

Complaint.

FEDERAL TRADE COMMISSION

v.

INTERSTATE FUEL COMPANY AND WHITE ASH COAL COMPANY.

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

Docket 1074—July 8, 1924.

SYLLABUS.

Where coal mined at Mount Olive, Ill., and in a small district contiguous thereto had long been known to and designated by the trade and a substantial part of the consuming public as "Mount Olive Coal" and as such had been extensively advertised and sold and had become well and favorably known to a substantial part of the consuming public; and thereafter two corporations engaged in the purchase and sale of coal, sold coal not produced at Mount Olive nor in the aforesaid district, as "Guaranteed Mount Olive Coal," "Coal Mount Olive Grade," and "Mount Olive White Ash Coal," and so advertised the same in competition with the genuine and more expensive Mount Olive Coal; with the capacity and tendency to mislead and deceive purchasers in reference to the source thereof:

Held, That such misleading designation of product, and such false and misleading advertising, under the circumstances set forth, constituted unfair methods of competition.

Mr. O. R. Stites for the Commission.

Ropiequet & Ropiequet of St. Louis, Mo., for respondents.

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 Interstate Fuel Company, a corporation, and White Ash Coal Company, a corporation, more particularly hereinafter described and 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, issues this complaint and states its charges in that respect as follows:

PARAGRAPH 1. Respondent, Interstate Fuel Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business in the city of St. Louis, in said State. Respondent was at all times hereinafter mentioned, and still is, engaged in the pur-

Complaint.

7 F. T. C.

chase and sale of coal in wholesale and retail quantities in interstate commerce. In the course and conduct of its said business, said respondent for the purpose and with the intent of filling orders, executing contracts and supplying its customers, purchases its said coal from a company or companies located in a State or States other than the State of Missouri and transports or causes said coal to be transported in interstate commerce from the point of purchase to purchasers residing in the State of Missouri and/or other States of the United States, and there is now and was at all times hereinafter mentioned, a constant current of trade and commerce in said coal purchased and sold by said respondent between and among various States of the United States. In the course and conduct of its said business, respondent continuously has been, and is now, in competition with other individuals, partnerships and corporations similarly engaged in the sale of coal in commerce among the States of the United States.

PAR. 2. Respondent, White Ash Coal Company, its corporate name having been previously changed from White Oak Fuel Company by amendment to charter, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business in the city of St. Louis, in said State. Respondent was at all times hereinafter mentioned, and still is, engaged in the business of selling coal as a wholesale merchant or jobber among and between various States of the United States, and there is now, and was at all times hereinafter mentioned, a constant current of trade and commerce in said coal sold by said respondent between and among various States of the United States. In the course and conduct of its said business, respondent continuously has been, and is now, in competition with other individuals, partnerships and corporations similarly engaged in the sale of coal in commerce among the States of the United States.

PAR. 3. Respondent, Interstate Fuel Company, trading as aforesaid, at all times hereinafter mentioned, has offered for sale and sold in interstate commerce its coal under the trade name or brand "Mt. Olive," "Mt. Olive Grade," and "Guaranteed Mt. Olive Coal," which said coal is sold by respondent in competition with coal mined at Mt. Olive, Ill., or the immediate coal district or section, including, in whole or in part, the counties of Macoupin and Madison, in said State, but not including that portion of the said Madison County wherein respondent's coal is mined, said coal known and understood by a substantial part of the purchasing public as "Mt. Olive coal"; that said coal sold by respondent has a lower market value than the

coal produced at the Mt. Olive mines, or the mines of said immediate district or section; that the sale by said respondent of its said coal as "Mt. Olive," "Mt. Olive Grade" and "Guaranteed Mt. Olive Coal," has the capacity and tendency to mislead and deceive the purchaser into the belief that said coal was, and is, the product of the Mt. Olive mines, when in truth and in fact said coal is not the product of the said Mt. Olive mines or the mines of said immediate district or section.

PAR. 4. Respondent, Interstate Fuel Company, as a means of inducing customers, prospective customers and the consuming public to purchase its coal, caused advertisements to be inserted in newspapers published in the city of St. Louis, State of Missouri, and circulated in commerce between and among the States of the United States, in which said advertisements and other advertising matter said respondent has published false and misleading statements or representations concerning its said coal, in which said advertisements and advertising matter its said coal was and is described as "Mt. Olive Grade" and "Guaranteed Mt. Olive Coal," when in truth and in fact said coal is not the product of said mines located at or near Mt. Olive, Ill., generally recognized and understood by a substantial part of the purchasing public as marketing its said coal under the trade name or brand "Mt. Olive."

PAR. 5. Respondent, White Ash Coal Company, trading as aforesaid, at all times hereinafter mentioned, has offered for sale and sold in interstate commerce, its coal under the trade name or brand "Mt. Olive" or "Mt. Olive White Ash," which said coal is sold by said respondent in competition with coal mined at Mt. Olive, Ill., or the immediate coal district or section, including, in whole or in part, the counties of Macoupin and Madison, in said State, but not including that portion of the said Madison County wherein respondent's coal is mined, known and understood by a substantial part of the purchasing public as Mt. Olive coal; that said coal sold by respondent has a lower market value than the coal produced at the Mt. Olive mines, or the mines of said immediate district or section; that the sale by said respondent of its said coal as "Mt. Olive" or "Mt. Olive White Ash" has the capacity and tendency to mislead and deceive the purchaser into the belief that said coal was and is the product of the Mt. Olive mines, when in truth and in fact said coal is not the product of said Mt. Olive mines or the mines of the said immediate district or section.

PAR. 6. Respondents, Interstate Fuel Company and White Ash Coal Company, trading as aforesaid, at all times hereinafter men-

Findings.

7 F. T. C.

tioned, severally and/or cooperating together each with the other, offered for sale, sold and advertised in interstate commerce their said coal under the trade name or brand "Mt. Olive," "Mt. Olive White Ash," "Mt. Olive Grade," and "Guaranteed Mt. Olive Coal," in competition with coal mined at Mt. Olive, Ill., or the immediate coal district or section, including, in whole or in part, the counties of Macoupin and Madison, in said State, but not including that portion of the said Madison County wherein respondents' coal is mined, the use by said respondents of said trade names or brands in the sale of their coal, has the capacity and tendency to mislead and deceive the purchaser into the belief that said coal was the product of the Mt. Olive mines, when in truth and in fact the said coal sold by said respondents is not the product of said Mt. Olive mines or the mines of said immediate district or section.

PAR. 7. The words "Mt. Olive" when used by respondents as their trade name or brand in the sale of their coal or the use of the words "Mt. Olive" in connection with or in any way descriptive of their said coal, have been and are understood by a substantial part of the purchasing public to mean coal mined at Mt. Olive, Ill., or the immediate coal district or section, including in whole or in part the counties of Macoupin and Madison, in said State, but not including the product of mines located at Edwardsville in the said Madison County, Ill. The use by respondents of the words "Mt. Olive" or "Mt. Olive White Ash" as their trade name or brand have the capacity and tendency to mislead and deceive the purchaser into the belief that said coal was and is the product of the Mt. Olive mines, when in truth and in fact said coal sold by said respondents is not the product of said mines or the mines of said immediate district or section.

PAR. 8. The above alleged acts and things done by respondents are all to the prejudice of the public, and of respondents' competitors, and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER.

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission issued and served a complaint upon the respondents, Interstate Fuel Company and White Ash Coal Com-

pany, charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act.

The respondent White Ash Coal Company having entered its appearance and filed its answer herein, evidence was thereupon introduced in support of the allegations of the complaint and on behalf of respondent White Ash Coal Company, before an examiner of the Federal Trade Commission. Thereupon, this proceeding came on for final hearing, and the Commission having duly considered the complaint, the answer thereto and the evidence adduced, and being fully advised in the premises, makes this its report stating its findings as to the facts and conclusion:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. Respondent, Interstate Fuel Company, is a corporation organized under the laws of Missouri, and had its principal office and place of business in St. Louis, Mo. It was incorporated in August, 1921, and from said date until March 3, 1923, when it ceased to do business, was engaged in purchasing and selling coal in interstate commerce. It solicited orders from customers in the city of St. Louis, Mo., and purchased coal to fill same from mines located at Edwardsville and Collinsville, in the State of Illinois, and caused the coal so purchased to be transported by motor truck direct from the aforesaid mines to its customers in St. Louis, Mo. In the course and conduct of its business respondent was, until March 3, 1923, in competition with other persons, partnerships and corporations engaged in the retail selling of coal in St. Louis, Mo., including those retail dealers selling coal which was produced at Mount Olive and Staunton, in the State of Illinois.

PAR. 2. Respondent White Ash Coal Company is a corporation organized and existing under the laws of Missouri, with its office and principal place of business in St. Louis, Mo. For a period of nine years last past it has been and still is engaged in the business of buying coal and reselling same to retail coal dealers and carlot consumers throughout the several States of the United States. It causes coal so sold to be transported from Edwardsville, in the State of Illinois, direct to the aforesaid purchasers. In the conduct of its business said respondent has been and still is in competition with other individuals, partnerships and corporations likewise engaged in business, including those dealers selling coal which was produced at Mount Olive and Staunton, in the State of Illinois.

PAR. 3. In the conduct of its business as aforementioned, respondent, Interstate Fuel Company, obtained its supply of coal from

Findings.

7 F. T. C.

mines located at Collinsville and Edwardsville, in the State of Illinois. It advertised in St. Louis newspapers and sold the coal so obtained under the trade name and brand "Guaranteed Mount Olive Coal" and "Coal Mount Olive Grade," in competition with coal mined at Mount Olive, Ill., or that immediate district known to the trade and purchasing public as the "Mount Olive District."

PAR. 4. Respondent White Ash Coal Company, in the conduct of its business, obtains its supply of coal from the aforementioned Madison County Mining Company, at the latter's mine located at Edwardsville, Ill. It has, from time to time since 1916, advertised and still advertises in St. Louis telephone directories, and has otherwise, by means of curculars sent by mail to prospective purchasers, offered for sale and offers for sale, and has sold and still sells, coal so obtained under the trade name or brand, "Mount Olive White Ash Coal." Some of the aforementioned advertisements and circulars have contained, in inconspicuous type, the statement, "Mined at Edwardsville, Illinois." Respondent White Ash Coal Company, in the conduct of its business as herein described has sold and sells its coal in competition with coal produced at Mount Olive and Staunton, in the State of Illinois.

PAR. 5. For more than forty years last past there has been produced and still is produced at Mount Olive, Ill., and in a small district contiguous to the said Mount Olive, including Staunton, in the State of Illinois, a coal having peculiar characteristics of fracture and composition which has become known to and designated by the trade and a substantial part of the consuming public as "Mount Olive Coal." Throughout the period aforementioned, coal produced at mines located in the said district has been extensively advertised and sold and is still advertised and sold as "Mount Olive Coal." The coal from the aforementioned mines has become well and favorably known to a substantial part of the consuming public because of the aforesaid advertising and sales and because of its high quality and the degree of care exercised by its producers in eliminating impurities therefrom. "Mount Olive Coal" has a higher market value than coal produced at Edwardsville, in the State of Illinois.

PAR. 6. Coal mined at Edwardsville, and Collinsville, Ill., has never been designated as, or understood to be, "Mount Olive Coal," by the trade, or by a substantial part of the purchasing public. Coal produced at Edwardsville and Collinsville is generally regarded by the trade and purchasing public as inferior in quality to the aforesaid Mount Olive Coal.

PAR. 7. The words "Mount Olive" as used by respondents as descriptive of the coal sold by them, as hereinbefore set out, have the capacity and tendency to mislead and deceive purchasers into the belief that the coal so advertised and sold is the product of mines at Mount Olive and Staunton, when, in truth, the coal advertised and sold by the respondents is not the product of the Mount Olive and Staunton mines.

CONCLUSION.

The acts and practices of the respondents as hereinabove set forth and under the conditions and circumstances set forth in the foregoing findings as to the facts, are unfair methods of competition in commerce and constitute a violation of Section 5 of the Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent White Ash Coal Company, and the testimony and evidence submitted, the trial examiner's report upon the facts and the exceptions thereto, and the Commission having made its findings as to the facts with its conclusion that the respondent has violated the provisions of the Act of Congress Approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,"

Now, therefore, it is ordered, That the respondent, Interstate Fuel Company, a corporation organized under the laws of Missouri, its agents, servants, representatives and employes, and the respondent White Ash Coal Company, a corporation organized and existing under and by virtue of the laws of Missouri, its agents, servants, representatives and employes, cease and desist from—

Making use of, by advertisement or otherwise, the words "Mount Olive," alone or in combination with other words in any way whatsoever, in connection with the sale or offering for sale of coal in commerce, unless the said coal is produced at mines located at Mount Olive, Ill., or within a small district contiguous thereto, including Staunton, in the aforesaid State.

ORDERS OF DISMISSAL.

CONSOLIDATED WOOLEN MILLS Co., November 8, 1923 (Docket 1003).

Charge: Adopting and using misleading corporate name, and advertising falsely and misleadingly; in connection with the manufacture and sale of knitted underwear, sweaters, hosiery, etc., and sale of blankets, overcoats, etc.

Dismissed, after answer and trial, Commissioner Nugent dissenting, for the reason that respondent "Consolidated Woolen Mills Co., has amended its articles of incorporation so as to change its name to 'Consolidated Knitting Mills Co.'"

Appearances: *Mr. G. Ed. Rowland* for the Commission; *Mr. H. A. Rich* of Rich & Roberts, Salt Lake City, Utah, for respondent.

C. H. KRONEBERGER & Co., November 13, 1923 (Docket 508).

Charge: Tying and exclusive contracts or dealings in violation of Section 5 of the Federal Trade Commission Act; in connection with the sale of coffee.

