and which is in the transcript. The letter shows that the Palestine Salt & Coal Company were themselves the manufacturers of a medicated block and had arranged to sell their own product to the United States Government at \$13.40 per ton; that on December 23, 1917, a Government inspector came to the Palestine plant to inspect their blocks. At that time 1,200 blocks which the Palestine Company had manufactured for the Guarantee Veterinary Company were on hand and the Palestine Company wanted "to have them out of the way," and it was suggested by the latter that they could turn these blocks belonging to the Guarantee Veterinary Company in on the contract which it, the Palestine Company, had with the Government, the blocks having been held so long in the Palestine's warehouse that they were being damaged. This was assented to and the 1,200 blocks were turned in by the Palestine Company on its contract. There is no evidence whatever that the United States Government ever bought any "Sal-Tonik" blocks other than those mentioned above. This was all the basis there was for the advertisement that "Sal-Tonik" had been adopted by the Quartermaster's Department of the United States Army, and that it had purchased the entire southern output for use in the United States Cavalry.

The advertisement was unquestionably false and misleading. The United States Government never adopted the respondent's product, never bought any Sal-Tonik blocks other than those mentioned above and which were taken over by the Government to accommodate the Palestine Company and to get them out of its warehouse and out of its way. And it does not appear that the respondent

ent at any time ever had a contract of any kind with the Government of the United States. Our conclusion is that finding No. 6, like finding No. 2, is amply sustained by the evidence.

It is not necessary for us to comment upon the other findings of fact. It is enough to say that we have read all the testimony the Commission had before it, and it amply sustains all the findings the Commission made.

The Commission's order among other things requires the petitioners to cease and desist from publishing and circulating any printed matter wherein it is falsely stated that the United States Government or any department, branch, or agency thereof has adopted respondent's product, Sal-Tonik. It appears that for several months before the complaint herein was filed against them the petitioners had voluntarily ceased to use the word "adopted" in their advertisements and circulars and inserted in lieu thereof the word "purchased." Because of this voluntary discontinuance of the word "adopted" prior to the filing of the complaint it is urged that this part of the order to cease and desist is unjustifiable and erroneous.

Mr. Kerr lays it down as a rule in regard to bills to restrain the violation of trade-marks that the owner of a trade-mark, where the mark has been illegally taken by another, is not bound to rely upon his assurance or promises not to repeat the illegal appropriation of the mark, but is entitled to the protection of the court by injunction. Kerr on Injunctions, 4th ed. 350.

Mr. Nims, in his work on Unfair Competition, sec. 372, states that the fact that defendant has ceased to commit infringing acts is no reason why an injunction should not issue.

In *Saxlehner v. Eisner*, 147 Fed. 189, 191, which was brought for an infringement of a trade-mark, it appeared that all use of the infringing bottles had ceased three weeks before the suit was brought. This court, speaking through Judge Lacombe, said: "In view of the past conduct of defendants, complainant might fairly aver an apprehension that they would in some way continue the old infringement or concoct some new one, even though the company itself were enjoined. The circumstance that since that time they have not, in fact, infringed is not controlling." The injunction granted below was sustained.

It is to be observed, however, that this is not a suit to restrain the infringement of a patent or a trade-mark or copyright, but that it is a proceeding under the Federal Trade Commission act. The language of the act therefore must be considered. Section 5 of the act declares that "whenever the Commission shall have reason to believe that any such person, partnership * * * *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 * * *." In view of this language of the statute we are unable to say that the language of the order was used improvidently and was beyond the Commission's authority.

In *Sears, Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307, 310, it was insisted as here that the injunctive order was improvidently issued because before the complaint was filed and hearing had, the petitioner had discontinued certain methods complained of. In that case, unlike this, the petitioner had stated in its answer that it had no intention of resuming them. The Circuit Court of Appeals for the Seventh Circuit, notwithstanding these facts, sustained the right of the Commission to make the injunctive order, and said: "No assurance is in sight that petitioner, if it could shake respondent's hand from its shoulder, would not continue its former course."

The testimony shows conclusively that the petitioners had been publishing advertising matter containing false and misleading statements and had used an unfair method of commerce, and we think the Commission was quite within its right in issuing the order in the form it did. In such cases the Commission must exercise its discretion in view of all the circumstances.

Before bringing this opinion to its conclusion we perhaps should refer to the fact that one of the petitioners, George L. Owens, moved the Commission to strike his name from the proceeding on the ground that he individually is not now and never was engaged in interstate commerce and never did any advertising of any kind individually. It is undoubtedly true that George L. Owens was not a necessary party to this proceeding. But the evidence shows that he is and has been since its organization the president or trustee and absolute manager of the Guarantee Veterinary Company. He has no right, therefore, to complain because he was made a party to the proceeding.

The order of the Commission is affirmed.

FEDERAL TRADE COMMISSION v. BALTIMORE GRAIN CO. ET AL.¹

(District Court, District of Maryland. November 20, 1922.)

No. 301.

1. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—SENATE RESOLUTION HELD NOT TO ENLARGE COMMISSION'S POWER TO EXAMINE PAPERS.

Senate Resolution No. 133 of December 22, 1921, directing the Federal Trade Commission to investigate certain phases of the marketing and exportation of grain and other farm products, gave the Commission no authority to examine the books and papers of nonpublic service corporations not already given by law.

2. SEARCHES AND SEIZURES KEY No. 7—FEDERAL TRADE COMMISSION NOT AUTHORIZED TO EXAMINE PAPERS IN GENERAL INVESTIGATION.

In view of the prohibition of unreasonable searches and seizures, under which general warrants are forbidden, the Federal Trade Commission Act (Comp. St. Pars. 8836a-8836k) does not authorize the Commission, in a general investigation of a branch of trade not directed against any particular corporations, to examine the books and papers of nonpublic service corporations engaged in interstate commerce, but to authorize such examination the inquiry must be more or less definite and restricted in character, and if the statute does give such authority it goes beyond the powers of Congress.

(The syllabus is taken from 284 Fed. 886.)

Mandamus petitions for writs by the Federal Trade Commission against the Baltimore Grain Company, against the H. C. Jones Company, Inc., and against the Hammond-Snyder Company, Inc. Petition denied.

Robert R. Carman, United States attorney, of Baltimore, Md., for plaintiff.

• R. E. Lee Marshall, of Baltimore, Md., for defendants.

Rose, District Judge:

In these cases the Federal Trade Commission seeks a mandamus to compel the respondents, each a corporation, the first two of Maryland and the last of Delaware, and each of them engaged in foreign and interstate, as well as intrastate, trade in grain, to permit the petitioner's

¹ Writ of error to Supreme Court allowed April 11, 1923.

agents to examine, inspect, and copy respondents' books of account, records, documents, correspondence, and paper writings relating to or bearing upon their business in interstate commerce, and all letters and telegrams passing between the respondents and the latter's jobber customers throughout the United States during the calendar year 1921.

The petitions say that the commission, on its own motion, determined to gather and compile information concerning, and to investigate from time to time, the organization, business, conduct, practice, and management of the respondents and to investigate and determine the facts of the relation of each of them to other corporations, individuals, associations, and partnerships. The petitions further represent that the commission is also acting in compliance with Resolution No. 133 of the Senate of the United States, passed December 22, 1921, directing it to investigate the margins between farm and export prices; the freight and other costs of handling; the profits or losses of the principal exporting firms and corporations and their subsidiary or allied companies and firms; all the facts concerning market manipulations, if any, in connection with large export transactions or otherwise; the organization, ownership, control, interrelationship, foreign subsidiaries, agents, or connections of the concerns engaged in the export of grain, including the extent of their control of the facilities used by them; the organization, methods of operation and agents used by farm buyers of grain in this country; and other data affecting the demand for a foreign disposition movement and use of American exported grain and report its findings and recommendations thereon as promptly as the various phases of the work are concluded.

In the case of the *Federal Trade Commission v. P. Lorillard Company*,¹ Judge Manton, sitting in the District Court for the Southern District of New York, has recently elaborately reviewed the statutes and authorities defining or limiting the power of the Federal Trade Commission to compel private corporations to submit their papers to its examination. In that case, the petition of the Commission, which was denied, set forth facts legally indistinguishable from those alleged in the one at bar. Here, as there, the resolution of the Senate conferred upon the Commission no authority not already given by law. See *United States v. Louisville & Nashville R. R.*, 236 U. S. 329.

The Federal Trade Commission act does empower the Commission, upon the direction of the President or either House of Congress, "to investigate and report the facts relating to any alleged violation of the anti-

¹ 283 Fed. 999.

trust acts by any corporation." The resolution cited in the instant case does not suggest any breach of these acts. The question here is whether the statute creating the commission entitles it to the inspection for which it asks, and if so, whether the act in that respect is valid.

Paragraph A of section 6 of the statute authorizes the commission "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, * * * and its relation to other corporations and to individuals, associations, and partnerships."