Dismissed by the following order:

"Whereas, an order to cease and desist was heretofore, to-wit, on the 26th day of May, 1920, entered by the Federal Trade Commission in the above-entitled case, [see 2 F. T. C. 399] and

"Whereas, the Federal Trade Commission has reconsidered its report containing its findings as to the facts and its conclusions in said case, and the Commission being fully advised in the premises,

"Now, therefore, it is ordered, that the order to cease and desist entered in the above-entitled proceedings on the 26th day of May, A. D., 1920, be, and the same is hereby, rescinded and vacated, and the complaint dismissed."

Appearances: *Mr. Gaylord R. Hawkins* for the Commission; *Mr. Henry Zoller, Jr.* of Baltimore, Md., for respondent.

THE JOHN H. WILKINS Co., INC., November 13, 1923 (Docket 509).

Charge: Tying and exclusive contracts or dealings in violation of Section 5 of the Federal Trade Commission Act; in connection with the sale of coffee.

Dismissed by an order identical with that entered in the Kroneberger case, immediately above. [See 2 F. T. C. 403]

Appearances: *Mr. Gaylord R. Hawkins* for the Commission; *Mr. Frank J. Hogan* of Washington, D. C., for respondent.

THE LEVERING COFFEE Co., November 13, 1923 (Docket 510).

Charge: Tying and exclusive contracts or dealings in violation of Section 5 of the Federal Trade Commission Act; in connection with the sale of coffee.

Dismissed by an order identical with that entered in the Kroneberger case, immediately above but one. [See 2 F. T. C. 407]

Appearances: *Mr. Gaylord R. Hawkins* for the Commission.

ABRAHAM COHEN, DOING BUSINESS AS PURITAN PRODUCTS Co., INC., November 26, 1923 (Docket 979).

Charge: Simulation of trade name, labels and containers of a competitor; in connection with the manufacture and sale of a salad and cooking oil.

Dismissed by the following order:

Dismissed without prejudice for the reason that respondent "has discontinued business, and that his whereabouts, after diligent effort to ascertain same, can not be discovered."

Appearances: *Mr. Alfred M. Craven* for the Commission.

PENNSYLVANIA, NEW JERSEY & DELAWARE WHOLESALE GROCERS' ASSOCIATION, ITS OFFICERS, MEMBERS OF EXECUTIVE COMMITTEE AND MEMBERS, December 3, 1923 (Docket, 951).

Charge: Combining and conspiring; in connection with the purchase and sale of groceries, soap, soap products, and cooking fats.

Dismissed, after answer and trial, Commissioner Nugent dissenting, without assignment of reasons.

Appearances: *Mr. Charles Melvin Neff* for the Commission; *Mr. John A. Keppelman* of Reading, Pa., for respondent.

NATIONAL LEAD COMPANY, December 21, 1923. (Docket 900.)

Charge: Resale price maintenance; in connection with the manufacture and sale of white lead, red lead, litharge and other products used in the painting trade.

Dismissed, after answer and trial, without prejudice or assignment of reasons, Commissioner Nugent dissenting.

Appearances: *Mr. Robt. O. Brownell* for the Commission; *Mr. Charles W. Pierson* and *Mr. L. A. Doherty* of the firm of Alexander & Green of New York, N. Y., for respondent.

ROYAL DUTCH COMPANY OF TEXAS, January 5, 1924 (Docket 999).

Charge: Simulating firm or business name of competitor; in connection with the sale of oil stock.

Dismissed, after answer, without prejudice or assignment of reasons.

Appearances: *Mr. James M. Brinson* for the Commission.

MADEIRA, HILL & CO. ET AL., January 31, 1924. (Docket 1077.)

Charge: Combining and conspiring to enhance prices; in connection with the mining and sale of anthracite coal.

Dismissed, after answer and trial, without assignment of reasons. Commissioner Murdock dissenting, Commissioner Thompson not present at the hearing and taking no part in regard to the findings or order.

Appearances: *Mr. Claude R. Porter* for the Commission; *Stetson, Jennings, Russell & Davis* of New York City for Madeira, Hill & Co.; *Mr. Preston Davie* of New York City for Pattison & Bowns, Inc.; *Curtis Fosdick & Belknap* of New York City for Titan Fuel Corporation; and *Mr. Thomas Gregory* of New York City for Clement P. Brodhead, doing business as C. P. Brodhead Coal Co.¹

VAN CAMP PACKING CO. AND VAN CAMP PRODUCTS CO., February 8, 1924. (Docket 446.)

Charge: Guaranteeing against price decline; in connection with the manufacture, sale and distribution of food products.

Dismissed by the following order:

This proceeding having been consolidated, by the Order of this Commission, made and entered on the 29th day of January, 1920, with the proceeding by this Commission against Helvetia Milk Condensing Company, et al. (Docket No. 227), having been dismissed, without prejudice, by the order of this Commission, made and entered on the 15th day of May, 1923 [see 6 F. T. C. 148];

Now therefore, it is ordered, that this proceeding be, and the same is hereby, dismissed, without prejudice, Commissioner Nugent dissenting.

Appearances: *Mr. Edward L. Smith* for the Commission; *Smith, Remster, Hornbrook & Smith* of Indianapolis, Ind., for respondents.

E. W. LYNCH DOING BUSINESS UNDER THE NAME AND STYLE PURE SILK HOSIERY Co., February 15, 1924. (Docket 1058.)

Charge: Adopting and using misleading business or trade name and misrepresenting business status; in connection with the sale of hosiery.

Dismissed, without prejudice, for the reason that respondent cannot be located.

Appearances: *Mr. E. J. Hornbrook* for the Commission.

¹ Others joined as respondents in this case were: Hartwell-Lester, Inc., and Lynn M. Ranger.

PATENT VULCANITE ROOFING Co. February 29, 1924. (Docket 486.)

Charge: Misrepresenting product, misbranding or mislabeling, and advertising falsely and misleadingly; in connection with the manufacture and sale of a composition felt-base roofing material.

Dismissed, after answer, "on the ground that the respondent herein has been dissolved prior to April 1921, subsequent to the date of issue of the complaint herein."

Appearances: *Mr. John R. Dowlan* for the Commission; *Mr. Edwin P. Grosvenor* of Cadwalader, Wickersham & Taft, New York City, for respondent.

THE AMERICAN CAN Co., April 29, 1924. (Docket 123.)

Charge: Discriminating in price, tying or exclusive contracts or dealings (in violation of Sections 2 and 3, respectively, of the Clayton Act), and using long term contracts to stifle and suppress competition; in connection with the manufacture and sale of tin cans, canning machinery and canning accessories.

Dismissed, after answer, stipulation and trial, without assignment of reasons.

Appearances: *Mr. E. C. Alvord* and *Mr. G. Ed. Rowland* for the Commission; *Mr. L. A. Welles* and *Mr. P. G. Bartlett* of New York City and *Mr. Wade Ellis* of Washington, D. C., for respondent.

THE AMERICAN TOBACCO CO. OF THE PACIFIC COAST, AND THE WHOLESALE TOBACCO DEALERS OF PHOENIX, ARIZONA, Docket 1029; LIGGETT & MYERS TOBACCO CO., AND THE WHOLESALE TOBACCO DEALERS OF PHOENIX, ARIZONA, Docket 1030; P. LORILLARD CO., AND WHOLESALE TOBACCO DEALERS OF PHOENIX, ARIZONA, Docket 1031; May 21, 1924.

Charge: Agreeing, combining, and conspiring to fix and maintain resale prices; in connection with the sale of cigars, cigarettes and other tobacco products.

Dismissed, after answer and trial, without prejudice or assignment of reasons.

Appearances: *Mr. Robt. N. McMillen* for the Commission; *Mr. John Walsh* of Washington, D. C. and *Mr. Junius Parker* of New York City, for The American Tobacco Co., Inc. and The American Tobacco Co. of the Pacific Coast, Inc.; *Mr. F. L. Fuller* of New York City and *Mr. Hiram W. Johnson, Jr.* of San Francisco, Calif., for Liggett & Myers Tobacco Co., Inc.; *Mr. W. B. Bell* of New York City and *Mr. H. H. Shelton* of Washington, D. C., for P. Lorillard Co., Inc.; *Mr. Leon S. Jacobs* of Phoenix, Ariz., for Baswitz Cigar Co., Inc. and The Melzer Co., Inc.; *Britton & Gray* of Washington, D. C. and *Lawler & Degnan* of Los Angeles, Calif. for Haas, Baruch & Co., Inc.

THE OHIO WHOLESALE GROCERS' ASSOCIATION Co., ET AL., Docket 957, May 28, 1924.

Charge: Combining or conspiring to coerce respondent's vendor manufacturers to guarantee against price decline the products bought of them by respondent members; in connection with the purchase and sale of groceries, food and tobacco products.

Dismissed, after answer and trial, without assignment of reasons.

Appearances: *Mr. Walter B. Wooden* and *Mr. E. R. Blake* for the Commission; *Mr. George H. Silverman* of Cincinnati, Ohio, for respondent Daniel Keilson; and *Mr. Frank M. Raymond* of Columbus, Ohio, and *Mr. Andrew Wilson* of Washington, D. C., for Ohio Wholesale Grocers' Association and other respondents.

ONEPIECE BIFOCAL LENS Co., June 3, 1924. (Docket 591.)

Charge: Maintaining resale prices, and tying or exclusive contracts or dealings in violation of Section 3 of the Clayton Act; in connection with the manufacture and sale of onepiece bifocal lenses for optical purposes.

Dismissed, after answer and trial, without assignment of reasons.

Appearances: *Mr. M. B. Clarke* and *Mr. J. T. Clark* for the Commission; *Mr. Virgil H. Lockwood* of Lockwood & Lockwood of Indianapolis, Ind., and *Mr. Melville Church* of Washington, D. C., for respondent.

TOBACCO PRODUCTS CORPORATION, INC.; FALK TOBACCO Co., INC.; THE CINCINNATI WHOLESALE TOBACCO ASSOCIATION, its officers and members, June 10, 1924. (Docket 908.)

Charge: Combining or conspiring to fix and maintain uniform resale prices; in connection with the sale of cigars, cigarettes and other tobacco products.

Appearances: *Mr. Edward L. Smith* and *Mr. Edwin B. Haas* for the Commission; *Mr. Wm. A. Ferguson* of New York City and *Mr. H. H. Shelton* of Washington, D. C., for Tobacco Products Corporation and Falk Tobacco Co., Inc.; *Mr. Clarence Dorger* of Dorger & Dorger of Cincinnati, Ohio, for Janszen Grocery Co.; *Mr. Alfred G. Allen* of Cincinnati, Ohio, and *Mr. Charles S. Moore* of Washington, D. C., for The Cincinnati Wholesale Tobacco Association, its officers and members.

Dismissed, after answer, stipulation and trial, without prejudice or assignment of reasons, by the following order:

"Whereas, in each of four Complaints issued by this Commission and known respectively as Dockets Nos. 906, 907, 908 and 909, The Cincinnati Wholesale Tobacco Association, its officers and members are charged with the use of, among others, a certain unfair method of competition in interstate commerce, in that the said association,

its officers and members by agreement among one another fixed and maintained uniform resale prices for cigarettes and other tobacco products; and whereas heretofore, to wit, on February 29, 1924, this Commission made its findings as to the facts in Docket No. 909 aforesaid and on the same day served upon the said association, its officers and members an order requiring such association, its officers and members to cease and desist from using said unfair method of competition;¹ and whereas this Commission has not as yet held final hearing of either of the proceedings known as Dockets Nos. 906 and 907; and whereas, this Commission has duly considered the testimony and evidence and the argument of counsel in this proceeding, Docket No. 908;

"It is hereby ordered, That the complaint in this proceeding, Docket No. 908, be and the same is hereby dismissed, without prejudice, however, to such findings as to the facts and to such orders to cease and desist as may be made by the said Commission in said proceedings, Dockets Nos. 906, and 907, or either of them, and without prejudice to the findings as to the facts and to the order to cease and desist made by this Commission against the said Cincinnati Wholesale Tobacco Association, its officers and members in the said proceeding, Docket No. 909, aforesaid.

"By the Commission, Commissioner Thompson dissenting in attached memorandum."

Dissent by Commissioner Thompson.

It is with regret that I find myself unable to agree with my associates in the dismissal, as to the Falk Tobacco Company, of the complaint in the above entitled case.

Broadly speaking, the complaint charges the Cincinnati Tobacco Jobbers Association, its officers and members, *first*, with a price fixing combination, agreement and understanding among themselves, and *second*, with a price fixing combination agreement and understanding with the Falk Tobacco Company, a subsidiary of The Tobacco Products Corporation, which is also named as respondent.

As to the first of the above mentioned charges, the association, its officers and members, have been ordered in another proceeding, namely, Docket 909, to desist from such practice. As I understand it, the dismissal of my associates of the first charge is not due to the fact that there was not sufficient proof to support an appropriate order to cease and desist against the Jobbers Association on the charge of price fixing and combination in restraint of trade, but was because the order issued in Docket 909, covered this feature and it

¹ Reported in 7 F. T. C. 351.

would have been simply a repetition to repeat the order in the present case.

As to the second charge, however, since I am of the opinion that the Falk Tobacco Company conspired with the association to assist it in maintaining its price fixing combination, the order to cease from these practices should be repeated in the present case.

The action of the Falk Tobacco Company, and its relationship to the Tobacco Association is laid bare in correspondence between witness Bales, a division manager of the Falk Tobacco Company, and the officers of the said company (Exhibits 46, 47, 52, 57 and 58).¹ The Falk Company's methods involved a request on its part to its salesmen to keep the company posted as to price-cutters; cutting off of price-cutters from the Tobacco Company's direct list; the refusal to put price-cutters on its direct list; the request by the Falk Company (Exhibits 147, 148)¹ that its division manager, Bales, learn whether the association had any objection to the Falk Company's putting certain jobbers and in particular a former price-cutter by the name of Fennell, whose record was familiar to the company, on its price-list; the failure to put Fennell on its price-list until he had become a member of the association, and until the Falk Company had secured the consent of the association that he be put on said price-list.

The relationship of the Falk Tobacco Company in supporting the association's price-fixing practices is also demonstrated (Exhibits 41, 42, 43 and 44)¹ in the case of Lewis Brothers of Cincinnati, who had applied to be put on the direct list of the Falk Tobacco Company, and were refused that privilege solely because Lewis Brothers had sought to induce some of the jobbers of that community not to join the respondent association.

Summarizing, the evidence shows, *first*, that the association was a price fixing combination; *second*, that the Falk Tobacco Company did not put on its direct list jobbers outside the association, unless they were approved by the association or became members of the association; *third*, that the Falk Tobacco Company refused to sell those who did not maintain prices as required by the association.

The Falk Tobacco Company has urged that because, for four and one-half years after May, 1918, it added only five jobbers to its direct list, and that because only one, the said Fennell, was added during the year 1921, its resale price maintenance system, if it had any, was not extensive. This state of facts, in my opinion, shows on the contrary the high degree in which the resale price maintenance system of the company was perfected.

¹ Not published.

The cooperation of the Falk Tobacco Company with the Jobbers Association is, in my opinion, so clear from the evidence that I am compelled to dissent from the view taken by my associates that there was lack of evidence in this case of conspiracy between the Falk Tobacco Company and the association.

I am, therefore, of the opinion that an order should issue against the Cincinnati Tobacco Jobbers Association, its officers and members, and against the Falk Tobacco Company requiring them to cease and desist from the practices set forth in the complaint.

T. S. SOUTHGATE, TRADING UNDER THE NAME AND STYLE OF T. S. SOUTHGATE & CO., AND LEXINGTON GROCERY CO. AND TAYLOR BROS. & COMPANY INC., TRADING UNDER THE NAME AND STYLE OF SOUTHERN SALT CO., June 25, 1924. (Docket 935.)

Charge: Advertising falsely and misleadingly, misrepresenting products, and misbranding or mislabeling; in connection with the purchase and sale of salt.

Dismissed, after answer and stipulation, without prejudice or assignment of reasons.

Appearances: *Mr. G. Ed. Rowland* for the Commission.

BOWERS BROTHERS, INC., ET AL., June 25, 1924. (Docket 993.)

Charge: Cooperating to maintain and enforce resale price maintenance and to eliminate price competition; in connection with the sale of coffee.

Dismissed, after answer and trial, without assignment of reasons.

Appearances: *Mr. Richard P. Whiteley* for the Commission; *Mr. R. E. Cabell* of Cabell & Cabell of Richmond, Va. for Bowers Brothers, Inc. and *Mr. Stephen Nettles* of Greenville, South Carolina, for other respondents.

THE CHARLES H. ELLIOTT Co., July 1, 1924. (Docket 1000.)

Charge: Commercial bribery; in connection with the manufacture and sale of jewelry, stationery, printing and engraving products suitable for use by high schools, colleges, universities, etc.

Dismissed, after answer and trial, without prejudice or assignment of reasons.

Appearances: *Mr. E. J. Hornibrook* for the Commission; *Mr. Edw. Hopkinson, Jr.* of Dickson, Beitler & McCouch of Philadelphia, Pa., for respondent.

CANADA DRY GINGER ALE, INC., ET AL, July 1, 1924. (Docket 1007.)

Charge: Misbranding; in connection with the manufacture and sale of ginger ale.

Dismissed, after answer and trial, without assignment of reasons.

Appearances: *Mr. E. J. Hornibrook* and *Mr. H. A. Babcock* for the Commission; *Mr. Eugene Congleton* of Rounds, Hatch, Dillingham & Debevoise of New York City and *Mr. Daniel R. Forbes* of Washington, D. C., for respondents.

F. M. STAMPER Co., July 1, 1924. (Docket 1040.)

Charge: Cutting off competitors' supplies; in connection with the purchase and sale of produce, including poultry, eggs and cream.

Dismissed, after answer and trial, without assignment of reasons.

Appearances: *Mr. M. Markham Flannery* for the Commission; *Hunter & Chamier* of Moberly, Mo., for respondent.

THE STANDARD REGISTER Co., July 3, 1924. (Docket 1019.)

Charge: Disparaging a competitor and its products, intimidating customers of a competitor, and instituting and threatening to institute, suits, not in good faith; in connection with the manufacture and sale of manifolding or autographic registers and the supplies therefor.

Dismissed, after answer and trial, without assignment of reasons.

Appearances: *Mr. Alfred M. Craven* for the Commission; *Mr. W. B. Turner* of E. H. & W. B. Turner of Dayton, Ohio and *Mr. Alfred M. Allen* of Allen & Allen of Cincinnati, Ohio, for respondent.

ADOLPHE SCHWOB, INC., July 11, 1924. (Docket 801.)

Charge: Adopting and using misleading course of conduct in connection with the purchase and sale of imported watch movements.

Dismissed, after answer and trial, without assignment of reasons. Commissioner Nugent dissents.

Appearances: *Mr. Thomas H. Baker, jr.*, for the Commission; *H. A. & C. E. Heydt*, of New York City, for respondent.

THE AMERICAN TOBACCO Co., INC., AND THE CINCINNATI WHOLESALE TOBACCO ASSN., ET AL. (Docket 906.) LIGGETT & MYERS TOBACCO Co., INC., AND THE CINCINNATI WHOLESALE TOBACCO ASSN., ET AL. (Docket 907.) July 18, 1924.

Charge: Combining or conspiring to fix and maintain uniform resale prices; in connection with the sale of cigars, cigarettes, and other tobacco products.

Dismissed, after answer, stipulation and trial, without prejudice and assignment of reasons, Commissioner Thompson dissenting, by the following order:

Whereas, in the complaint issued by this Commission in this proceeding and in the complaint issued by this Commission in another proceeding known as Docket No. 909, The Cincinnati Wholesale

Tobacco Association, its officers and members, are charged with the use, among others, of a certain unfair method of competition in interstate commerce in that the said association, its officers and members by agreement among one another fixed and maintained uniform re-sale prices for cigarettes and other tobacco products; and whereas heretofore, to-wit, on February 29, 1924, this Commission made its findings as to the facts in Docket No. 909 aforesaid and on the same day served upon the said association, its officers and members an order requiring the said association, its officers and members to cease and desist from using said unfair method of competition;¹ and whereas this Commission has duly considered the testimony and evidence and the argument of counsel in this proceeding, Docket No. 906. [907 in the other case.]

It is hereby ordered, That the Complaint in this proceeding, Docket No. 906 [907 in the other case], be and the same is hereby dismissed without prejudice, however, to the findings as to the facts and to the order to cease and desist made by this Commission against the said Cincinnati Wholesale Tobacco Association, its officers and members in the said proceeding, Docket No. 909 aforesaid.

By the Commission, Commissioner Thompson dissenting.

Appearances: *Mr. Robt. N. McMillen* for the Commission; *Mr. John Walsh* of Washington D. C., and *Mr. Junius Parker*, of New York City, for American Tobacco Co., Inc.; *Mr. Clarence Dorger*, of Dorger & Dorger, of Cincinnati, Ohio, for Janszen Grocery Co.; *Mr. Alfred G. Allen*, of Cincinnati, Ohio, and *Mr. Charles S. Moore*, of Washington, D. C., for the Cincinnati Wholesale Tobacco Association, its officers and members; and *Dunnington, Walker & Gregg* and *Mr. F. L. Fuller*, of New York City, for Liggett & Myers Tobacco Co., Inc.

SCOTCH WOOLEN MILLS, July 18, 1924. (Docket 940.)

Charge: Assuming misleading firm or business name, and advertising falsely and misleadingly; in connection with the manufacture and sale of men's clothing.

Dismissed, after answer, stipulation and trial, without assignment of reasons.

Appearances: *Mr. G. Ed. Rowland* for the Commission; *Mr. Isaac S. Rothschild* and *Mr. Arthur B. Schaffner*, of Chicago, Ill., and *Covington, Burling & Rublee*, of Washington, D. C., for respondent.

¹ Reported in 7 F. T. C. 351.

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.]

[H. R. 15613.]

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

Sec. 1. CREATION AND ESTABLISHMENT OF THE COMMISSION.

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

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

¹This 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 (Nov. 5, 1923, to July 20, 1924) and arising under this act are printed in full in Appendix II hereof (see *infra*, p. 589 et seq.). Previously reported decisions will be found set forth in Appendix II of Volumes II-VI, inclusive, 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.

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

Chairman to be chosen by commission.

Pursuit of other business prohibited.

Removal by President.

Vacancy not to impair exercise of power 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, 1916, 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; 14923-14933 (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), 11379-11380, 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); Lippit against, 11111-11112 (part 11), 13210-13219 (part 13); Newlands for, 9930 (part 10), 10378-10378 (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, 12330-12331 (part 13), 12933-12939, 13224-13234, 14787-14791 (part 15); Robinson for, 11107 (part 11), 11228-11232; Saulsbury for, 11185, 11591-11594 (part 2); Shields against, 13056-13061 (part 13), 13146-13148; Sutherland against, 11601-11604 (part 12), 12805-12817 (part 13), 12855-12862, 12980-12986, 13055-13056, 13109-13111; Thomas against, 11181-11185 (part 11), 11598-11600 (part 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. 504 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

May prosecute any inquiry anywhere in United States.

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.

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.

* For text of Sherman Act, see footnote on pp. 564-565.

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. 549.

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.

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.

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.

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,

By registered mail.

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

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

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

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. 564-565. As enumerated in last paragraph of sec. 4 of this act, see p. 553.

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. 564-565. As enumerated in last paragraph of sec. 4, of this act, see p. 553.

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 in such form and manner as may be best adapted for public information and use.

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 commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.

To ascertain and report an appropriate form of decree.

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

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

Sec. 8. COOPERATION OF OTHER DEPARTMENTS AND BUREAUS.

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. 564-565. As enumerated in last paragraph of sec. 4 of this act, see p. 553.

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.*

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

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

May require attendance of witnesses and production of evidence.

Subpœnas, oaths, affirmations, examinations, 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 subpœna, the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

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

Disobedience to a subpœna. 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 subpœna issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

In case of contumacy or disobedience of subpœna, 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.

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

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

May be taken before person designated by Commission. 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, etc.

Testimony to be reduced to writing, etc. 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.

Appearance, testimony, and production of evidence may be compelled as in proceeding before Commission. Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Witness fees, same as paid for like services in United States courts. No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the 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.

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

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

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. 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.

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 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.]

[II. 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. 564-565. As enumerated in last paragraph of sec. 4 of this act, see p. 553.

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 volumes (July 1, 1921, to July 20, 1924) 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. 346, 42 Sup. Ct. 360; *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 Volume V 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 Volume V at p. 542 et seq.); *Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568 (see opinion set forth in Appendix II of Volume V at p. 599 et seq.); *Mennen Co. v. Federal Trade Commission*, 288 Fed. 774 (see opinion and decision set forth in Appendix II of Volume VI at p. 579 et seq.); *Federal Trade Commission v. Sinclair Refining Co. et al.*, 261 U. S. 463 (see opinion and decision set forth in Appendix II of Volume VI at p. 587 et seq.); *B. S. Pearsall Butter Co.*, 292 Fed. 720 (see opinion and decision set forth in Appendix II of Volume VI at p. 605 et seq.); *A. B. Dick Co. v. Fuller*, 6 F. (2d) 393; *National Biscuit Co. et al. v. Federal Trade Commission*,

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,

209 Fed. 733 (see opinion and decision set forth in Appendix II of this volume at page 603 et seq.); and *Aluminum Co. of America v. Federal Trade Commission*, 299 Fed. 361 (see opinion and decision set forth in Appendix II of this volume at page 618 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 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. 20, 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. 18, 1922 (42 Stat. 388), 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.)

²The 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 Department of Justice for the enforcement of the anti-trust laws for the fiscal years 1920-1925, inclusive, (41 Stat. 208, 41 Stat. 922, 41 Stat. 1411, 42 Stat. 613, 42 Stat. 1080, and 43 Stat. 215, 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

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

and organize in an effort to and for the purpose to obtain and maintain a fair and reasonable price for their products."

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

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

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

PERSON MONOPOLIZING TRADE GUILTY OF MISDEMEANOR—PENALTY.

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

COMBINATIONS IN TERRITORIES OR DISTRICT OF COLUMBIA ILLEGAL—PENALTY.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every 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

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.

it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

ADDITIONAL PARTIES.

SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and 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 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 footnote on p. 563.

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

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

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.

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 footnote on p. 583.

⁵ For text of Sherman Act, see footnote on pp. 584-585. As enumerated in Clayton Act, see first paragraph thereof on p. 582.

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. 564-565. As enumerated in Clayton Act, see first paragraph thereof on p. 562.

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 footnote on p. 562.

It should be noted also that corporations for export trade are excepted from the provisions of this section. (See p. 586, 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.

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.

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

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

Existing rights heretofore lawfully acquired not affected.

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. 564-565. As enumerated in Clayton Act, see first paragraph thereof on p. 562.

* 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.

How eligibility determined.

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.

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.

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

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 footnote on p. 563.

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, 1916, ch. 120, and act May 26, 1920, ch. 206.

¹¹ For text of Sherman Act, see footnote on pp. 564-565. As enumerated in Clayton Act, see first paragraph thereof on p. 562.

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.

Penalty, fine, or imprisonment, or both.

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.

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 499.

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 footnote on p. 563.

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. 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

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

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

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

Petition by respondent to review order to cease and desist. Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A

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

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

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

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 subpœnas 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. 564-565. For Antitrust Acts as enumerated in Clayton Act, see first paragraph thereof on p. 562.

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.

A misdemeanor.

Penalty, fine or imprisonment, or both.

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.

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

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.

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

¹⁵ For text of Sherman Act, see footnote on pp. 564-565. For Antitrust Acts as enumerated in Clayton Act, see first paragraph thereof on p. 562.

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,¹⁶ including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

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

Preliminary injunction may issue upon proper bond and showing.

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

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.

¹⁶ For text of Sherman Act, see footnote on pp. 564-565. For Antitrust Acts as enumerated in Clayton Act, see first paragraph thereof on p. 562.