Paragraph H provides that the commission may, upon its own motion, "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. * * *"

Section 9 declares "That for the purpose of this act, the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purposes of examination and the right to copy, any documentary evidence of any corporation being investigated or proceeded against. * * *"

The measure originated in the House of Representatives, and the committee which reported it was familiar with what the Supreme Court had said in *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, and it said that in order that the proposed Trade Commission "may have powers of subpoena and production of books and papers the language" of the bill "has been expressly made broad enough to permit a full exercise of that power in connection with any kind of investigation which may be undertaken." (Report of Committee on Interstate and Foreign Commerce, No. 533, 63d Congress, 2d session.)

The Senate Committee on Interstate Commerce, while recognizing that in "the conduct of such special investigations as the commission may deem necessary it is indispensable that it should have extensive powers of inquiry with the right to subpoena witnesses, and require the production of books and papers," concluded that those conferred upon it were practically the same as were then possessed by the Interstate Commerce Commission and by the Bureau of Corporations. (Report Senate Committee on Interstate Commerce, No. 597, 63d Congress, 2d session.)

The legislative history of the act may suggest that Congress did not intend that the powers of the commission to investigate should be confined to cases in which a complaint had been made, or might have been, but there is no reason to suppose that Congress thought that in

other respects it was giving any authority which the Interstate Commerce Commission did not possess.

The precise question here to be decided is whether the statute confers upon the commission the right to inspect and copy the papers of any private corporation engaged in interstate or foreign commerce whenever, in the judgment of the commission, such inspection may furnish information of value to an inquiry it is making as to some economic or commercial problem and when it has no reason to believe that any violation of law has been committed. There can be no question of the timeliness of an investigation into the causes of the marked difference between the prices received by the grain grower and those paid by the ultimate consumer. Many of the farmers have long been convinced that in some way they were victimized by the railroads and the middlemen. The feeling of resentment has become so strong among them that in some of the wheat-growing States it has forced a realignment of political parties and has resulted in the demand for many laws and the enactment of a number of them as to the wisdom of which there is still grave difference of opinion.

The problems involved are of unusual perplexity. The causes of the evils most complained of are still obscure to many. Congress and the people need all the light they can get. The more thorough the inquiry, the more valuable its results should be, provided the investigators do not gather so much material that they will be unable to see the woods for the trees.

That is one side of the question. There is another. The respondents in these cases are private corporations, by which various individuals more conveniently carry on that trade of corn merchants which antedates the beginning of recorded history. They have and exercise no franchises other than that of being corporations. They are not engaged in rendering public service except in the sense that such service is rendered by every one who follows any useful calling. To them the demand that they shall be compelled to let strangers, officials though they be, go through not only their books of account but their correspondence files as well seems outrageous. In their belief the gain to the public from anything which such an inquiry can probably or possibly reveal seems slight as compared with the annoyance and sense of wrong it will cause them. If they are right, the search and seizure asked for would be unreasonable and therefore forbidden. The prohibition of unreasonable and the sanction of reasonable search and seizure is simply a practical compromise between two conflicting rights.

For upward of a century and a half there has been no doubt that general warrants are forbidden. No official can be given authority to rummage through the papers

of an individual without the latter's consent, in the hope that something or other may be discovered useful for some public purpose. A corporation's rights as against the sovereign which created it, or permits it to do business within its borders, are not, it is true, the same as those of a natural person. It is the creature of the State. He is not. The State may exclude it, while he may freely come in. As a condition of obtaining a charter or, under some circumstances, of retaining it or doing business under it, it is probable the State might reserve a right to an unlimited inspection of all corporations' books and papers. But that question is not here presented. As was said in *Silverthorne Lumber Co. v. United States*, 251 U. S. at 392, "The rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way."

It is not necessary for the purposes of the instant case to inquire whether the United States may exercise over a corporation engaged in interstate or foreign commerce all the powers which are possessed by the State which chartered it. Even if it may, the wording of the statute, broad and general as in some respects it is, does not suggest that Congress intended to strike down as respects private corporations engaged in interstate commerce all the limitations which for 150 years or more had protected private papers from searches under general warrants. Nor is there anything in the legislative history of the act to suggest that the legislators supposed that they were taking so radical a step, or that they were raising a constitutional question of serious and far-reaching character. Unquestionably some of them wanted to authorize the compulsory examination of the papers of a corporation, although no complaint of a specific violation of law was pending against it, or was in contemplation. Very possibly that much could be done, some of the things which were said in *Harriman v. Interstate Commerce Commission*, *supra*, to the contrary notwithstanding. *Smith v. Interstate Commerce Commission*, 245 U. S. 44. But so far as concerns nonpublic service corporations, at least, the inquiry in which the commission is engaged, whatever it is, must be more or less definite and restricted in its character, so that the activities of its minor agents, to whom in practice the actual searching must necessarily be confided, can be kept within some bounds. Very possibly, to sustain any right of inspection and searching, it must also appear that there is some reasonable proportion between the public value of the information likely to be obtained and the private annoyance and irritation it will occasion.

With these general principles in mind, it will be noted that the act gives the Commission power "to investigate the organization, business, conduct, practices, and man-

agement of any corporation engaged in [interstate or foreign] commerce and its relation to other corporations, and to individuals, associations, and partnerships," and that the right of access to papers and books is limited to those of a corporation being investigated or proceeded against. That much of a restriction the statute itself imposes. Whether it may, to that extent, authorize the examination of a private corporation's papers need not be here considered. These corporations are not being "proceeded" against. Are they, in the sense of the statute, being "investigated"? The investigation which the Commission has in hand, and for which it is here seeking information, is, strictly speaking, not of them or of the scores or, perhaps, hundreds of other corporations whose papers it wishes to inspect, but of the conditions affecting one of the most important branches of our national trade.

To make such an investigation scientifically complete, it may well be desirable to find out precisely how not only the corporations engaged in it conduct their business but to obtain the same fullness of information concerning the individuals or firms concerned in it; but the portions of the statute with which we are now dealing give no authority to inspect papers of any natural person. Is there not a fair presumption that the investigation mentioned in the statute was one of another character than the one now being carried on, and that it was to be an inquiry into the way the particular corporation itself conducted its business, having as its substantial object the ascertainment of facts concerning that corporation, and as its ultimate end the possibility that in some way such corporate body might be required to mend its ways? If that be not the true construction of the act, and if it really means that whenever the commission thinks best to make an inquiry into the way in which some great department of commerce is carried on it may send its employees into the office of every private corporation which does an interstate business in that line and empower them to go through the company's books, correspondence, and other papers, I am satisfied it goes beyond any power which Congress can confer, in this way at least.

It follows that the petitions for writs of mandamus must be denied.

**FEDERAL TRADE COMMISSION v. CLAIRE
FURNACE CO. ET. AL.¹**

(Court of Appeals of District of Columbia. Submitted
May 22, 1922. Decided January 2, 1923.)

No. 3798.

- 1. EQUITY KEY No. 262—PLEADING KEY No. 8(13)—STATEMENTS
AS TO POWERS OF CONGRESS AND TRADE COMMISSION ARE
CONCLUSIONS NOT ADMITTED BY MOTION TO STRIKE.**

Extensive arguments in the answer relative to the powers delegated by Congress to the Trade Commission and the power of Congress under the commerce clause of the Constitution (article 1, par. 8), are mere legal conclusions, not admitted by the motion to strike the answer.

- 2. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION
KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—POWERS OF
TRADE COMMISSION ARE LIMITED TO MATTERS DIRECTLY
RELEVANT TO INTERSTATE COMMERCE.**

The powers of the Trade Commission are limited to matters directly relevant to interstate commerce, so that the corporation under investigation must not only be engaged in such commerce; but the subject under investigation must be so related to interstate commerce that its regulation may be accomplished by an act of Congress, or so interwoven with interstate commerce that the whole subject is necessarily brought within the jurisdiction of Congress.

- 3. COMMERCE KEY No. 3—INTERSTATE BUSINESS OF CORPORATIONS
HELD SEPARABLE FROM INTRASTATE, AND NOT SUBJECT TO
FEDERAL REGULATION.**

Where corporations maintained manufacturing plants in a single State, but purchased their raw materials or produced them at points without the State, and had them shipped by interstate carriers to their plants, and then sold the manufactured product in interstate commerce, the intrastate portion of the business was separable from the interstate so as not to be subject to regulation by Congress.

- 4. COMMERCE KEY No. 16—MANUFACTURE OR PRODUCTION IS NOT
"COMMERCE."**

The manufacture or production of goods is not "commerce."

- 5. COMMERCE KEY No. 16—MANUFACTURE AND PRODUCTION MAY BE
ACCESSORY TO INTERSTATE COMMERCE.**

Where manufacture and production are a part of, and essential to, the operation of an instrumentality of interstate commerce, they may be so intimately associated with the instru-

¹ Writ of error to Supreme Court allowed March 17, 1923.

mentality itself as to be an accessory thereto, whose regulation is necessary to insure a regulation of the instrumentality.

6. COMMERCE KEY No. 16—PURCHASE OR PRODUCTION OF RAW MATERIAL SHIPPED INTERSTATE IS NOT "INTERSTATE COMMERCE."

The purchase or production by a manufacturer in another state of the raw materials for his plant, which are then delivered to an interstate carrier for shipment to the plant, are not in themselves commerce, since the articles are not used in connection with an instrumentality of commerce.

7. COMMERCE KEY No. 16—CONGRESS CAN NOT REGULATE MANUFACTURE OF RAW MATERIAL SHIPPED INTERSTATE INTO A PRODUCT FOR INTERSTATE SHIPMENT.

Except where the act of production or manufacture is directly related to the operation of an instrumentality of commerce, Congress can not regulate the manufacture of raw materials which have been shipped to the factory in interstate commerce into products which are to be shipped in interstate commerce.

8. COMMERCE KEY No. 1—CONGRESS CAN NOT INDIRECTLY REGULATE WHAT IT CAN NOT DIRECTLY REGULATE.

If Congress may not regulate manufacture and production directly, because it is not a part of interstate commerce, it may not regulate it indirectly through the medium of publicity.

9. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY 80½, NEW, VOL. 8A KEY-NO. SERIES—STEEL AND IRON BUSINESS IS NOT AFFECTED WITH PUBLIC INTEREST.

The steel and iron business of the country is not affected with a public interest, such as to justify its regulation for the promotion of the public welfare.

10. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—TRADE COMMISSION HAS NO GENERAL VISITATORIAL POWERS.

The Federal Trade Commission is not invested by Federal Trade Commission Act, Par. 6 (Comp. St. Par. 8830f), empowering it to gather and compile information concerning corporations engaged in commerce, etc., with authority to inquire into any business of nation-wide extent, and has no visitatorial powers coextensive with the constitutional functions of Congress; but its activities are strictly limited to the field of interstate commerce, outside of the portions of that field occupied by the Act to Regulate Commerce and the Federal Reserve Act.

(The syllabus is taken from 285 Fed. 936.)

Appeal from the Supreme Court of the District of Columbia.

Suit by the Claire Furnace Company and others against the Federal Trade Commission and its members.

Decree for complainants, and defendants appeal. Affirmed.

J. Wallace Nichol, W. H. Fuller, and William T. Chantland, all of Washington, D. C., for appellants.

Levi Cooke and George R. Beneman, both of Washington, D. C., A. Leo Weil, of Pittsburgh, Pa., and William Wallace, Jr., of New York City, for appellees.

Before Smyth, Chief Justice, and Robb and Van Orsdel, Associate Justices, Smyth, Chief Justice, dissenting.

VAN ORSDEL, *Associate Justice*:

Appellee corporations filed a bill in the Supreme Court of the District of Columbia for an injunction to restrain appellant, Federal Trade Commission, from enforcing or attempting to enforce an order issued by the Commission against the complainant companies requiring them to furnish monthly reports of the cost of production, balance sheets, and other information in detail, upon a large variety of subjects relative to the business in which complainant corporations are engaged.

The authority under which the Commission assumes to act is expressed in a resolution, wherein it is stated that at a hearing held by a Committee of the House of Representatives the Commission was requested to suggest what might be done to reduce the high cost of living. In response the Commission recommended to the Committee "that it would be desirable to obtain and publish from time to time current information with respect to the 'production, ownership, manufacture, storage, and distribution of food stuffs, or other necessities, and the products or by-products arising from or in connection with the preparation and manufacture thereof, together with figures of cost and wholesale and retail prices,' and particularly with respect to various basic industries, including coal and steel."

An appropriation of \$150,000 was made available and the Commission resolved to "proceed to the collection and publication of such information with respect to such basic industries as the said appropriation and other funds at its command will permit; and that such action be started as soon as possible with respect to the coal industry and the steel industry, including in the latter closely related industries such as iron ore, coke, and pig iron industries."

The alleged purpose of this report was to compile in combined or consolidated form the data received from individual companies, and to issue currently in such form accurate and comprehensive information regarding changes in the conditions of the industry, both for the benefit of the industry and of the public. At the same time orders were issued to the complainant coal and

coke companies requiring them to report the "monthly costs of production for the several products designated and other data as specified in the form prescribed." Accordingly, the Commission issued to each of the complainant companies forms of reports, schedules, and questionnaires, calling for detailed information regarding the amount of products produced by the several complainants respectively, the sales and contract prices thereof, and orders booked by them, the amounts allocated by them to depreciation, and administrative and selling expenses, and also to file with the Commission quarterly income statements and balance sheets. In addition the Commission required complainants to submit their accounts and books for inspection to enable it to check the reports which complainants were required to furnish from time to time. Complainants were warned that upon failure to comply with the orders of the Commission the penalties prescribed by Section 10 of the Trade Commission Act would be imposed upon them.

Complainants allege, and it is not denied in the answer, that they "are engaged in producing, manufacturing, and making sales in the States wherein their producing and manufacturing operations are conducted, and all of them are conducting mining operations or manufacturing plants, or both." The location of the manufacturing and mining plants is given and it appears that the companies are engaged in producing pig iron, tin plate, strip steel, billets, slabs, ingots, blooms, and other products of iron and steel, finished and unfinished. It further appears that some of the companies are engaged in coal mining, manufacturing coke, and mining of ore. Defendant commission avers in its answer that with the exception of three companies named, "sixty-five per cent or more of the sales made by each of complainants is in interstate or foreign commerce, and that the greater portion of the principal raw materials of each concern is purchased and transported in interstate commerce to their converting plants."

The right of the Commission to make the inquiry here involved is based upon the power of Congress to secure information concerning any subject matter in regard to which it has been given the power to legislate, and upon the further proposition that when one phase of a subject matter is within the jurisdiction of Congress it possesses the power to secure information as to the whole of the subject matter as a guide to further legislation. It is also urged that power to obtain information is not limited to interstate commerce but includes intrastate commerce as well, when the two phases are a part of one subject; that the orders and report forms issued to complainants and others are for the purpose of inquiring into the whole of the steel industry of the United States, which industry, it is averred, includes both interstate

and intrastate commerce. The Commission then seeks to justify its proposed inquiry into complainants' business, both interstate and intrastate, upon the hypothesis that the publication and dissemination of the information obtained will benefit the public and furnish a guide for future legislation.

Complainants having failed and refused to make the reports, the Commission by written notice threatened the imposition of penalties for delay or failure to make due report as required. It is to restrain the Commission from carrying the threats into effect that the present injunction is sought.

The Commission answered the bill and complainants moved to strike out certain parts of the amended answer and to strike the entire amended answer from the files. The court ordered: "First. That the motion to strike out certain parts of the amended answer be overruled without prejudice to the right of the plaintiffs on any further hearings in said suit to raise objections to matters not properly pleaded. Second. That the second motion to strike the entire amended answer from the files be and the same is hereby denied except as to the ground that the said amended answer set forth no defense to the bill of complaint."

Defendants refusing to further plead or amend their answer, and expressing their willingness to stand upon their answer as a sufficient and complete defense, the court, treating the motion to strike as in the nature of a demurrer, entered a judgment making the temporary injunction final, from which decree this appeal was taken.

The extensive arguments set out in the answer relative to the powers delegated by Congress to the Commission; the power of Congress under the Commerce Clause of the Constitution; the authority of the Commission to investigate the business affairs of a shipper in interstate commerce; the delegated power to inquire into the production of any commodity in nation-wide use, and the constitutional power of the Commission to compel disclosure of the business methods employed by manufacturers and producers, are mere legal conclusions, not admitted by the motion to strike.

The statutory authority under which the Commission in this instance presumes to act is found in Section 6 of the Federal Trade Commission Act (38 Stat. 717), which provides: "That the commission shall also have power (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships. (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."

The Act further authorizes the Commission "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."

The word "commerce" as used in the Act is defined as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation."

It will be observed that the inquiry instituted by the Commission originated from a discussion of a Committee of Congress relative to the high cost of living, and an appropriation by Congress of a lump sum to enable the Commission to conduct such investigations as it might deem proper. There was no specific direction by Congress to make an investigation of the steel, iron, or coal business. The Commission on its own motion and by resolution instituted this investigation.

The Commission is not proceeding upon any complaint filed before it, charging complainants with unfair competition or the violation of the Federal Trade Commission Act or the Antitrust Acts. Neither is it the expressed intention of the Commission to make an investigation relative to the operations of complainant companies in interstate commerce. The investigation seems to be more in the nature of a news-gathering expedition, in hope of securing something of public interest for publication, or possibly subject matter for future legislation by Congress. Common justice would seem to demand that before the business methods pursued by a corporation or an individual should be investigated, the party

should be apprised either by a formal charge or by notice of the extent of the purposed investigation, in order that a day in court may be accorded. This is essential to determine whether the Commission is acting within its jurisdiction and to meet the charges preferred.