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.

Sec. 263 of Judicial Code repealed.

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

Sec. 266 not affected.

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

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. 564-565.

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

Nor agreement such export trade, or an agreement made or act done in
nor act, if not the course of export trade by such association, provided
in restraint of trade within the United States, or
of the export such association, agreement, or act is not in restraint of
trade of any domestic competitor, and is not in restraint of
trade of any domestic competitor, and
the export trade of any domestic competitor of such as-

If such associa- association: *And provided further*, That such association
tion does not does not, either in the United States or elsewhere, enter
artificially or in- into any agreement, understanding, or conspiracy, or do
tentionally en- any act which artificially or intentionally enhances or de-
hance or depress presses prices within the United States of commodities
prices of, or sub- of the class exported by such association, or which sub-
stantially lessen stantially lessens competition within the United States
competition, or and otherwise restrains trade therein.
restrain trade in
commodities of
class exported.

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

SEC. 3. That nothing contained in section seven of the
Act entitled "An Act to supplement existing laws against
unlawful restraints and monopolies, and for other pur-
poses," approved October fifteenth, nineteen hundred
and fourteen,³ shall be construed to forbid the acqui-
sition 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 un-
less effect may be
to restrain trade
or substantially
lessen competi-
tion 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. 562 et seq.

⁴ See *ante*, p. 549 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 sec. 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 or depression of prices or substantial lessening of competition by association.

Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein, it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and 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. 549 et seq.

APPENDIX II.

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

FOX FILM CORPORATION *v.* FEDERAL TRADE COMMISSION.²

(Circuit Court of Appeals, Second Circuit. January 7, 1924.)

No. 121.

1. COMMERCE KEY No. 40 (1)—MANUFACTURER OF MOVING-PICTURE FILMS HELD ENGAGED IN "INTERSTATE COMMERCE," WITHIN THE FEDERAL TRADE COMMISSION ACT.

Manufacturer of moving-picture films, which shipped the films to its agencies in several states to be sold and leased to owners and operators of moving-picture theaters throughout the United States, was engaged in "interstate commerce," within Act September 26, 1914 (Comp. St. secs. 8836a-8836k), empowering the Federal Trade Commission to prevent persons and corporations engaged in interstate commerce from using unfair methods of competition.

2. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—FINDINGS THAT MOVING-PICTURE FILM PRODUCER USED UNFAIR METHODS IN CONNECTION WITH THREE PICTURES HELD TO SUPPORT ORDER TO DESIST.

Federal Trade Commission's findings that motion-picture film producer reissued three old pictures under new titles as new photo plays, and advertised such pictures as new pictures not previously exhibited, and induced the public to believe them to be new pictures, *held* to support order to desist from reissuing old pictures under new titles as new pictures, as unfair competition.

3. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 68—ONE MAY BE ENGAGED IN "UNFAIR COMPETITION," WITHIN FEDERAL TRADE ACT, THOUGH GENERAL PRACTICE IS NOT UNFAIR.

Under Act September 26, 1914 (Comp. St. secs. 8836a-8836k), empowering the Federal Trade Commission to prevent persons and corporations engaged in interstate commerce from using unfair methods of competition, the general practice of the offender need not be unfair, since general practice may involve many methods, each conceived and to be applied for its particular desired result, but one act that constitutes an unfair practice may of itself be offensive to the act.

4. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 68—MOTION-PICTURE PRODUCER'S REISSUANCE OF OLD FILMS UNDER NEW TITLES AS NEW PICTURES HELD "UNFAIR COMPETITION."

Issuance by producer of moving-picture films, engaged in competition with other corporations, persons, and partnerships similarly engaged, of old pictures under new titles as new pictures never before exhibited, *held* "unfair competition," within Federal Trade Act (Comp. St. Sections 8836a-8836k).

¹ The period covered coincides with that of this volume, namely, Nov. 5, 1923, to July 20, 1924.

² Reported in 296 Fed. 353.

5. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—CORPORATION'S ABANDONMENT OF UNFAIR METHODS DOES NOT DEPRIVE COMMISSION OF AUTHORITY TO COMMAND CORPORATION TO DESIST.

The mere fact that a corporation which has engaged in unfair methods of competition has discontinued such methods and promises to follow a different practice does not deprive the Federal Trade Commission of authority under the Federal Trade Act (Comp. St. secs. 8836a-8836k) to command the corporation to desist from using such methods.

6. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—EFFECT OF ORDER DIRECTING MOVING PICTURE FILM MANUFACTURER TO DESIST FROM REISSUING OLD PICTURES UNDER NEW TITLES STATED.

An order of the Federal Trade Commission commanding a manufacturer of moving-picture films to desist from reissuing old films under new titles, as new pictures, and from advertising such pictures as pictures which have never before been exhibited, does not prohibit the remaking of a photoplay in which an entirely new cast is used or an entirely new production is made or where the original title is used, or reference made thereto in the advertising of the picture.

(The syllabus is taken from 296 Fed. 353)

Petition to review the order of the Federal Trade Commission directing the petitioner to cease and desist from methods of unfair competition in trade.¹ This petition is by the Fox Film Corporation to revise such order. Order affirmed.

Saul E. Rogers, of New York City, for petitioner.

James M. Brinson, of Butte, Mont., for respondent.

Before Hough, Manton, and Mayer, Circuit Judges.

MANTON, *Circuit Judge*:

Under the authority of the Act of September 24, 1914 (38 Stat. L. 717; Comp. Stat. 8836-a), the respondent filed a complaint against the petitioner, alleging that it was engaged in the production of photoplays and leased and sold its products to the owners and operators of moving-picture theatres throughout the United States, granting the right to exhibit said photoplays to the public. It is admitted that the petitioner, in leasing and selling to the exhibitors, maintains agencies at various cities in the several states of the United States. It makes positive photoplays produced by it and packs the same in such manner as to be adapted for use in motion-picture projecting machines. These are called films, and the photoplays are known in the trade as releases. It ships to its agencies in several states from New York City. The petitioner is therefore engaged in interstate commerce. *Binderup v. Pathe Exchange* (Supreme Court, Nov. 19, 1923; 263 U. S. 291; 68 L. Ed. 114).

The parties stipulated the facts, and they had been embodied in the findings of the commission. It is stipulated that when a picture has

¹ 6 F. T. C. 191.

been run and generally exploited in the United States or in a considerable portion of it and it is again offered for exhibition at a later period it is commonly known as a reissue or revival. That, according to the accepted practice, usage, and custom of this industry, unless the original title of the picture is retained or the picture is so described in the contract between the producer and the exhibitor and in the advertising matter as a reissue or revival of a photoplay previously released, it is understood by the exhibitor and the public that the photoplay to be furnished or screened is or will be a new picture; that is to say, a continuity not previously exhibited or exploited throughout any considerable portion of the United States. On December 18, 1916, the petitioner released a motion picture which was entitled "The Love Thief," and on May 28, 1917, it released a motion picture which was entitled "The Silent Lie," and on September 17, 1917, it released a motion picture entitled "The Yankee Way." These pictures were extensively exploited and exhibited throughout the United States. They were known at the time as feature pictures, being ordinary five-reel pictures designed for the principal part of an ordinary motion-picture theater program. It is stipulated that in the course of the season of 1919-20 the petitioner reissued the old picture of "The Love Thief" as "The She Tiger"; reissued the old picture of "The Silent Lie" and entitled it "Camille of the Yukon"; and reissued the old picture of "The Yankee Way" and entitled it "Sink or Swim." It furnished each of these three pictures so retitled to exhibitors in various states of the United States in connection with leases providing for the petitioner's so-called program series of pictures. All other pictures furnished under such program contracts to exhibitors were new pictures.

The petitioner furnished the exhibitors with bill posters and other matter for use in advertising the photoplays to the public. In no way did the petitioner disclose that the pictures so furnished or any of them were reissues. The advertising matters furnished exhibitors by petitioner in connection with the picture "Sink or Swim" conspicuously displayed the legend "William Fox presents George Walsh in 'Sink or Swim'"; and in connection with "The She Tiger" it conspicuously displayed the legend "The She Tiger from the Famous Novel The Love Thief by N. P. Niessen." The advertising furnished exhibitors in connection with the picture "Camille of the Yukon" displayed the legend "Based on Larry Evans' Alaskan Novel 'The Silent Lie.'" Various exhibitors who received these three photoplays from the petitioner used this advertising matter to advertise the exhibition of the pictures without further disclosing to the public that they were old pictures. It was, in effect, stipulated that without further information from the petitioner or its agents that any or either of the pictures were reissues, the exhibitors believed them new pictures and advertised them for exhibition with the bills and posters supplied by the petitioner, and in some instances they received complaints from patrons of their theaters who claimed to have been misled into believing them new pictures. In effect, it was stipulated that in communities where pictures were received and advertised patrons attended the exhibition under the belief that they were new pictures.

The petitioner concedes that it is engaged in competition with other persons, partnerships, and corporations similarly engaged.

Through its agency, it enters into leases and contracts with exhibitors, agreeing to furnish the exhibitors over a fixed period, its current releases and grants the right to exhibitors to exhibit the same to the public for a stated number of performances. The president of the petitioner, in effect, testified that it has never been the general practice or policy of the petitioner to exploit, sell or lease old pictures under new names or to reissue pictures under any names other than those of their original release. That the practice or policy of reissuing of old pictures under new names is obnoxious to him and to the motion-picture industry "and indefensible from any ethical or business standpoint; that of the multitude of motion pictures or photoplays produced by respondent, he knows of no instance except those involved in this proceeding, in which respondent has reissued any old pictures under new names; that with respect to the above pictures, there was no attempt to mislead the exhibitors, or the public that said pictures were not reissues." The order to cease and desist provides—

"That the respondent, Fox Film Corporation, its agents, servants and employees, cease and desist from directly or indirectly advertising, selling or leasing, or offering to sell or lease, reissued motion-picture photoplays under titles other than those under which such photoplays were originally issued and exhibited, unless the former titles of such photoplays and the fact that they theretofore have been exhibited under such former titles, be clearly, definitely, distinctly, and unmistakably stated and set forth, both in the photoplay itself and in any and all advertising matter used in connection therewith in letters and type equal in size and prominence to those used in displaying the new titles."

While the findings of the Commission embraced but three pictures where the unfair methods were practiced, that is sufficient to support the order to desist. It is now well recognized that the act refers specifically to unfair methods of competition. This does not mean the general practice of the offender must be unfair in competition. General practice may involve many methods each conceived and to be applied for its particular desired result. One act that constitutes an unfair practice may of itself be offensive to the act. Congress had in mind, in this legislation, the prevention of acts which amount to unfair methods of competition, whatever their inception.² (*Federal Trade Comm. v. Gratz*, 253 U. S. 421.) To meet

² Senator Cummins, chairman of the committee which reported the bill, said (Cong. Rec., vol. 51, p. 11455):

"Unfair competition must usually proceed to great lengths and be destructive of competition before it can be seized and denounced by the anti-trust law. In other cases it must be associated with, coupled with, other vicious and unlawful practices in order to bring the person or the corporation guilty of the practice within the scope of the Anti-Trust Law. The purpose of this bill in this section, and in other sections which I hope will be added to it, is to seize the offender before his ravages have gone to the length necessary in order to bring him within the law that we already have.

"We knew little of these things in 1890. The commerce of the United States has largely developed in the last twenty-five years. The modern methods of carrying on business have been discovered and put into operation in the last quarter of a century; and as we have gone on under the Anti-Trust Law and under the decisions of the courts in their effort to enforce that law, we have observed certain forms of industrial activity which ought to be prohibited, whether in and of themselves they restrain trade or commerce or not. We have discovered that their tendency is evil; we have discovered that the end which is inevitably reached through these methods is an end which is destructive of fair commerce between the states. It is these considerations which, in my judgment, have made it wise, if not necessary, to supplement the Anti-Trust Law by additional legislation, not in antagonism to the Anti-Trust Law, but in harmony with the Anti-Trust Law, to more effectively put into the industrial life of America the principle of the Anti-Trust Law, which is fair, reasonable competition, independence to the individual, and disassociation among the corporations. * * *"

this, the Anti-Trust Law was supplemented. To violate the Sherman Act, it is necessary to find that the practice has grown to such proportions and strength that the business and practice is obnoxious as a trust or monopoly and restrains trade.

No better illustration may be exampled than the instant case of these three offenses or acts which are unfair restraints of trade and damage the competitor who sells to the exhibitors. The Federal Trade Act was intended to reach such unfair business methods when the Anti-Trust Law could not do so. The Commission may restrain an act which tends so unduly to hinder competition as to permit the act to be classed as an unfair method of competing. An act which involves such fraud in competition as to render it unfair, is an act within the condemnation of this statute. It is by stopping its use before it becomes a general practice that the effect of an unfair method in suppressing competition is destroyed and competitors protected.

False and misleading advertising or representations concerning hosiery was held to be an unfair method of competition. (*Winsted Hosiery case*, 258 U. S. 483.) In that case a manufacturer's practice of selling underwear and other knit goods made partly of wool, was to label it "Natural Merino," "Natural Worsted" and "Natural Wool." This product was purchased by the consuming public in the retail trade as indicating pure wool fabrics. It misled part of the public into buying as all wool garments, garments made largely of cotton, and aided and encouraged misrepresentation by unscrupulous retailers and other salesmen. It was held to be an unfair method of competition as against manufacturers of like garments made of wool and wool and cotton who branded their products truthfully, and therefore should be suppressed under Sec. 5 of the Federal Trade Act. It was held further that such method of competition does not cease to be so because competitors became aware of it or because it becomes so well known to the trade that retailers as distinguished from consumers are not deceived by it.