This brings us to the point of determining whether in the present investigation the Commission was acting within its jurisdiction. The authority of the Commission, we think, is limited by the acts of Congress to investigating and reporting upon unfair methods of competition in interstate commerce, the enforcement of anti-trust decrees and violations of the antitrust laws, and the making and publishing of reports thereon. The powers of the Commission are limited to matters directly relevant to interstate commerce. In other words, the corporation under investigation must not only be engaged in interstate commerce, but the subject under investigation must be so related to interstate commerce that its regulation may be accomplished by act of Congress. Where the operations of a corporation, engaged in both interstate and intrastate commerce, are so interwoven and intermingled as to be inseparable, it may be conceded that in order to regulate interstate commerce, the intrastate phases may be subjected to regulation and possible restriction, since the whole subject is thus brought within the jurisdiction of Congress.

But that is not this case. Here there is no intermingling in such manner as to render the interstate and intrastate features inseparable. Indeed, it is said of the iron and steel companies, in the brief of counsel for the Commission, that "appellees bring their raw material from other States into those States where their plants are situated, and when the conversion or fabrication is complete approximately 65% of the total of such converted products is sold and shipped into other States." Three separate and distinct operations are involved. First, the shipment of raw materials to the plants. If from outside of the State, the materials are in the nature of freight in interstate commerce from the time they are delivered to the carrier until they are delivered by the carrier at the plant. Second, the processes of manufacture by which the raw materials are converted into finished products, during which time the complainants are not engaged in commerce. Third, the sale and delivery of the finished product. If this is made outside of the State where the product has been manufactured, the product is in commerce as freight from the time of delivery to the carrier at the plant until the carrier in turn delivers it to the consignee at destination. Indeed the answer tacitly concedes the three operations by complainants—the assembling, the manufacture, and the sale of the manufactured article.

It, therefore, does not appear that complainants are common carriers or engaged in the operation of any of

the instrumentalities of commerce. They are mere shippers, and as such are engaged in commerce only from the time their products, whether it be raw material or the finished product, are delivered to the carrier and in turn by the carrier delivered to them or to their consignees. "When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another State for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another State." *In re Green*, 52 Fed. 113; quoted with approval in *Hammer v. Dagenhart*, 247 U. S. 251, 272.

Nothing is more clearly established by a long line of decisions than that manufacture is not commerce. In *Kidd v. Pearson*, 128 U. S. 1, 20, the court said: "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is 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."

It is equally well established that the mere act of production is not commerce. As the court said in *Hammer v. Dagenhart*, *supra*: "However much the *Knight Case*, 156 U. S. 1, may be weakened by later decisions, its distinction between production and commerce is still effective to prevent direct congressional regulation of production as distinguished from sale and transportation."

Where manufacture and production are a part of and essential to the operation of an instrumentality of interstate commerce, they may become so intimately associated with the instrumentality itself that they may be treated as accessory thereto. In such a case inquiry into the conditions of manufacture and production may become necessary to insure intelligent regulation of the instrumentality. A coal mine or railroad shop maintained by the same company, or by a subsidiary company, to further the operation of a railroad or other instrumentality of interstate commerce, may be so closely associated with the operation of the road itself that their operation may be conducted in such a manner as to obstruct or burden the freedom of interstate commerce and therefore be within the regulatory power of Congress. But this condition has no application where the manufacture and production are independent of the operation of an instrumentality of commerce.

In the present case some of the complainants, either directly or through subsidiary companies, produce the coal, ore, and coke used in manufacturing their iron and steel products, while other complainants purchase these materials for similar use. In these circumstances the mere production or purchase is not commerce, since the articles are not used in connection with an instrumentality of commerce, but are delivered to common carriers for transportation, thus creating the relation merely of shipper and carrier. The mining of the coal and ore and the production of the coke precede and are independent of any act of commerce, just as manufacture is independent of commerce.

Except where the act of production or manufacture is directly related to the operation of an instrumentality of commerce and directly connected therewith the regulatory power of Congress over the commerce in shipping raw materials to the manufacturing plant and the commerce in shipping the product from the plant terminates with the assembling and begins again with the shipment of the manufactured product. It also follows that if Congress may not regulate manufacture and production directly it may not regulate it indirectly through the medium of publicity. No facts are alleged from which it may be inferred that the interstate commerce in which complainants are engaged, in assembling raw materials and in shipping the finished product, is affected even remotely by either the production of the raw materials or their manufacture into the finished product. As was said in the *Dagenhart* case: "The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce make their production a part thereof. * * * Over interstate transportation or its incidents the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation."

It is not even claimed that the proposed investigation is for the purpose of aiding Congress in the exercise of the Federal police power, or for the purpose of affecting a possible disclosure of some vague ground upon which Congress might be induced to attempt its exercise by legislation. The dividing line between a strictly private enterprise and a "business impressed with a public interest" has not been clearly defined. A corporation devoted wholly to the service of the public, and whose revenues are derived from fixed uniform charges for the various services rendered, as an insurance company, *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389, or an elevator company, *Munn v. Illinois*, 94 U. S. 113, or a bank, *Noble State Bank v. Haskell*, 219 U. S. 104, may well be so impressed with a public interest as to justify

its regulation for the promotion of the public welfare. But this modern doctrine, so frequently invoked in justification of the assertion of the police power, has no application to the steel and iron business. There is no governmental power that can be invoked to compel the steel companies to serve the public, nor do they assume to render a public service.

The large percentage of their products go into the construction of the instrumentalities of transportation which are owned and employed by companies engaged in commerce, which, in their interstate aspect, are subject to Federal control; but that implies no authority in the Government to regulate the production of a mere commodity entering into an agency the management and control of which Congress has the delegated power to regulate. Complainant companies are engaged in a competitive productive industry similar to the woolen or cotton manufacturers and those engaged in numerous other industries, where the business is regulated by competition and supply and demand, and the product enters into the general volume of commerce, subject to all the natural laws and conditions which generally govern and affect trade.

Citation is made in brief of counsel of instances where private corporations submitted to requests of the Commission for so-called "war reports" and answered without objection. But the emergency caused by the war has passed and no test was made of the jurisdiction of the Commission to proceed even in those cases. It is unnecessary, therefore, to consider the authority of the Commission in a war emergency, since the question of jurisdiction was not raised and the circumstances which there obtained are not present here.

The cases relied upon by the Commission relate chiefly to the power of Congress, either directly or through the Commission, to regulate and inquire into the affairs of corporations engaged in the operation of instrumentalities of interstate commerce, or industries so closely allied as to form a part of the general business entering into such commerce and capable of being so conducted as to impose a burden on interstate commerce. They arose upon charges, in some instances civil and in others criminal, based upon violations of the Anti-Trust Act, or unfair methods of competition in commerce, or violations of the Federal Trade Commission Act, or of so conducting a business as to obstruct or burden interstate commerce. They are not pertinent, however, to this inquiry, since the manufacturing business of complainants is not commerce, and therefore not subject to regulation by Congress or investigation by the Commission.

Special reliance, however, is placed upon the recent decision of the Supreme Court of the United States in *Stafford et al. v. Wallace et al.*, and *Burton et al. v.*

Clyne, 258 U. S. 495, involving the validity of an act of Congress providing "for the supervision by Federal authority of the business of the commission men and of the live-stock dealers in the great stockyards of the country."

In an action for injunction to restrain the enforcement of the act, the court held that the plan of operation of the stockyards companies was so closely allied with interstate commerce as to amount to a scheme for monopolization thereof. The court basing its opinion upon the decision in *Swift & Co. v. United States*, 196 U. S. 375, said: "It is manifest that Congress framed the Packers and Stockyards Act in keeping with the principles announced and applied in the opinion in the *Swift case*. The recital in sec. 2, par. b of Title 1 of the Act quoted in the margin leaves no doubt of this. The act deals with the same current of business and the same practical conception of interstate commerce.

While in some instances the great volume of live stock passing in commerce through the stockyards of the country is transformed into dressed meat, the court was careful to distinguish the processes employed from manufacture in general. As was said in the *Swift case*: "Therefore, the case is not like *United States v. E. C. Knight Co.*, 156 U. S. 1, where the subject matter of the combination was manufacture and the direct object monopoly of manufacture within a State. However likely monopoly of commerce among the States in the article manufactured was to follow from the agreement it was not a necessary consequence nor a primary end. Here the subject-matter is sales and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales. The two cases are near to each other, as sooner or later always must happen where lines are to be drawn, but the line between them is distinct."

In *Hill et al v. Wallace*, 257 U. S. 310,¹ the court referring to the *Stafford case* "held it to be within the power of Congress to regulate business in the stockyards of the country and include therein the regulation of commission men and of traders there, although they had to do only with sales completed and ended within the yards, because Congress had concluded that through exorbitant charges, dishonest practices, and collusion they were likely, unless regulated, to impose a direct burden on the interstate commerce passing through." This again clearly distinguishes the *Stafford case*, since in the present case commerce does not pass through the plants where the processes of manufacture are conducted.

In these cases the court was dealing directly with the validity of statutes in which the purpose of Congress

¹ The citation apparently intended was 259 U. S. 44, where the case was considered on the merits, the matter quoted being found on p. 69.

was clearly expressed. In the present case, however, there is no statute, and no object has been even intimated by Congress, nor are we enlightened by any definite statement from the Commission of its purpose in making the investigation. The most that can be gathered from the answer is that a general survey of the coal, coke, steel, and allied industries is contemplated in a tentative search for information relative to the high cost of living. We are not impressed by the contention that the Commission is invested with authority to inquire into and regulate any business of nation-wide extent, or that the scope of its visitorial powers are coextensive with the constitutional functions of Congress. As already suggested, we think the activities of the Commission are strictly limited to the field of commerce, except so much thereof as has been occupied by the Act to Regulate Commerce and by the Federal Reserve Act.

The decree is affirmed with costs.

Chief Justice SMYTH, dissenting:

Being unable to concur in the opinion just announced, I state in a very general way the reasons for my dissent. For convenience, I shall speak of the defendants as the Commission.

This case does not call for a decision as to whether or not Congress or the Federal Trade Commission, acting by its authority, has the power to regulate manufacture or intrastate commerce. The order of the Commission which is challenged does not seek to regulate anything. It simply calls for information relative to the activities of the plaintiffs in manufacture and commerce, both interstate and intrastate. It bases its claim to that part of the information which relates to manufacture and intrastate commerce upon the postulate that it is necessary to enable Congress and the Commission to perform their respective duties with regard to commerce between the States, or at least that it is appropriate for that purpose.

The trial court sustained the plaintiffs' motion to strike the Commission's amended answer (hereafter called the answer), on the ground that it did not state a defense, and entered a decree for the plaintiffs. All its allegations, therefore, which are properly pleaded must be treated as admitted. Among other things, it alleges that plaintiffs are engaged in interstate commerce; that it is necessary that the Commission procure complete information as to all the business of each of the plaintiffs in order that it shall perform its duty as to their interstate commerce; that unless the information is produced the Commission will be unable to properly perform that duty, for the reasons that all of the plaintiffs, while engaged substantially in interstate commerce, have also certain activities which are performed intrastate, and which

activities are so interwoven with their interstate business that it is impossible to separate them, and that even if they could be separated the separation would render the result untrue and inaccurate and of little or no value in enabling the Commission to perform its regulatory duties as to the interstate business of the plaintiffs. The answer also alleges that the information sought is necessary to enable Congress to perform its duties with respect to regulating the interstate and foreign commerce of the plaintiffs.

It is argued that the allegations of the answer to the effect that the information sought is necessary to enable Congress and the Commission to perform their respective duties in regard to commerce between the States are mere conclusions of fact, and as such were not admitted by the motion; that the pleader should have set forth the facts from which it deduces the conclusion that the information is necessary. To this I can not accede. The purpose of the answer was to advise the plaintiffs as to what the Commission expected to prove. This purpose was sufficiently served by stating the ultimate or operative facts. It was not required that the evidence upon which the Commission relied to establish the facts should be set out. If the plaintiffs desired a more specific statement, it was their right to move for it under equity rule 20, promulgated by the Supreme Court of the United States. This they did not do. A general statement of the essential ultimate facts upon which the defense rests is enough. "It was not necessary to aver * * * all the minute circumstances which may be proven in support of the general statement * * *." The answer distinctly apprised the plaintiffs of the precise case they were required to meet. *St. Louis v. Knapp Co.*, 104 U. S. 658, 661. As was said by Mr. Justice Holmes, delivering the opinion of the court in *Swift and Company v. United States*, 196 U. S. 375, 395, "a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech." See also *United States v. United Shoe Machinery Co.*, 234 Fed. 127, 136. It is my opinion that the answer sufficiently alleged that the information sought was necessary or at least appropriate for the purposes indicated, and that the motion to strike admitted it.

Plaintiffs allege in variant forms that the Commission is not authorized by the act creating it to demand the information sought. Section 6 of the act is set out in the opinion of the court. It authorizes the Commission 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"; to require, "by general or special orders, corporations engaged in commerce * * * 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, [and] practices" of the corporations mentioned. And it is declared to be the duty of the Commission to "make public from time to time such portion of the information obtained by it * * * 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," etc. The commerce spoken of is interstate.

In the answer it is alleged, and not denied, that all the plaintiffs are engaged in interstate commerce, and that sixty-five per cent of their business, save as to three, is such commerce. They belong, therefore, to the class of corporations "concerning" which the act authorizes the Commission to gather information. Does the information requested come within the purview of the act? It relates to the "business, conduct, practices, and management" of the corporate plaintiffs. It is called for in the form of special reports, and is sought for the purpose of making it public and of laying it before Congress with recommendations for additional legislation.

It is urged that, while the information relates to the business, etc., of the plaintiffs, this is not enough—that it must concern the interstate commerce features of that business. The answer, as we have shown, alleges, and the allegation is admitted, that the information is necessary in order that the Commission and Congress may perform their duties with respect to the interstate features of the business. Since this is true, it must concern those features, and therefore it is such as the Commission is authorized to gather.

The next inquiry is as to whether Congress had the power to confer upon the Commission authority to gather information with respect to the manufacturing and intrastate activities of corporations engaged in commerce between the States, to the end that it might regulate, either by legislation or otherwise, the commerce over which it has jurisdiction. The requiring of information concerning a business is not a regulation of that business. *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 211. In that case reports were called for by the Commission with respect to intrastate business. The corporation refused to supply it, on the ground that the Commission had no power to demand such information, because it related to intrastate business. But the

court said that, since the information was essential to enable the Commission to perform its required duties touching interstate commerce, the Commission had a right to require it. There are other decisions to the effect that Congress may enter the domain of intrastate activities whenever it is appropriate that it should do so in order that it may properly exercise its regulatory power with respect to interstate commerce. *Interstate Commerce Commission v. Vincinnati, New Orleans and Texas Pacific Railway Company*, 167 U. S. 479, 506; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 21; *The Minnesota Rate Cases*, 230 U. S. 352, 431.

One of the briefs for the plaintiffs admits that as soon as any concrete legislation should be submitted to or contemplated by Congress, "it would have full power to secure any and all information indispensable to a proper consideration and disposition of such proposed legislation." I think this concession is sound, but it is too restricted. May it not be essential that Congress should have information on a given phase of commerce before it formulates any concrete legislation or contemplates legislation with reference to it? And if so, why should it not have the same right to gather it as it would have, according to the concession, where legislation is actually pending? To say that it may authorize the procuring of all the facts necessary to the proper disposition of pending legislation but that it has no power to gather what may be appropriate to enable it to determine whether any legislation is necessary does not appeal to me as correct.

But it is argued that the regulatory power of Congress must be exercised through legislation, and that information desired for the mere purpose of publication may not be required by it. There is nothing in the Constitution which says how Congress shall exercise its regulatory power. This is left to its judgment. Former Senator Burton, of Ohio, in his work on Corporations and the State, 60, 61, after a very careful consideration of the matter, declared that "of all regulations which promise results publicity should be placed first."

It is beyond dispute that Congress has no general visitatorial powers over State corporations, but it has been decided that it has power to visit them for the purpose of seeing "that its own laws are respected." *Wilson v. United States*, 221 U. S. 361, 384. By a parity of reasoning may it not be said that if it is necessary to protect interstate commerce, or appropriate for that purpose, that Congress should enter the field of intrastate commerce, it may do so? *Houston & Texas Railway Company v. United States*, 234 U. S. 342. In that case the court said that Congress possesses "the power to foster and protect interstate commerce and to take all measures

necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled." Page 353.

The power of Congress to require the production of the information in question is defended by the Commission upon several grounds in addition to those I have mentioned, but I do not think it necessary for me to go further into the subject.

I am satisfied that the law requires that the information demanded be supplied, and therefore I think the decree of the lower court should be reversed and the bill dismissed.

FEDERAL TRADE COMMISSION v. CURTIS PUBLISHING CO.¹

(Argued Nov. 17, 1922. Decided Jan. 8, 1923.)

No. 86.

1. TRADE-MARKS AND TRADE-NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW VOL. 8A KEY-NO. SERIES—WHETHER METHOD IS UNFAIR COMPETITION, OR AGREEMENT TENDS TO CREATE MONOPOLY, IS FOR THE COURT.