The pictures in the instant case were presented in the advertising matter and misrepresented by the petitioner to the exhibitors as new pictures when they were in fact old. The exhibitors in the trade had a right to expect that a new name described a new picture. The exhibitors were accordingly deceived. It had been the custom to entitle the photoplay products truthfully. Fox's stipulated testimony concedes this. In *Royal Baking Powder Co. v. Federal Trade Comm.*, 281 Fed. 744, the petitioner, due to the increased cost of cream of tartar, discontinued manufacturing its widely advertised brand of cream of tartar baking powder which had been on the market for sixty years, and began to manufacture a phosphate baking powder and advertised it for sale at about one-half the former price, under practically the same trade name and put up in the same containers. This court held that the finding to the effect that this was misleading to the public and unfair to other manufacturers selling cream of tartar baking powder, was justified and that false and misleading labeling and advertising induced the public to believe that the phosphate baking powder it was manufacturing was the same as the more expensive cream of tartar baking powder which

it had formerly manufactured, was an unfair method of competition and could be prevented by the Trade Commission.

The fact that the petitioner has discontinued this misrepresentation and promises a business practice which will forbid the publishing of false advertising in the future, does not deprive the Commission of authority to command the company to desist from such advertising, for it is not obliged to assume that false representations or publications or advertising will not be resumed. (*Guaranty Vet. Co. v. Federal Trade Comm.*, 285 Fed. 860.) This record establishes that exhibitors were actually misled by the contracts and the advertising matter into the belief that the pictures purchased for exhibition were new pictures. The case, therefore, presents the instance of a producer and distributor misrepresenting the quality of his goods in his contracts and in his advertising matter, misrepresenting them so that the trade, apart from the public, was misled and deceived. In the reissuance of the old pictures under the new titles, without any intimation or notice concerning their origin or history, the petitioner was passing off one of its products for another of its products, that is to say, one of its old productions for a new production. This order to desist will not prohibit the remaking of a photoplay in which an entirely new cast is used or an entirely new production is made, or where the original title is used or reference made thereto in the advertising of the picture. There is no objection to the use of the former photoplay if the name be not changed and no deception be practiced in its release to the exhibitors or its exhibition.

The order of the Commission is affirmed.

FEDERAL TRADE COMMISSION v. RAYMOND BROS.—
CLARK CO.¹

(Supreme Court of the United States, January 7, 1924.)

No. 102.

1. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 68—
REFUSAL TO PURCHASE FROM MANUFACTURER, UNLESS SALES TO COMPETITOR
CEASE, NOT UNFAIR COMPETITION; "UNFAIR METHOD OF COMPETITION."

A wholesaler's refusal to purchase further from a manufacturer, unless the manufacturer discontinued sales to a competitor, *held* not an "unfair method of competition," within the Federal Trade Commission Act (Comp. St. Secs. 8836a-8836k); no element of conspiracy being involved.

2. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 68—
"UNFAIR METHOD OF COMPETITION" DEFINED.

The words "unfair method of competition," as used in the Federal Trade Commission Act (Comp. St. Secs. 8836a-8836k), are inapplicable to practices not previously regarded as apposed 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.

¹ 283 U. S. 565.

3. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 68—
INDIVIDUAL RETAINS REASONABLE DISCRETION IN BUSINESS METHODS UNDER
FEDERAL TRADE COMMISSION ACT.

Under the Federal Trade Commission Act (Comp. St. Sections 8836a-8836k), the individual retains the right to exercise reasonable discretion in respect of his own business methods.

4. CONSPIRACY KEY No. 24—ACT LAWFUL WHEN DONE BY ONE MAY BECOME
WRONGFUL WHEN DONE BY MANY ACTING TOGETHER.

An act lawful when done by one may become wrongful when done by many acting in concert, taking on the form of a conspiracy, which may be prohibited, if the result be hurtful to the public, or to the individual against whom the concerted action is directed.

(The syllabus is taken from 44 Sup. Ct. Rep. 162.)

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Adrien F. Busick, of Washington, D. C., for petitioner.

Mr. Emmet Tinley, of Council Bluffs, Iowa, for respondent.

Mr. JUSTICE SANFORD delivered the opinion of the Court.

This writ brings up for review a decree of the Circuit Court of Appeals² which set aside an order of the Federal Trade Commission requiring the Raymond Bros.-Clark Company to desist from a method of competition held to be prohibited by the Trade Commission Act of September 26, 1914, c. 311, 38 Stat. 717.

By Section 5 of that Act "unfair methods of competition" in interstate commerce are declared unlawful, and the Commission is empowered and directed to prevent their use.

The Commission, in January, 1920, issued a complaint charging the Raymond Company with acts and practices the purpose and effect of which was to cut off the supplies purchased by the Basket Stores Company, a competitor, from the T. A. Snider Preserve Company, stifle and prevent competition by the Stores Company, and interfere with the right of the Stores Company and the Snider Company to deal freely with each other in interstate commerce. The Raymond Company answered, and evidence was taken. The Commission made a report, stating its findings of fact and conclusions.

The material facts shown by the findings are: The Raymond Company and the Stores Company are dealers in groceries, with their principal places of business and warehouses in Nebraska. They buy groceries in wholesale quantities from manufacturers in other States, which are shipped to their warehouses and resold to customers within and outside of Nebraska. Each does an annual business of approximately \$2,500,000. The Raymond Company sells exclusively at wholesale. The Stores Company operates a chain of retail stores, but also sells at wholesale. In its wholesale trade, which constitutes about ten per cent of its total business, it is a competitor of the Raymond Company. The Snider Company is a manufacturer of

² 280 Fed. 529. Also reported in 4 F. T. C. 625.

groceries, with its office in Illinois. In September, 1918, it sold groceries to the Raymond Company, the Stores Company, and other neighboring dealers. These groceries were shipped in interstate commerce in a "pool" car to the Raymond Company, for distribution among the several purchasers.³ The Raymond Company, upon thus learning of the sale to the Stores Company, delayed the delivery of its portion of the groceries, to the hindrance and obstruction of its business, and wrote to the Snider Company, protesting against the sale direct to the Stores Company and asking for the allowance of the jobber's profit on such sale.⁴ Later, the Raymond Company declined to pay the Snider Company until this commission was allowed, and threatened to cease business with it and return all goods purchased from it then in stock, unless it allowed this commission and discontinued direct sales to the Stores Company; and, thereafter, an attempted settlement of the controversy having failed the Raymond Company ceased to purchase from the Snider Company.

The conclusions of the Commission were: That the conduct of the Raymond Company tended to, and did, unduly hinder competition between the Stores Company and others similarly engaged in business; that the purpose of the Raymond Company was also to press the Snider Company to a selection of customers, in restraint of its trade, and to restrict the Stores Company in the purchase of commodities in competition with other buyers; and that the conduct of the Raymond Company tended to the accomplishment of this purpose.

The Commission thereupon adjudged that the method of competition in question was prohibited by the Act, and ordered the Raymond Company to desist from directly or indirectly hindering or preventing any person, firm, or corporation in or from the purchase of groceries or like commodities direct from the manufacturers or producers, in interstate commerce, or attempting so to do; hindering or preventing any manufacturer, producer, or dealer in groceries and like commodities in or from the selection of customers in interstate commerce, or attempting so to do; and influencing or attempting to influence any such manufacturer, producer, or dealer not to accept as a customer any firm or corporation with which, in the exercise of a free judgment, he has, or may desire to have, such relationship.

Upon a petition of the Raymond Company for review of this order, the Circuit Court of Appeals held that the findings of fact did not show an unfair method of competition by the Raymond Company as to the Stores Company or others similarly engaged in business. The court said: "There is no finding that petitioner combined with any other person or corporation for the purpose of affecting the trade of the Basket Stores Company, or others similarly engaged in business. So far as petitioner itself is concerned, it had the positive and lawful right to select any particular merchandise which it wished to purchase, and to select any person or corporation from whom it might

³ The facts that the Snider Company's office is in Illinois and that it shipped these groceries in interstate commerce are not stated in the findings, but they otherwise appear in the record and are not disputed.

⁴ It otherwise appears from the record that the ground of its protest and claim was its assertion that the Stores Company was "nothing but a retail store."

wish to make its purchase. The petitioner had the right to do this for any reason satisfactory to it or for no reason at all. It had a right to announce its reason without fear of subjecting itself to liability of any kind. It also had the unquestioned right to discontinue dealing with any manufacturer, . . . for any reason satisfactory to itself or for no reason at all. Any incidental result which might occur by reason of petitioner exercising a lawful right cannot be charged against petitioner as an unfair method of competition." The decree setting aside the order of the Commission was thereupon entered.

We pass, without determination, the preliminary contentions of the Raymond Company, that the findings of the Commission are not supported by the testimony, in many respects,⁵ and that, as both the complaint and the findings of fact relate merely to a controversy between it and a single manufacturer, over a single shipment of merchandise, the broad order of the Commission, commanding it to desist from all acts of like character with "the entire commercial world" is improvident, and can not be sustained.⁶

The gravamen of the contention in behalf of the Commission is that the conduct of the Raymond Company, acting alone and not in combination with others, in threatening the withdrawal of patronage from the Snider Company if it continued to sell goods to the Stores Company, constituted an unfair method of competition, oppressive in its character, unlawful when tested by common law criteria, and having a dangerous tendency unduly to hinder competition.

The words "unfair method of competition," as used in the Act, "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." *Federal Trade Comm. v. Gratz*, 253 U. S. 421, 427; *Federal Trade Comm. v. Beech-Nut Co.*, 257 U. S. 441, 453. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods, must be preserved. *Federal Trade Comm. v. Gratz*, supra, page 429.

The present case discloses no elements of monopoly or oppression. So far as appears the Raymond Company has no dominant control of the grocery trade, and competition between it and the Stores Company is on equal terms. Nor do we find that the threatened withdrawal of its trade from the Snider Company was unlawful

⁵ The Raymond Company insists that the testimony shows, among other things, that it did not intentionally delay the delivery of the groceries to the Stores Company; that the Stores Company is not its competitor in the wholesale business, but engaged in the retail business, selling groceries to consumers in competition with other retail dealers to whom the Raymond Company sells at wholesale; and that it did not threaten the Snider Company with the withdrawal of patronage if it continued to sell to the Stores Company, but merely expressed surprise at the change made by the Snider Company from its former policy of selling only to wholesalers, and declared that it would not have made its own purchases had it known of this change.

⁶ The Circuit Court of Appeals stated, in the outset of its opinion, that, in any event, as the proceeding related to the use of an unfair method of competition against the Stores Company, the order of the Commission, being "as broad as the business world," would have to be modified if sustained in any particular. See *Federal Trade Comm. v. Gratz*, 253 U. S. 421, and *Western Sugar Refining Co. v. Trade Comm.* (C. C. A.), 275 Fed. 725, 732.

at the common law, or had any dangerous tendency unduly to hinder competition.

It is the right, "long-recognized," of a trader engaged in an entirely private business, "freely to exercise his own independent discretion as to the parties with whom he will deal." *United States v. Colgate & Co.*, 250 U. S. 300, 307. See also *United States v. Freight Ass'n*, 166 U. S. 290, 320; *Dueber Watch-Case Co. v. Howard Watch Co.* (C. C. A.), 66 Fed. 637, 645; *Great Atlantic Tea Co. v. Cream of Wheat Co.* (C. C. A.), 227 Fed. 46, 48; *Wholesale Grocers' Ass'n v. Trade Comm.* (C. C. A.), 277 Fed. 657, 664; *Mennen Co. v. Trade Comm.* (C. C. A.), 288 Fed. 774, 780; *Booth v. Burgess*, 72 N. J. Eq. 181, 190; and 2 Cooley on Torts, (3d ed.), 587. Thus a retail dealer "has the unquestioned right to stop dealing with a wholesaler for reasons satisfactory to himself." *Eastern States Lumber Co. v. United States*, 234 U. S. 600, 614; *United States v. Colgate & Co.*, supra, page 307. He may lawfully make a fixed rule of conduct not to buy from a producer or manufacturer who sells to consumers in competition with himself. *Granada Lumber Co. v. Mississippi*, 217 U. S. 433, 440. Or he may stop dealing with a wholesaler who he thinks is acting unfairly in trying to undermine his trade. *Eastern States Lumber Co. v. United States*, supra, page 614; *United States v. Colgate & Co.*, supra, 307. Likewise a wholesale dealer has the right to stop dealing with a manufacturer "for reasons sufficient to himself." And he may do so because he thinks such manufacturer is undermining his trade by selling either to a competing wholesaler or to a retailer competing with his own customers. Such other wholesaler or retailer has the reciprocal right to stop dealing with the manufacturer. This each may do, in the exercise of free competition, leaving it to the manufacturer to determine which customer, in the exercise of his own judgment, he desires to retain.

A different case would of course be presented if the Raymond Company had combined and agreed with other wholesale dealers that none would trade with any manufacturer who sold to other wholesale dealers competing with themselves, or to retail dealers competing with their customers. An act lawful when done by one may become wrongful when done by many acting in concert, taking on the form of a conspiracy which may be prohibited if the result be hurtful to the public or to the individual against whom the concerted action is directed. *Granada Lumber Co. v. Mississippi*, supra, page 440; *Eastern States Lumber Co. v. United States*, supra, page 614. See also *Binderup v. Pathe Exchange*, 263 U. S. 291 (Nov. 19, 1923).

We conclude that the Raymond Company in threatening to withdraw its trade from the Snider Company exercised its lawful right, and that its conduct did not constitute an unfair method of competition within the meaning of the Act. The decree of the Circuit Court of Appeals is accordingly

Affirmed.

FEDERAL TRADE COMMISSION *v.* AMERICAN
TOBACCO CO.¹

SAME *v.* P. LORILLARD CO., INC.¹

(Supreme Court of the United States. March 17, 1924.)

Nos. 206, 207.

1. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 80½,
NEW, VOL. 8A KEY-NO. SERIES--RESOLUTION OF SENATE DIRECTING TRADE
COMMISSION TO MAKE INVESTIGATION WITHOUT REFERENCE TO ALLEGED
VIOLATION OF LAW NOT CONSIDERED.