The ultimate determination of what constitutes unfair competition in interstate commerce, and whether the leases, sales agreements, or understandings substantially lessen* competition or tend to create monopoly, is for the court, and not for the Trade Commission.

2. TRADE-MARKS AND TRADE-NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW VOL. 8A KEY-NO. SERIES—COURT NEED NOT REMAND TO COMMISSION FOR FURTHER FINDINGS, IF CIRCUMSTANCES SHOW JUSTICE REQUIRES DECISION.

Under the Federal Trade Commission Act (Comp. St., par. 8836a-8836k), making the findings of fact supported by evidence conclusive, but granting jurisdiction to the Circuit Court of Appeals to make and enter, on the pleadings, testimony, and proceedings, a decree affirming, modifying, or setting aside an order of the Commission, the court can examine the whole record, and ascertain whether there are material facts not reported by the Commission, and if there is substantial evidence relating to such facts, from which different conclusion reasonably might be drawn, the matter should be remanded to the Commission to make additional findings; but if, from all the circumstances, it clearly appears that in the interest of justice the controversy should be decided without further delay, the court has full power to do so.

3. MONOPOLIES KEY No. 17(2)—CONTRACTS WITH DISTRIBUTORS HELD AGENCY AND NOT SALES AGREEMENTS.

Contracts between a publisher and a large number of distributors, some of whom had been wholesale dealers in maga-

¹ 260 U. S. 568.

zines and others not, whereby the distributors agreed to requisition from the publisher the number of magazines required for their territory, title to remain in the publisher until sold, and to train and supervise boys who were to sell the magazines, are contracts of agency and not of sale on condition, so that they do not violate Clayton Act, paragraph 3 (Comp. St., par. 8835c), prohibiting lease or sale contracts which prohibit the lessee or buyer from handling the product of competitors, even though the contracts contained clauses prohibiting the distributors from handling other magazines, unless with the consent of the publisher.

4. TRADE-MARKS AND TRADE-NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW VOL. 8A KEY-NO. SERIES—EMPLOYMENT OF EXCLUSIVE AGENTS IS NOT "UNFAIR COMPETITION."

The employment of competent agents obligated to devote their entire time and attention to developing the principal's business, to the exclusion of all others, where nothing else appears, is not unfair competition, within Federal Trade Commission Act par. 5 (Comp. St., par. 8836e).

(The syllabus is taken from 43 Sup. Ct. 210.)

On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Complaint by the Federal Trade Commission against the Curtis Publishing Company. An order of the Commission requiring the company to desist from entering into certain contracts or enforcing certain provisions of outstanding contracts was set aside by the Circuit Court of Appeals (270 Fed. 881), and the Commission brings certiorari. Affirmed.

Mr. Chief Justice Taft and Mr. Justice Brandeis, doubting.

Mr. Solicitor General Beck and Adrien F. Busick, both of Washington, D. C., for petitioner.

Mr. John G. Milburn, of New York City, for respondent.

Mr. Justice McREYNOLDS delivered the opinion of the court.

The court below entered a decree setting aside an order of the Trade Commission, dated July 21, 1919, which directed respondent Publishing Company to cease and desist from entering into or enforcing agreements prohibiting wholesalers from selling or distributing the magazines or newspapers of other publishers. 270 Fed. 881. And the cause is here by certiorari.

The Commission issued an original complaint July 5, 1917, based mainly on a restrictive clause in existing contracts with so-called district agents. Thereafter, re-

spondent changed its agreement. An amended complaint followed, which amplified the original allegations and attacked the second contract and consequent conditions.

The first section of the amended complaint declares there is reason to believe that respondent has been and is using unfair methods of competition contrary to section 5, act of Congress approved September 26, 1914, c. 311, 38 Stat. 717,¹ and specifically charges: That respondent, a Pennsylvania corporation with principal place of business at Philadelphia, has long engaged in publishing, selling, and circulating weekly and monthly periodicals in interstate commerce. That with intent, purpose, and effect of suppressing competition in the publication, sale, and circulation of periodicals it now refuses and for some months past has refused to sell its publications to any dealer who will not agree to refrain from selling or dis-

¹ Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

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

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

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

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for 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.

tributing those of certain competitors to other dealers or distributors. That with the same intent, purpose, and effect it is making and for several months last past has made contracts with numerous wholesalers to distribute its periodicals as agents, and not to distribute those of other publishers without permission. That wholesalers so restricted are the principal and often the only medium for proper distribution of weekly and monthly periodicals in various localities throughout the United States, and many of the so-called agents formerly operated under contracts with respondent which abridged their liberty of resale.

The second section declares there is reason to believe respondent is violating section 3, act of Congress approved October 15, 1914—Clayton Act—c. 323, 38 Stat. 730,² and specifically charges: That respondent publishes, sells, and circulates weekly and monthly periodicals in interstate commerce. That for some months past, in such commerce, it has sold and is now selling and making contracts for the sale of its publications and periodicals for use and resale and is fixing the price charged on condition, agreement, or understanding that the purchaser shall not sell other publications or periodicals, thereby substantially lessening competition and tending to create a monopoly.

Respondent replied to the notice to show cause why it should not be required to desist "from the violations of law charged in this complaint." It denied unlawful conduct and claimed that the parties contracted with as agents were such in fact; that their services were necessary for the maintenance of the plan originated by it of distributing publications through schoolboys, who require special superintendence; and further, that such agents had lawfully agreed to abstain from other connections and devote their time and attention to superintending the boys and to the general upbuilding of sales. Copies of respondent's first and second agreements with distributors accompanied the answer. The first had then been superseded and largely discontinued.

The second contract provides that upon requisition respondent will consign its publications to the agent as he

² 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.

Section 11 authorizes the Trade Commission to enforce section 3, with certain exceptions, and directs that this shall be done as prescribed by the act establishing the commission, *supra*, with like power of review in the courts.

may require, retaining title until they are sold; that the agent will supply the demand of boys and dealers at specified prices; will use reasonable efforts and devote all necessary time to promoting the sales of such publications; "that without the written consent of the publisher he will not display, deliver, or sell any copies of any one of said publications before the authorized publication date, as specified in the printed requisition blanks, or dispose of any copies of said publications in the territory of any other district agent or special agent of the publisher, or *act as agent for or supply at wholesale rates any periodicals other than those published by the publisher*, or directly or indirectly furnish to any other publisher or agent the names and addresses of the persons to whom the publisher's publications are sold or delivered"; that subject to the principal's direction and control the agent shall train, instruct, and supervise an adequate force of boys for distributing the publications; and that he will return unsold copies, their cover pages, or headings.

After taking much testimony—2,500 pages—the Commission made a brief and rather vague report of two pages, containing findings and conclusions based on the second contract with dealers and without direct reference to the earlier one. The substance of the report follows.

"PARAGRAPH 1. Respondent, a Pennsylvania corporation with principal place of business at Philadelphia, is engaged in publishing, selling and distributing weekly and monthly periodicals among the States.

"PAR. 2. That in the course of such commerce, the respondent has entered into contracts with certain persons, partnerships, or corporations to sell or distribute its magazines, by the terms of which contracts, such persons, partnerships, or corporations have agreed among other things, *not to 'act as agent for or supply at wholesale rates any periodicals other than those published by the publisher'—the respondent herein—without the written consent of such publisher; that of such persons, partnerships, or corporations approximately four hundred forty-seven (447), hereinafter referred to as 'dealers,' are and previous to entering into such contracts with respondent were regularly engaged in the business of wholesale dealers in newspapers or magazines, or both, and as such are as aforesaid engaged in the sale or distribution of magazines, or newspapers, or both, of other publishers; that many of said four hundred forty-seven (447) dealers, and many others who have become such wholesale dealers since entering into such contracts, bound by said contract provisions as aforesaid, have requested respondent's permission to engage also in the sale or distribution of certain publications competing in the course*

* These words are quoted from the second contract.

of said commerce, with those of respondent, which permission as to said competing publications has been uniformly denied by respondent; that in enforcing said contract provision as to said dealers, and in denying them said permission, respondent has prevented and now prevents certain of its competitors from utilizing established channels for the general distribution or sale of magazines or newspapers, or both, of different and sundry publishers; that such established channels are in most instances the principal and most efficient, and in numerous cases, the only medium for the distribution of such publications in the various localities of the United States; that such method of competition so employed by respondent in the course of such commerce, as aforesaid, has proved and is unfair.

“PAR. 3. That in the course of such commerce, the respondent has made sales of its magazines to or entered into contracts for the sale of the same with certain persons, partnerships, or corporations, by the terms of which sales or contracts for such sales, such persons, partnerships, or corporations have agreed, among other things” (here follow, without material change, the words of paragraph 2 printed, *supra*, in italics); “that the effect of said contract provision has been, and is, to substantially lessen competition with respondent’s magazines and tends to create for the respondent a monopoly in the business of publishing magazines of the character of those published by respondent.”

The Commission concluded that the method of competition described in paragraph 2 of the report violates section 5, act of September 26, 1914, and that the acts and conduct specified in the third paragraph violate section 3, act of October 15, 1914. And it thereupon ordered: That the respondent cease and desist, while engaged in interstate commerce, from entering into any contracts, agreements, or understandings which forbid persons, partnerships, or corporations already engaged in the sale or distribution of magazines or newspapers, or both, of other publishers from acting as agents for, selling, or supplying to others at wholesale rates periodicals other than respondent’s without its consent; from contracting with those already engaged in the sale or distribution of magazines or newspapers, or both, of other publishers, forbidding them from selling or distributing or continuing to sell or distribute the same; and from enforcing any provision of an outstanding contract whereby one now engaged in the sale or distribution of magazines or newspapers, or both, of other publishers is forbidden to sell or distribute the same without respondent’s permission.

The statute provides (sec 5) that when the Commission’s order is duly challenged it shall file a transcript of the record, and thereupon the court shall have jurisdiction of the proceedings and the question determined

therein and shall have power to make and enter, upon the pleadings, testimony and proceedings, a decree affirming, modifying, or setting aside the order; but the Commission's findings as to the facts, if supported by evidence, shall be conclusive. The court is also empowered to order the taking of additional evidence for its consideration.

We have heretofore pointed out that the ultimate determination of what constitutes unfair competition is for the court, not the Commission; and the same rule must apply when the charge is that leases, sales, agreements, or understandings substantially lessen competition or tend to create monopoly. *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427.

Manifestly, the court must inquire whether the Commission's findings of fact are supported by evidence. If so supported, they are conclusive. But as the statute grants jurisdiction to make and enter, upon the pleadings, testimony, and proceedings, a decree affirming, modifying or setting aside an order, the court must also have power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission. If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think should be remanded to the Commission—the primary fact-finding body—with direction to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay the court has full power under the statute so to do. The language of the statute is broad and confers power of review not found in the interstate commerce act. *Louisville and Nashville Railroad Company v. Behlmer*, 175 U. S. 648, 675, 676; *Interstate Commerce Commission v. Clyde Steamship Company*, 181 U. S. 29, 32; and *Interstate Commerce Commission v. Chicago, Burlington and Quincy Railroad Company*, 186 U. S. 320, 340, while helpful as to proper practice, do not determine the present problem.

Here we find a vague general complaint charging unfair methods of competition and also sales and contracts for sales on condition that the purchaser shall not deal in other publications. This is followed by an answer setting out the original agreement with dealers and also the substituted form. The findings of fact make no reference whatever to the first agreement, but do show that respondent had entered into the second (quoting its language) with "certain" (no number is given but there were 1,535) persons, partnerships, and corporations, approximately 447 of whom before making such contracts were wholesale dealers in newspapers and magazines. Further, that many of this 447, as well as other parties to such contracts, have been denied permission to dis-

tribute the periodicals of other publishers. And that in these ways the most efficient established channels of distribution have been closed to competitors, competition lessened, and a tendency to monopoly established.

The present record clearly discloses the development of respondent's business, how it originated, the plan of selling through school boys, the necessity for exclusive agents to train and superintend these boys and to devote their time and attention to promoting sales, and also contracts with 1,535 such agents. The Commission's report suggests no objection as to 1,088 of these representatives who, prior to their contracts, had not been engaged in selling and distributing newspapers or periodicals for other publishers. There is no sufficient evidence to show that respondent intended to practice unfair methods or unduly to suppress competition or to acquire monopoly, unless this reasonably may be inferred from making and enforcing the second or substituted agreement with many important wholesale dealers throughout the country.

Judged by its terms, we think this contract is one of agency, not of sale upon condition, and the record reveals no surrounding circumstances sufficient to give it a different character. This, of course, disposes of the charges under the Clayton Act.

The engagement of competent agents obligated to devote their time and attention to developing the principal's business, to the exclusion of all others, where nothing else appears, has long been recognized as proper and unobjectionable practice. The evidence clearly shows that respondent's agency contracts were made without unlawful motive and in the orderly course of an expanding business. It does not necessarily follow because many agents had been general distributors, that their appointment and limitation amounted to unfair trade practice. And such practice can not reasonably be inferred from the other disclosed circumstances. Having regard to the undisputed facts, the reasons advanced to vindicate the general plan are sufficient.

Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face. The mere selection of competent, successful, and exclusive representatives in the orderly course of development can give no just cause for complaint, and, when standing alone, certainly affords no ground for condemnation under the statute.

In the present cause the Commission has not found all the material facts, but considering those which it has found and the necessary effect of the evidence, the order to desist is clearly wrong and should be set aside without further delay.

Affirmed.

Mr. Chief Justice Taft, doubting.

The sentence in the majority opinion, which makes me express doubt, is that discussing the duty of the court in reviewing the action of the Federal Trade Commission when it finds that there are material facts not reported by the Commission. The opinion says:

"If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be remanded to the Commission—the primary fact-finding body—with directions to make additional findings, but if from all the circumstances, it clearly appears that in the interest of justice the controversy should be decided without delay, the court has full power under the statute so to do."

If this means that where it clearly appears that there is no substantial evidence to support additional findings necessary to justify the order of the Commission complained of, the court need not remand the case for further findings, I concur in it. It is because it may bear the construction that the court has discretion to sum up the evidence pro and con on issues undecided by the Commission and make itself the fact-finding body, that I venture with deference to question its wisdom and correctness. I agree that in the further discussion of the evidence, the reasoning of the opinion of the court would seem to justify the view that it does not find in the evidence sufficient to support additional findings by the Commission justifying its order. I only register this doubt because I think it of high importance that we should scrupulously comply with the evident intention of Congress that the Federal Trade Commission be made the fact-finding body and that the court should in its rulings preserve the board's character as such and not interject its views of the facts where there is any conflict in the evidence.

I am authorized to say that Mr. Justice Brandeis concurs with me in this.



APPENDIX III.

RULES OF PRACTICE BEFORE THE COMMISSION.

[Adopted June 17, 1915. As amended to Jan. 14, 1924.]

I. SESSIONS.

The principal office of the Commission at Washington, D. C., is open each business day from 9 a. m. to 4.30 p. m. Principal office.
The Commission may meet and exercise all its powers at any other place, and may, by one or more of its members, Commission may exercise power elsewhere.
or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

Sessions of the Commission for hearing contested proceedings will be held as ordered by the Commission. Hearings as ordered.

Sessions of the Commission for the purpose of making orders and for the transaction of other business, unless otherwise ordered, will be held at the office of the Commission at Washington, D. C., on each business day at 10.30 a. m. Three members of the Commission shall constitute a quorum for the transaction of business. Sessions for orders and other business. Quorum.

All orders of the Commission shall be signed by the Secretary. Orders signed by Secretary.

II. COMPLAINTS.

Any person, partnership, corporation, or association may apply to the Commission to institute a proceeding in respect to any violation of law over which the Commission has jurisdiction. Who may ask complaint.

Such application shall be in writing, signed by or in behalf of the applicant, and shall contain a short and simple statement of the facts constituting the alleged violation of law and the name and address of the applicant and of the party complained of. Form of application.

The Commission shall investigate the matters complained of in such application, and if upon investigation the Commission shall have reason to believe that there is a violation of law over which the Commission has jurisdiction, the Commission shall issue and serve upon the party complained of a complaint stating its charges and containing a notice of a hearing upon a day and at Commission to investigate. Issuance and service of complaint.

Notice. a place therein fixed, at least 40 days after the service of said complaint.

III. ANSWERS.

Time allowed for answer. Within 30 days from the service of the complaint, unless such time be extended by order of the Commission, the defendant shall file with the Commission an answer to the complaint. Such answer shall contain a short and simple statement of the facts which constitute the ground of defense. It shall specifically admit or deny or explain each of the facts alleged in the complaint, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Answers in typewriting must be on one side of the paper only, on paper not more than $8\frac{1}{2}$ inches wide and not more than 11 inches long, and weighing not less than 16 pounds to the ream, folio base, 17 by 22 inches, with left-hand margin not less than $1\frac{1}{2}$ inches wide, or they may be printed in 10 or 12 point type on good unglazed paper 8 inches wide by $10\frac{1}{2}$ inches long, with inside margins not less than 1 inch wide. Three copies of such answers must be furnished.

Form of answer.

Size of paper, margin, etc.

IV. SERVICE.

Complaints, orders, and other processes of the Commission may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer, or a director, of the corporation or association to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, corporation, or association; or (c) by registering and mailing a copy thereof addressed to such person, partnership, corporation, or association at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other 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.

Personal, or

By leaving copy, or

By registered mail.

Return.

V. INTERVENTION.

Any person, partnership, corporation, or association desiring to intervene in a contested proceeding shall make application in writing, setting out the grounds on which he or it claims to be interested. The Commission may, by order, permit intervention by counsel or in person to such extent and upon such terms as it shall deem just.