A resolution of the Senate, directing the Federal Trade Commission to investigate and report the tobacco situation as to domestic and export trade, etc., but without reference to any alleged violation of antitrust acts (Comp. St. sec. 8820 et seq.), is not within the provisions of the act of September 26, 1914, sec. 6 (Comp. St. sec. 8836f), authorizing the commission, on direction of the President or either House of Congress, to investigate and report the facts relative to any violation of the antitrust acts by any corporation, and hence such a resolution need not be considered on petitions for mandamus to compel production of records for inspection.

2. SEARCHES AND SEIZURES KEY No. 7--TRADE COMMISSION NOT EMPOWERED
TO COMPEL COMPANIES TO PRODUCE ALL THEIR BOOKS AND PAPERS.

The Federal Trade Commission, under act of September 26, 1914, sections 6, 9 (Comp. St. secs. 8836f, 8836i), has no power to compel tobacco companies to produce all their books and papers, relevant or irrelevant, including those relating to intrastate business, in order to disclose the possible existence of practices in violation of section 5 (Comp. St. sec. 8836e), in view of constitutional amendment 4, as the mere fact of carrying on commerce not confined within State lines, and of being organized as a corporation, do not make men's affairs public, as those of a railroad company now may be.

3. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 80½,
NEW, VOL. 8A KEY-NO. SERIES--DEMAND BY TRADE COMMISSION FOR PRO-
DUCTION OF RECORDS MUST BE REASONABLE, AND SHOW THAT RECORDS ARE
MATERIAL.

A ground must be laid for a demand of the Federal Trade Commission that a private corporation produce certain records, and the demand must be reasonable, and some evidence of the materiality of the papers demanded must be produced before the corporation can be compelled to comply.

(The syllabus is taken from 44 Sup. Ct. 336.)

In error to the District Court of the United States for the Southern District of New York.

¹264 U. S. 298. Petition for rehearing denied June 9, 1924.

Mr. James A. Fowler, of Knoxville, Tenn., and the Attorney General, for plaintiff in error.

Mr. Junius Parker, of New York City, for defendant in error, American Tobacco Co.

Mr. William D. Guthrie, of New York City, for defendant in error, P. Lorillard Co.

Mr. JUSTICE HOLMES delivered the opinion of the court.

These are two petitions for writs of mandamus to the respective corporations respondent, manufacturers and sellers of tobacco, brought by the Federal Trade Commission under the act of September 26, 1914, c. 311, section 9, 38 Stat. 717,722, and in alleged pursuance of a resolution of the Senate passed on August 9, 1921. The purpose of the petitions is to require production of records, contracts, memoranda, and correspondence for inspection and making copies. They were denied by the district court (283 Fed. Rep. 999). The resolution directs the commission to investigate the tobacco situation as to domestic and export trade with particular reference to market price to producers, etc. The act directs the commission to prevent the use of unfair methods of competition in commerce and provides for a complaint by the commission, a hearing and a report, with an order to desist if it deems the use of a prohibited method proved. The commission and the party concerned are both given a resort to the circuit court of appeals (section 5). By section 6 the commission shall have power (*a*) to gather information concerning, and to investigate the business, conduct, practices, and management of any corporation engaged in commerce, except banks and common carriers, and its relation to other corporations and individuals; (*b*) to require reports and answers under oath to specific questions, furnishing the commission such information as it may require on the above subjects; (*c*) upon the direction of the President or either house of Congress to investigate and report the facts as to alleged violation of the antitrust acts. By section 9 for the purposes of this act the commission 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, and 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. In case of disobedience an order may be obtained from a district court. Upon application of the Attorney General the district courts are given jurisdiction to issue writs of mandamus to require compliance with the act or any order of the commission made in pursuance thereof. The petitions are filed under this clause and the question is whether orders of the commission to allow inspection and copies of the documents and correspondence referred to were authorized by the act.

The petitions allege that complaints have been filed with the commission charging the respondents severally with unfair competition by regulating the prices at which their commodities should be resold, set forth the Senate resolution, and the resolutions of the commission

to conduct an investigation under the authority of sections 5 and 6 (a), and in pursuance of the Senate resolution, and for the further purpose of gathering and compiling information concerning the business, conduct and practices, etc., of each of the respondent companies. There are the necessary formal allegations and a prayer that unless the accounts, books, records, documents, memoranda, contracts, papers, and correspondence of the respondents are immediately submitted for inspection and examination and for the purpose of making copies thereof, a mandamus issue requiring, in the case of the American Tobacco Company, the exhibition during business hours when the commission's agent requests it, of all letters and telegrams received by the company from, or sent by it to all of its jobber customers, between January 1, 1921, to December 31, 1921, inclusive. In the case of the P. Lorillard Company the same requirement is made and also all letters, telegrams, or reports from or to its salesmen, or from or to all tobacco jobbers' or wholesale grocers' associations, all contracts or arrangements with such associations, and correspondence and agreements with a list of corporations named.

The Senate resolution may be laid on one side as it is not based on any alleged violation of the antitrust acts, within the requirement of section 6 (d) of the act. *United States v. Louisville & Nashville R. R. Co.*, 236 U. S. 318, 329. The complaints as to which the commission refused definite information to the respondents, and one at least of which we understand has been dismissed, also may be disregarded for the moment, since the commission claims an unlimited right of access to the respondents' papers, with reference to the possible existence of practices in violation of section 5.

The mere facts of carrying on a commerce not confined within State lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company now may be. *Smith v. Interstate Commerce Commission*, 245 U. S. 33, 43. Anyone who respects the spirit as well as the letter of the fourth amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 479) and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this court to sustain such a claim is shown in *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, and as to correspondence, even in the case of a common carrier, in *United States v. Louisville & Nashville R. R. Co.*, 236 U. S. 318, 335. The question is a different one where the State granting the charter gives its commission power to inspect.

The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer. Wigram, *Discovery*, 2d ed., Section 293. We assume that the rule to be applied here is more liberal, but still a ground must be laid and the ground and the demand must be reasonable. *Essgee Co. v. United States*, 262 U. S. 147, 156, 157. A general subpoena in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced. *Hale v. Henkel*, 201 U. S. 43, 77. In the State case relied on by the Government, the requirement was only to produce books and papers that were relevant to the inquiry. *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541. The form of the subpoena was not the question in *Wheeler v. United States*, 226 U. S. 478, 488.

The demand was not only general, but extended to the records and correspondence concerning business done wholly within the State. This is made a distinct ground of objection. We assume for present purposes that even some part of the presumably large mass of papers relating only to intrastate business may be so connected with charges of unfair competition in interstate matters as to be relevant. *Staford v. Wallace*, 258 U. S. 405, 520, 521. But that possibility does not warrant a demand for the whole. For all that appears the corporations would have been willing to produce such papers as they conceived to be relevant to the matter in hand. See *Terminal Taxicab Co. v. District of Columbia*, 241 U. S. 252, 256. If their judgment upon that matter was not final, at least some evidence must be offered to show that it was wrong. No such evidence is shown.

We have considered this case on the general claim of authority put forward by the commission. The argument for the Government attaches some force to the investigations and proceedings upon which the commission had entered. The investigations and complaints seem to have been only on hearsay or suspicion—but even if they were induced by substantial evidence under oath the rudimentary principles of justice that we have laid down would apply. We can not attribute to Congress an intent to defy the fourth amendment or even to come so near to doing so as to raise a serious question of constitutional law. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408; *U. S. v. Jin Fuey Moy*, 241 U. S. 394, 401.

Judgments affirmed.

NATIONAL BISCUIT CO. *v.* FEDERAL TRADE COMMISSION.¹

LOOSE-WILES BISCUIT CO. *v.* SAME.

(Circuit Court of Appeals, Second Circuit. May 5, 1924.)

No. 346.

1. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 68—PERMITTING OWNER OF CHAIN STORES TO POOL PURCHASES, AND REFUSING TO PERMIT OWNERS OF SINGLE STORES TO POOL PURCHASES, FOR COMPUTATION OF DISCOUNT, HELD FAIR COMPETITION.

A sales policy of giving a graduated quantity discount to owner of chain stores on total purchases of all the stores of the chain, and refusing to allow owners of a single store to pool their purchases for purpose of computing discount, *held* fair competition and not violative of Federal Trade Commission Act, Sec. 5 (Comp. St. sec. 8836e) and Clayton Act, Sec. 2 (Comp. St. Sec. 8835b).

2. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY NO. SERIES—COMMISSION'S FINDING OF FACTS SUPPORTED BY TESTIMONY CONCLUSIVE.

A finding of Federal Trade Commission as to the facts, if supported by testimony, is conclusive on a review in the Circuit Court of Appeals.

3. MONOPOLIES KEY No. 12 (1)—SIZE DOES NOT CREATE MONOPOLY.

Size alone does not create a monopoly.

4. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY NO. SERIES—MEANING OF PHRASE "UNFAIR METHODS COMPETITION" HELD FOR COURTS.

The meaning of the phrase "unfair methods of competition," within Federal Trade Commission Act, Sec. 5 (Comp. St. sec. 8836e), is for the courts and not the Commission to determine as a matter of law, and this rule is not voided by stating as a finding of fact what is a conclusion of law.

5. MONOPOLIES KEY No. 8—EXCLUSION OF OTHERS FROM OPPORTUNITY OF DOING BUSINESS HELD MONOPOLIZING.

It is the exclusion of others from the opportunity of doing business that is regarded as monopolizing.

6. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 68—UNFAIR COMPETITION CHARACTERIZED BY FRAUD, DECEPTION, OR OPPRESSION.

To be successful may increase or render insuperable the difficulties that rivals must face, but it does not constitute fraudulent or unfair methods, as methods of competition, to be condemned as unfair, should be characterized by fraud, deception, or oppression.

(Syllabus taken from 299 Fed. 733.)

¹ Petition for writ of certiorari denied by the Supreme Court on Oct. 20, 1924.

Petitions to revise orders of the Federal Trade Commission.

Separate petitions by the National Biscuit Company and the Loose-Wiles Biscuit Company against the Federal Trade Commission to have set aside orders of the Commission separately entered against both petitioners. Orders reversed.

William C. Breed, Charles A. Vilas, George E. Shaw, and Dava T. Ackerly for National Biscuit Co.

J. Frederick Eagle and Carroll G. Walter for Loose-Wiles Biscuit Co.

W. H. Fuller and I. E. Lambert for Federal Trade Commission.
Before Hough, Manton, and Mayer, Circuit Judges.

MANTON, Circuit Judge:

These proceedings to review orders of the respondent were heard together and will be disposed of in one opinion.

The complaints against the petitioners charge (a) violation of Section 5 of the Federal Trade Commission Act (38 Stat. 717); (b) violation of Section 2 of the Clayton Act (38 Stat. 730). The petitioners manufacture and sell to retail grocers crackers, biscuits, cakes, and other bakery products. They are perishable and therefore sold in small quantities at frequent intervals to insure freshness and quality. The petitioners have a business policy of allowing the following discounts: (a) customers whose purchases from the company in a calendar month are less than \$15.00 pay list prices with no discounts; (b) customers whose purchases from the company in a calendar month aggregate \$15.00 or more receive a quantity discount of 5 per cent; (c) customers whose purchases from the company in a calendar month aggregate \$50.00 or more receive a quantity discount of 10 per cent; (d) customers whose purchases from the company in a calendar month aggregate \$200 or more receive a quantity discount of 15 per cent. For payment in cash a one per cent discount is given to all customers, and no customer under any circumstances receives any greater quantity discount than fifteen per cent.

The orders entered against the petitioners were the same in form and directs them to cease and desist—

"1. From discriminating in price between purchasers operating separate units or retail grocery stores of chain systems and purchasers operating independent retail grocery stores of similar kind and character purchasing similar quantities of respondent's products, where such discrimination is not made on account of difference in the grade or quality of the commodity sold, nor for a due allowance in the difference in the cost of selling or transporting, nor in good faith to meet competition in the same or different communities.

"2. From giving to purchasers operating two or more separate units or retail grocery stores of chain systems a discount on the gross purchases of all the separate units or retail stores of such chain system, where the same or a similar discount on gross purchases is not allowed or given to associations or combinations of independent grocers operating retail grocery stores similar to the separate units or stores of such chain system."

A chain store referred to in this proceeding is regarded as a series of two or more retail stores owned by one person or corporation. The quantity discounts allowed to owners of chain stores are computed upon the purchase of the owner of the chain for all his stores and quantity discounts computed at the same rates are allowed to the owner of a single store. In practice, the retailer owning one store must meet the competition of the branches of the chain stores whose owner because of the volume of his purchases for all his units or stores in the chain, obtains a greater discount than does the owner of the one store who does not use the same volume, and therefore does not buy in such quantities. The disadvantage is sought to be corrected by respondent, by requiring the petitioners to (1) base chain store discounts upon the quantity delivered to each store, treating each branch of the chain as a separate purchaser or owner, or (2) to allow separate and individual purchasers or owners to pool their purchases for the purpose of computing discounts. It is found as a fact—

“That the respondent [National Biscuit Company] is the largest single producer of such bakery products in the United States; that the total value of respondent's products for the year 1914 was approximately \$46,143,210; whereas the total value of production in the biscuit and cracker industry in the United States for the same year was approximately \$89,484,000. Figuring the same in percentages, the National Biscuit Company, for the year 1914, had approximately 51.6 per cent of the biscuit and cracker business in this country; that the value of respondent's products for the year 1919 was approximately \$101,707,597; whereas the total value of production in the biscuit and cracker industry in the United States for the same year was approximately \$204,020,000. Figuring the same in percentages, the National Biscuit Company, for the year 1919, had approximately 49.9 per cent of the biscuit and cracker business in this country; that the total value of respondent's products for the year 1921 was approximately \$104,836,255; whereas the total value of production in the biscuit and cracker industry in the United States for the same year was approximately \$187,509,000. Figuring the same in percentages, the National Biscuit Company, for the year 1921, had approximately 55.7 per cent of the biscuit and cracker business in this country; that east of the Mississippi River, for the year 1921, the National Biscuit Company had approximately 64.1 per cent of the biscuit and cracker business.