Form of application.

Permitted by order.

Applications to intervene must be on one side of the paper only, on paper not more than 8½ inches wide and not more than 11 inches long, and weighing not less than 16 pounds to the ream, folio base, 17 by 22 inches, with left-hand margin not less than 1½ inches wide, or they may be printed in 10 or 12 point type on good unglazed paper 8 inches wide by 10½ inches long, with inside margins not less than 1 inch wide.

Size of paper, margin, etc., used on application.

VI. CONTINUANCES AND EXTENSIONS OF TIME.

Continuances and extensions of time will be granted at the discretion of the Commission.

In discretion of Commission.

VII. WITNESSES AND SUBPŒNAS.

Witnesses shall be examined orally, except that for good and exceptional cause for departing from the general rule the Commission may permit their testimony to be taken by deposition.

Examination ordinarily oral.

Subpœnas requiring the attendance of witnesses from any place in the United States at any designated place of hearing may be issued by any member of the Commission.

Subpœnas for witnesses.

Subpœnas for the production of documentary evidence (unless directed to issue by a commissioner upon his own motion) will issue only upon application in writing, which must be verified and must specify, as near as may be, the documents desired and the facts to be proved by them.

Subpœnas for production of documentary evidence.

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 and mileage shall be paid by the party at whose instance the witnesses appear.

Witness fees and mileage.

VIII. TIME FOR TAKING TESTIMONY.

Examination of witnesses to proceed as fast as practicable.

Notice to counsel.

Upon the joining of issue in a proceeding by the Commission the examination of witnesses therein shall proceed with all reasonable diligence and with the least practicable delay. Not less than five days' notice shall be given by the Commission to counsel or parties of the time and place of examination of witnesses before the Commission, a commissioner, or an examiner.

IX. OBJECTIONS TO EVIDENCE.

To state grounds of objection, etc.

Objections to the evidence before the Commission, a commissioner, or an examiner shall, in any proceeding, be in short form, stating the grounds of objections relied upon, and no transcript filed shall include argument or debate.

X. MOTIONS.

To briefly state nature of order applied for, etc.

A motion in a proceeding by the Commission shall briefly state the nature of the order applied for, and all affidavits, records, and other papers upon which the same is founded, except such as have been previously filed or served in the same proceeding, shall be filed with such motion and plainly referred to therein.

XI. HEARINGS ON INVESTIGATIONS.

By single commissioner.

When a matter for investigation is referred to a single commissioner for examination or report, such commissioner may conduct or hold conferences or hearings thereon, either alone or with other commissioners who may sit with him, and reasonable notice of the time and place of such hearings shall be given to parties in interest and posted.

General counsel or assistant to conduct hearing.

The general counsel or one of his assistants, or such other attorney as shall be designated by the Commission, shall attend and conduct such hearings, and such hearings may, in the discretion of the commissioner holding same, be public.

XII. HEARINGS BEFORE EXAMINERS.

Examiner to take testimony.

When issue in the case is set for trial, it shall be referred to an examiner for the taking of testimony. It shall be the duty of the examiner to complete the taking of testimony with all due dispatch, and he shall set the day and hour to which the taking of testimony may from time to time be adjourned. The taking of the testimony both for the Commission and the respondent shall be completed within 30 days after the beginning of the same

Testimony to be completed within 30 days except for good cause.

unless, for good cause shown, the Commission shall extend the time. The examiner shall, within 10 days after the receipt of the stenographic report of the testimony, make his report on the facts, and shall forthwith serve copy of the same on the parties or their attorneys, who, within 10 days after the receipt of same, shall file in writing their exceptions, if any, and said exceptions shall specify the particular part or parts of the report to which exception is made, and said exceptions shall include any additional facts which either party may think proper. Seven copies of exceptions shall be filed for the use of the Commission. Citations to the record shall be made in support of such exceptions. Where briefs are filed, the same shall contain a copy of such exceptions. Argument on the exceptions, if exceptions be filed, shall be had at the final argument on the merits.

Examiner to make and serve proposed findings and order.

Exceptions by parties.

Briefs and argument on exceptions.

When, in the opinion of the trial examiner engaged in taking testimony in any formal proceeding, the size of the transcript or complication or importance of the issues involved warrants it, he may of his own motion or at the request of counsel at the close of the taking of testimony announce to the attorneys for the respondent and for the Commission that the examiner will receive at any time before he has completed the drawing of the "Trial Examiner's Report upon the Facts" a statement in writing (one for either side) in terse outline setting forth the contentions of each as to the facts proved in the proceeding.

Examiner under certain circumstances to receive from each side statement of its contentions after testimony and before his report.

These statements are not to be exchanged between counsel and are not to be argued before the trial examiner.

Any tentative draft of finding or findings submitted by either side shall be submitted within 10 days after the closing of the taking of testimony and not later, which time shall not be extended.

Time allowance for submission of tentative findings.

XIII. DEPOSITIONS IN CONTESTED PROCEEDINGS.

The Commission may order testimony to be taken by deposition in a contested proceeding.

Commission may order.

Depositions may be taken before any person designated by the Commission and having power to administer oaths.

Before any person designated.

Any party desiring to take the deposition of a witness shall make application in writing, setting out the reasons why such deposition should be taken, and stating the time when, the place where, and the name and post-office address of the person before whom it is desired the depo-

Applications for depositions.

sition be taken, the name and post-office address of the witness, and the subject matter or matters concerning which the witness is expected to testify. If good cause be shown, the Commission will make and serve upon the parties, or their attorneys, an order wherein the Commission shall name the witness whose deposition is to be taken and specify the time when, the place where, and the person before whom the witness is to testify, but such time and place, and the person before whom the deposition is to be taken, so specified in the Commission's order, may or may not be the same as those named in said application to the Commission.

Testimony of witness.

The testimony of the witness shall be reduced to writing by the officer before whom the deposition is taken, or under his direction, after which the deposition shall be subscribed by the witness and certified in usual form by the officer. After the deposition has been so certified

Deposition to be forwarded.

it shall, together with a copy thereof made by such officer or under his direction, be forwarded by such officer under seal in an envelope addressed to the Commission at its office in Washington, D. C. Upon receipt of the deposition and copy the Commission shall file in the record in said proceeding such deposition and forward the copy to the defendant or the defendant's attorney.

And filed. Copy to defendant or his attorney.

Size of paper, etc.

Such depositions shall be typewritten on one side only of the paper, which shall be not more than 8½ inches wide and not more than 11 inches long and weighing not less than 16 pounds to the ream, folio base, 17 by 22 inches, with left-hand margin not less than 1½ inches wide.

Notice.

No deposition shall be taken except after at least six days' notice to the parties, and where the deposition is taken in a foreign country such notice shall be at least 15 days.

Limitations as to time.

No deposition shall be taken either before the proceeding is at issue, or, unless under special circumstances and for good cause shown, within 10 days prior to the date of the hearing thereof assigned by the Commission, and where the deposition is taken in a foreign country it shall not be taken after 30 days prior to such date of hearing.

XIV. DOCUMENTARY EVIDENCE.

Relevant and material matter only to be filed.

Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evi-

dence, such document will not be filed, but a copy only of such relevant and material matter shall be filed.

XV. BRIEFS.

Unless otherwise ordered, briefs may be filed at the close of the testimony in each contested proceeding. If briefs are filed, the exceptions, if any, to the examiner's report must be incorporated in the briefs. The presiding Commissioner or examiner shall fix the time within which briefs shall be filed and service thereof shall be made upon the adverse parties. Time of filing.

All briefs must be filed with the secretary and be accompanied by proof of service upon the adverse parties. Filed with secretary with proof of service. Twenty copies of each brief shall be furnished for the use of the Commission, unless otherwise ordered.

Application for extension of time in which to file any brief shall be by petition in writing, stating the facts upon which the application rests, which must be filed with the Commission at least five days before the time for filing the brief. Applications for extension of time

Every brief shall contain, in the order here stated— Form of brief.

(1) A concise abstract or statement of the case.

(2) A brief of the argument, exhibiting a clear statement of the points of fact or law to be discussed, with the reference to the pages of the record and the authorities relied upon in support of each point.

Every brief of more than 10 pages shall contain on its top fly leaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where the cases are cited. Requirements if more than 10 pages.

Briefs must be printed in 10 or 12 point type on good unglazed paper 8 inches by 10½ inches, with inside margins not less than 1 inch wide and with double-ledged text and single-ledged citations. Size of type, paper, etc.

Oral arguments will be had only as ordered by the Commission. Oral arguments.

XVI. ADDRESS OF THE COMMISSION.

All communications to the Commission must be addressed to Federal Trade Commission, Washington, D. C., unless otherwise specifically directed. Federal Trade Commission, Washington, D.C.