“The respondent has, in the various States of the United States, 28 cracker bakeries and 8 bread bakeries, and has sales agents established in more than 192 different cities. Quoting from the testimony of Albert B. Bixler, respondent's general sales manager, ‘They are from Portland, Maine, to Portland, Oregon, and from Duluth to New Orleans, scattered over all the country.’ In 1921, the respondent had approximately 248,487 customers. Nearly every grocer in Greater New York handles respondent's products, and in the District of Columbia and the vicinity thereof, out of 2,000 grocers, every one of them carried National Biscuit Company's products. Similar conditions exist in many cities of the United States. ‘Uneeda Biscuit’ is a cracker manufactured and sold by respondent, and is the fastest selling cracker in the world.”

The Loose-Wiles Biscuit Company does about 15 per cent of the cracker and biscuit business in the United States. It is also found that the cracker and biscuit sales represent from one to three per cent of the grocers' total business.

Error is assigned in the finding that the petitioners are engaged in interstate commerce. It is argued that the transactions affected by the order of the Commission are solely between agencies of the petitioners and retail merchants located adjacent to other branches within a State and therefore the respondent was without jurisdiction. The petitioners admitted in the answer filed, that they were engaged in interstate commerce, as charged in paragraph 1 of the complaint. There is some evidence that biscuits and crackers which are manufactured in one state are shipped without that state and to another within the United States in competition with other firms and corporations similarly engaged. Since this conclusion of fact has some support in the evidence, we must regard it as binding upon us. *Curtis Pub. Co. v. Federal Trade Commission*, 260 U. S. 568. We do not, however, regard the existence of this interstate commerce as material to the present litigation.

Section 5 of the Federal Trade Commission Act (38 Stat. 717) provides that unfair methods of competition in commerce are declared unlawful and the Commission is empowered to order a person, partnership, or corporation to cease and desist from using such unfair methods in commerce. The finding of the Commission as to the facts, if supported by testimony, is conclusive on the review in this court. The Supreme Court said as to the conclusiveness of the findings of the Commission in the *Curtis Publishing Company case*, *supra*:

"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."

Section 2 of the Clayton Act which is declared to be an act to supplement existing laws against unlawful restraints and monopolies and for other purposes (38 Stat. 730) provides:

"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 commerce; Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of difference 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."

The gravamen of the offense or the unfair method is the granting of discounts to purchasers of quantities as above referred to. The Commission does not find that the respondents have a monopoly nor that they intend by unlawful means to obtain one. It is not charged or found that the petitioners have an agreement or understanding of any kind as to the creation of a monopoly or, indeed, the maintenance of a sales policy for such a purpose. The law does not make mere size of business an offense or the existence of unexerted power an offense. It requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition nor require all that is possible. *United States v. U. S. Steel Corp.*, 251 U. S. 417; *United States v. United Shoe Machinery Co.*, 247 U. S. 32. In the first case it was held to be lawful for a single corporation to control fifty per cent of the steel industry and in the latter, it was said to be lawful for a single corporation to control substantially all the shoe machinery industry. Size alone does not create a monopoly.

In many instances each branch of the chain stores is a distinct and separate purchaser; petitioners solicit and take orders and make deliveries to each unit of the chain, and it is found that in some instances the owner of but one store is in competition with a branch of a chain that handles no more of the companies' goods in a month than does the owner of but one store, and the unit of the chain store receives a discount. It is found that the cost of selling and delivery is the same. This is said to be the disadvantage in competing with chain stores and the various owners have pooled their orders because they do not carry on a large enough business to obtain the discounts. But the petitioners refuse to grant the discounts for such pooled or combined orders, and it is found that—

"An undue advantage in competing with the owners operating but one retail store in the handling of respondent's [petitioner's] said products which practices have the capacity to and do tend to substantially lessen competition and create a monopoly in the retail distribution of respondent's [petitioner's] products."

And the Commission says that (1) they "are all to the prejudice of the public"; and (2) they "are all to the prejudice" "of said respondent's competitors." This court announced in *Standard Oil Co. v. Federal Trade Commission*, 273 Fed. 478, that—

"It may be admitted that one function of the Trade Commission is to discern and suppress such practices in their beginning; but a thing exists from its beginning, and it is not a conclusion of law from any facts here found that a system which at present is keenly competitive, extremely advantageous to the public, and, in the opinion of a majority of the competent witnesses, economical, is at present unfair to anyone or unfair because tending to monopoly. A

tendency is an inference from proven facts, and an inference from the facts as found by the Commission is a question of law for the Court."

In *Mennen Co. v. Federal Trade Commission*, 288 Fed. 774 (certiorari denied, 262 U. S. 759) a charge was made against the petitioner which sold its products to wholesalers, retailers, and cooperative corporations of retailers who practiced unfair methods of competition in violation of the Trade Commission Act and of Section 2 of the Clayton Act, in that they refused to grant to cooperative corporations of retailers or to retailers therein discounts as large as those granted wholesalers. One of the charges against the petitioner there was that the practice of varying discounts irrespective of the quantity and quality tended unduly to hinder competition between distributors of the respondent's products to retailers or directly to the consuming public. This court set aside the Commission's order and announced:

"In this case, as in the *Gratz case*, the complaint contains no intimation that the Mennen Company has any monopoly of the business of manufacturing and selling toilet articles or that it has the ability or intent to acquire one. So far as appears the Mennen Company, acting independently, has undertaken to sell its own products in the ordinary course, without deception, misrepresentation, or oppression, and at fair prices, to purchasers willing to take them upon terms openly announced.

"In this case, as in the *Gratz case*, nothing is alleged which would justify the conclusion that the public suffered injury or that competitors had reasonable ground for complaint. The allegation that its practice of varying discounts tended unduly to hinder competition between distributors of respondent's products to retailers or directly to the consuming public is a pleader's conclusion. The acts complained of in this case are not those which have heretofore been 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.' And as said in the *Gratz case*: 'If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved.'"

Whatever may be the exact meaning of the phrase "unfair methods of competition," it is now settled that it is for the courts and not the commission to determine as a matter of law what is and what is not included in the phrase. This rule is not voided by stating as a finding of fact what is a mere conclusion of law. *Federal Trade Commission v. Gratz*, 253 U. S. 421; *Standard Oil Co. v. Federal Trade Commission*, 273 Fed. 478; *N. J. Asbestos Co. v. Federal Trade Commission*, 264 Fed. 509. It is very apparent that no cracker manufacturer could be prejudiced by the refusal of his largest rival to satisfy customers or prospective customers by granting the discounts desired. Such a refusal could only have the effect upon a competitor of driving the dissatisfied customer to it. In this regard, there is nothing to indicate that the public was in any way prejudiced by the discounts. There is no claim that the owners

of chain stores are not competing one with the other or with other retail grocers, including those who have pooled or combined for ordering purposes, and there being no allegation or suggestion of any agreement or understanding among manufacturers, it is evident that the public purchases its bakery products in an open competitive market as respects both manufacturer and distributor. The only pools or combinations are among the grocers who seek to combine for ordering purposes. The practice of giving discounts is permitted under Section 2 of the Clayton Act where it is 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."

The holding below does not say that the size of the petitioner's business was attained or contributed to by unfair or unlawful methods or that it had any monopoly or control of the biscuit or cracker business, nor that it does injure its competitors or restrain trade among them. No conspiracy is alleged or proven. Indeed, the petitioner, the Loose-Wiles Co., has but fifteen per cent of the business. And there are many smaller cracker and biscuit manufacturers throughout the country. It is the exclusion of others from the opportunity of doing business that is regarded as monopolizing. *Patterson v. United States*, 222 Fed. 599. It has been said that size may increase trade and may benefit the consumer. *United States v. Keystone Watch Case Co.*, 218 Fed. 502. There is a finding that the petitioners have extensively advertised and have created a great demand for their products throughout the United States, and now the Commission concludes that "in many localities the demand for such products is so great that it is impossible for a retail grocer to successfully conduct his business if he does not handle respondent's products."

Even though the manager of the branch store of a chain exercises the fullest discretion in determining what and how he will purchase from the company and that the salesmen and deliverymen of the company spend as much time and effort in the branch store of the retail grocer as in the store of the so-called independent or individual grocer, it cannot be said that the branch store of the chain retailer is a separate or different purchaser as intended by Section 2. It is undeniable that the manager of a branch of a chain store system who may have the fullest individual authority in dealing with the salesmen or deliverymen of the petitioner, is nevertheless an employee or agent of the owner of the chain system and can not be regarded as a different purchaser; the indebtedness is incurred by the company, the payment is made by it and the goods are delivered to it. It may be that the cost of selling the chain is the same as the cost of selling to the owner of but one store, but that does not sustain the charge of price discrimination for there is no provision in the Clayton Act or elsewhere that the price to two different purchasers must be the same if it cost the seller as much to sell one as it does to the other.

The provision of Section 2 of the Act as to the difference in the cost of selling is merely one of many separate and distinct permissive exemptions in that section expressly declaring price determination to be lawful if within the particular exception. Equal opportunity is given to all, in the discount system of petitioners' business. The determining factor is the quantity consumed; there is no discrimination among purchasers. All are supplied on equal terms according to the quantity purchased. While the chain stores have grown in numbers, this record demonstrates that there are thousands of retail grocers who are carrying on their business in one store. The discount plan was designed for the individual dealer as well as for the large chain store owner. It is the right of a merchant engaged in private business freely to exercise his own independent discretion as to the parties with whom he will deal. *Federal Trade Commission v. Raymond Bros.-Clark Co.*, 280 Fed. 529, 64 L. Ed. 175; *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 224 Fed. 566. The only injury claimed as a result of the petitioners' acts comes after the retailer has the biscuits or crackers and is disposing of them at retail. Then it is said, one retailer has an undue advantage over another of the same competing class. But we said in the *Mennen case*:

"This substitution in the final stages of the Clayton Bill of the clause to which we have referred plainly indicates the intent of Congress to exclude from the operation of the Section (Section 2) mere competition among 'purchasers' from the 'seller' or 'person' who allowed or withheld the discount and to include therein only competition between such 'seller' or 'person' and the latter's own competitors."

This section can have no application unless the unfair act substantially lessens competition or tends to create a monopoly in any line of commerce. It was never intended by Congress that the Trade Commission would have the duty and power to judge what is too fast a pace for merchants to proceed in business and to compel them to slow up. To do so, would be to destroy all competition except that which is easy. Congress intended to eliminate all varieties of fraudulent practices from business in interstate commerce. *Sinclair Refining Co. v. Federal Trade Comm.*, 276 Fed. 686. "The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill, and capital should have large freedom of action in the conduct of their own affairs," said the Supreme Court in *Federal Trade Commission v. Sinclair Refining Co.*, 261 U. S. 463.

Effective competition requires that merchants have freedom of action in conducting their own affairs. To be successful may increase or render insuperable the difficulties that rivals must face, but it does not constitute reprehensible or fraudulent methods. *Federal Trade Commission v. Curtis Pub. Co.*, 260 U. S. 568. The method of competition to be condemned as unfair should be characterized by fraud, deception, or oppression. *Federal Trade Comm. v. Curtis*, supra; *Federal Trade Comm. v. Gratz*, 253 U. S. 421; *N. J. Asbestos*

Co. v. Federal Trade Comm., 264 Fed. 511; *Silver Co. v. Federal Trade Comm.*, 289 Fed. 983.

In its complaint the Commission charged that the practices were all to the prejudice of the public. It does not make any specific finding as to this. The practice of discounts is not an unfair method of competition under the statute unless it is prejudicial to the public. The intent of the act is the prevention of injury to the general public and what forms the basis of the proceeding is that it deceives the public or that it was unfair alike to the public and to the competitors. *Royal Baking Powder Co. v. Federal Trade Comm.*, 281 Fed. 744; *N. J. Asbestos Co. v. Federal Trade Comm.*, 264 Fed. 510.

We conclude that the sales policy of the petitioners as to their discount plan, as well as the refusal to sell cooperative or pooling buyers, is fair in all respects as to all its competitors and customers. This policy obviously does not affect the public interest nor deprive it of anything it desires. It is a practice which is recognized by manufacturers of bakery products and is inoffensive to good business morals. It was error to direct the petitioners to sell to individual grocers who pooled their orders of purchase or who bought on a cooperative basis. While a chain store owner may handle more crackers because of his ownership of more than one store, this is but the result of healthy competition. A manufacturer of biscuits can not be expected to adopt a uniform policy that is appropriate to meet the small buyer and the large buyer. There is no discrimination between the large buyer such as the owner of a chain store and the grocer owning but one store.

There is evidence in the record that many individual grocers do a large enough business to win the discount provided for under the petitioners' policies. A pool is organized merely to buy and not for selling purposes. The manager of the pool, when it has a manager, merely buys as an agent or employee of the pool. He has no control over any of the various grocers in the pool. He incurs no financial liability. Each member of the pool controls his own business and is liable for his own indebtedness. The case is different where the sale is made direct to the manager of a chain unit. By pooling purchases, the retail customers of the petitioners would afford no service in the sale of the petitioners' product to the consumers, beyond that which each furnishes individually, and it may be noted that the advertising of the large chain stores inures to the benefit of the petitioners' products by creating a widespread and uniform demand for their products and consequently larger sales.

For these reasons we regard the orders below entered against each of the petitioners as improvidently granted and the orders complained of are reversed.

JOHN BENE & SONS, INC. *v.* FEDERAL TRADE COMMISSION.¹

(Circuit Court of Appeals, Second Circuit. May 8, 1924.)

1. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION—KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—COURT MUST INQUIRE WHETHER TRADE COMMISSION'S FINDINGS SUPPORTED BY EVIDENCE.

On petition to review order of Federal Trade Commission, court must inquire whether Commission's findings of fact are supported by evidence.

2. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—TESTIMONY, THOUGH LEGALLY INCOMPETENT, MAY BE RECEIVED BY FEDERAL TRADE COMMISSION.

Evidence or testimony, even though legally incompetent, if of kind that usually affects fair-minded men in conduct of their daily and more important affairs, should be received and considered by Federal Trade Commission, but it should be fairly done.

3. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—PROCEEDING BY FEDERAL TRADE COMMISSION MUST BE IN INTEREST OF PUBLIC.

Under Federal Trade Commission Act, Section 5 (Comp. St. sec. 8836e), no complaint can issue from Federal Trade Commission, unless person complained of is using unfair method of competition in commerce, and a proceeding by Commission in respect thereof would be "to the interest of the public."

4. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY No. 67—PUBLIC HAD NO INTEREST IN PROTECTING MISBRANDED PRODUCT OF VARYING COMPOSITION.

The public had no interest in production of an antiseptic of varying composition and misbranded, in that the public was by its label requested to use it for purposes for which it was medically unfit, and Federal Trade Commission should not have granted any relief to its owner against unfair competition by another, under Federal Trade Commission Act, Sec. 5 (Comp. St. sec. 8836e).

(The syllabus is taken from 299 Fed. 468.)

Petition to review an order of the Federal Trade Commission made and entered December 27, 1922.² Order reversed.

Petitioner (hereinafter called Bene) is and was in 1918 engaged among other things in the manufacture and sale of hydrogen peroxide.

At the same time one Proper was making and selling a compound to which he gave the trade name of Daxol.

¹ 299 Fed. 468. Petition for rehearing denied May 26, 1924.

² Sec 5 F. T. C. 314.

Among the customers of Bene were certain store systems commonly known as chain stores, and the same chain stores or some of them had purchased some Daxol.

In the autumn of 1918 Bene obtained a bottle purporting to contain Daxol, and submitted it for analysis to a well-known independent laboratory in New York City. The result was not favorable to Daxol, and Bene communicated the same (in the language of the findings) "to the principal officers of * * * four large chain stores." In the month of December, petitioner submitted Daxol to another and different independent laboratory, and again the result of the analysis was not, to say the least, a favorable advertisement for Proper's compound. This analysis Bene sent (according to the findings) to one chain store manager, accompanied by a letter substantially advising the recipient to confirm the result of the analysis, and the comment of the letter, "by asking any chemist or doctor."

In April, 1920, the Commission issued a complaint alleging that the analyses aforesaid and Bene's comment upon them "contained certain false and misleading statements and representations concerning (Daxol); that among such false and misleading statements * * * (is the representation that Daxol) contained lime, and that the use of (Daxol) on the human body would be attended with great danger."

Bene answered promptly, averring *inter alia* that the analysis was correct and that the label upon Daxol was "absolutely false, fraudulent, and misleading."

Testimony on this issue was taken in September, 1921, and on December 27, 1922, findings were made to the effect:

1st. As the result of the analyses circulated by Bene, the chain store systems known as Kresge, McCrory, Kress, and Woolworth withdrew from sale in their stores the preparation known as Daxol, and shortly thereafter ceased to purchase the same.

2d. The analyses aforesaid and petitioner's comment thereon misled the customers of Proper into the belief that Daxol contained lime; that the use of the same on the human body would be attended with great danger, that Daxol was a weak solution and lost its effectiveness in about seventy-two hours.

3d. The truth of the matter is that Daxol contains either no lime, or lime in such small quantities as to be entirely innocuous, and its use on the human body would not be attended with great danger, and that Daxol is not a weak solution of bleaching powder and does not lose its effectiveness in seventy-two hours.

4th. That the statement of Bene concerning a competitive product, to wit, Daxol, that its use on the human body would be attended with great danger is false and that the statement of the analyses to the

effect that Daxol is a solution of calcium hypochlorite, commonly known as bleaching powder, is misleading, deceptive, and constitutes a misrepresentation.

Immediately on making these findings the order under review was entered. The order is as follows:

"It is ordered, that the respondent, John Bene & Sons (Inc.), its officers, agents, representatives, and employees do cease and desist from directly or indirectly publishing, circulating, or causing to be published or circulated, any false, deceptive, or misleading statements of or concerning the product of a competitor, and particularly from publishing, circulating, or causing to be published or circulated, directly or indirectly, such statements concerning the product Daxol manufactured by the Proper Antiseptic Laboratories of Cincinnati, Ohio, to wit:

"That 'This is a solution of calcium hypochlorite or as it is usually known, bleaching powder. It is our opinion that its use on the human body would be attended with great danger.'

"That 'Daxol' is a very weak solution of bleaching powder and loses its effect in about 72 hours."

Petition for review followed.

Frederick N. Van Zandt, of New York City, for petitioner.

W. A. Sweet, of New York City, and W. H. Fuller, of McAlester, Okla., for Federal Trade Commission.

Before Hough, Manton, and Mayer, Circuit Judges.

HOUGH, Circuit Judge:

Under the *Curtis Publishing Co. case*, 260 U. S., 568, we "must inquire whether the Commission's findings of fact are supported by evidence"; and this inquiry includes an ascertainment of what kind of evidence, or evidence so-called, the fact-findings rest upon.

If by evidence is meant testimonial matter legally competent, relevant, pertinent, and material, this record contains very little of that kind.

It was plainly desirable, as Bene manufactured hydrogen peroxide, to compare Daxol with the other preparation, and on this point one Irene Kuhlman replied in answer to the question "What are Daxol and peroxide used for," thus, "Well, not a serious wound of any kind; it is very injurious to a serious wound; for cuts, very small cuts, or bruises, or sore throat it was very helpful, the same as could be considered as to peroxide." How competent this witness was to answer this question over due objection is perhaps suggested by the fact that her usual and regular occupation was that of running a "beauty parlor."

It also seemed appropriate to show that the business of the proprietors of Daxol had been injured by what Bene had done, and how such injury had arisen, and Miss Kuhlman testified fully on this point. Her qualifications for giving such testimony were that on the 6th of January, 1920, she became connected with the corpora-

tion that succeeded Proper in the manufacture of Daxol. At this time she became a stockholder to the extent of one share, and a director, and she also, in her own language, "operated the books of the Company." After thus qualifying she testified at length concerning events that had occurred long before her connection with the concern. The scheme of her evidence may be judged from this question and answer:

"Q. Do you remember when this trouble arose about this analysis?—A. I was not connected with the Company, but at the time they incorporated the whole case was explained, and I have all the papers concerning the case."

She was permitted to testify not only as to correspondence antedating her connection with Proper's successor but as to the contents of books which were never produced. This evidence related to sales made by Proper individually prior to the time when (again in the witness's language) he "sold out as an individual and changed it to a corporation."

It was further necessary under the issue as framed, to prove the inaccuracy or falsity of the analyses made at Bene's request; and this was sought to be done by introducing the investigation of other chemists. Accordingly there was offered in evidence a report on Daxol made in February, 1919, by the chemist of the Dairy and Food Department of the State of Ohio, one made by the Bureau of Chemistry of the United States Department of Agriculture in November, 1919, and one made in September, 1921, by Pitkin, Inc., of New York City.

Apparently no effort was made to identify or ascertain the origin of the substance submitted for analysis, further than that it was contained in a bottle labeled "Daxol." The inference is necessarily that the Commission regarded the content of any bottle labeled "Daxol" as material to this issue, and it must also have been assumed that everything in a bottle labeled "Daxol" came from Proper. But there was no identification of what was analyzed as being Proper's product.

On the assumptions made, and without any evidence as to the age of the preparation as analyzed, the inferences are irresistible either that the preparation known as "Daxol" was not stable or that its composition varied.

The taking of opinion evidence extends over a field hitherto we think unknown in legal investigation. One of the chemists who had analyzed the contents of a Daxol bottle at the request of Bene had said that its use "on the human body would be attended with great danger." Whereupon another chemist was asked by the Commission's attorney, whether he thought Daxol would be injurious when applied to the human body. Over objection he was permitted to testify on the ground that "Well, it was a chemist that made the statement, that's the reason I think that he [the witness] is qualified." And examples of similar procedure might be multiplied.

The questions suggested by the foregoing references, are whether the Commission, in its investigations, is restricted to the taking of legally competent and relevant testimony. We incline to think that it is not by the statute, and having regard to the exigencies of administrative law, that it should not be so restricted.

We are of opinion that evidence or testimony, even though legally incompetent, if of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs, should be received and considered; but it should be fairly done. The Trade Commission, like many other modern administrative legal experiments, is called upon simultaneously to enact the rôles of complainant, jury, judge, and counsel. This multiple impersonation is difficult, and the maintenance of fairness perhaps not easy, but we regard the methods pursued in showing Proper's diminution in sales as lacking in every evidential or testimonial element of value; and opposed to that sense of fairness which is almost instinctive.

We note that no finding of fact was made by the Commission to the effect that Proper's sales of Daxol in the aggregate diminished. But a finding was made *ut supra* that four chain store systems excluded Daxol from their counters.

As to this finding the record contains no evidence whatever justifying any reference to the Woolworth Co. The agent of Kresge testified plainly that Daxol did not sell and that that was the reason "we discontinued carrying it." The buyer for McCrory declared that the chemical analysis would have had no effect on him if there had been a large trade in Daxol, and averred that the reason why he did not continue buying it was because the demand slackened. The witness produced from the Kress Company was the only support of the Commission's substantial averment, namely that these particular four chain stores dropped Daxol as the result of Bene's activities.

We can not think that such testimony as this affords a foundation either legal or reasonable for the finding first above summarized.

Having pointed out the infirmity of what was introduced as evidence, we shall not pause to inquire as to whether the order could be justified on all that is left of any probative value, to wit, the statement on behalf of the Kress Company, the various analyses, and the admissions of the petitioner herein. For there is a much more important question presented by this record.

This proceeding has nothing to do with the various antitrust acts; the only statute invoked is Section 5 of the act creating the Commission (38 Stat., 717, 724).

Under this statute there are two points that must be made to appear before any complaint can issue:

1st. That the person complained of "is using any unfair method of competition in commerce"; and

2d. That a proceeding by the Commission in respect thereof would be "to the interest of the public."²

It would seem elementary that whatever is necessary to justify a proceeding by the Commission must be proved in that proceeding by said Commission. Both these points are duly alleged in the complaint herein, but no finding has been made to the effect that the proceeding has been justified as being in the interest of the public.

That the public interest is to be considered in proceedings of this kind is manifest from all the reports. But it is sufficient to cite the *Winsted Hosiery case*, 258 U. S., 483. The Court said (page 493),

² See a discussion of this point by Denison, J., in *Silver v. F. T. C.*, 289 Fed. 985. (Also reported in 8 F. T. C. 559 at pp. 566 et seq.)

"The facts show that it is to the interest of the public that a proceeding to stop the practice be brought * * * When misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods." The decision cited rests flatly on the proposition that the goods there complained of were misbranded and therefore afforded an unfair method of competition with goods properly branded. But what the Court said concerning the goods advertised under a name deemed to contain improper and indeed fraudulent implications is just as applicable to goods sought to be protected and the sale thereof advanced through a proceeding *by* the Federal Trade Commission, but for the benefit and advantage primarily of a complainant; in this case a single person, the manufacturer of Daxol.

The real meaning of this litigation is perfectly shown by the witness Kuhlman, who after testifying that sales of Daxol had practically ceased at the time she testified, volunteered the statement that "the concerns to whom we have been selling this product have had no faith up to this time because of the analysis that has been forwarded to the different companies. If the decision is in our favor we may be able to reinstate their faith in the product." An objection by petitioner to this declaration was overruled, and the statement stands as a peculiarly frank exposition of the nature and purpose of the proceeding. We shall therefore consider, in the absence of any finding on the subject, whether it is true as alleged in the answer that what is imparted to the public by the label on the Daxol container is "false, fraudulent, and misleading."

The label on a Daxol bottle declares that it is a "new American antiseptic, stronger than peroxide." It is said to represent "the highest chemical skill in producing a most potent antiseptic similar to the one in use at hospitals, at the European fronts, and recognized to be the greatest medical discovery of the age." In a special note the public is recommended "To obtain the best results use Daxol as often as possible."

The directions for using this "potent antiseptic" are in part as follows: "For cuts, open wounds, and ulcers, moisten thoroughly on lint or cotton and apply freely. For sore throat gargle every half hour. For abscesses and boils apply freely by moistening cotton. For sore and inflamed eyes mix one teaspoonful to two tablespoons warm water and bathe eye." And there are other directions of a similar nature too long to quote.

Of the five analyses offered in evidence all but one report lime as present in varying proportions, and the one that does not mention lime does not pretend to be fully quantitative. This analysis put in evidence by the Commission concludes thus: "Product is principally chlorine water of a strength of 0.06 per cent. As a disinfectant free chlorine is only equal to hydrogen peroxide, so to be as strong this solution should be 3 per cent. Misbranded. Statement on label is false."

So far as chlorine is concerned, the proportions of that chemical found in the samples submitted vary enormously, viz, from 0.11 per cent to 0.058 per cent; while as for calcium hypochlorite (bleaching powder) it is present in a majority of the specimens submitted. The record contains no attack upon the accuracy of the several analyses,

It follows necessarily that we have here a compound either chemically unstable, which is a point no chemist testified upon, or varying in composition, which is a point any layman can ascertain and understand from the evidence herein.

Finally the record contains no contradiction of the evidence given from a highly qualified physician and surgeon who testified from all the analyses, and his own experience with disinfectants and antiseptics. This uncontradicted and unimpeached witness went through the label from which we have quoted above and pointed out that most of the purposes for which the proprietor so highly recommended Daxol meant the free application of this solution to mucous membrane both healthy and diseased. He gave it as his professional opinion that such applications of Daxol would invariably produce "an irritating caustic effect"; and he heartily agreed with the Ohio Food Department that Daxol was a misbranded article.

From this evidence we deduce as findings of fact:

1st. Daxol is a product of varying composition and misbranded in that the public is by its label requested to use it for purposes for which it is medically unfit.

2d. The public has no interest in the protection of such an article.

As a conclusion of law we hold that there being no proof of a public interest herein, or of its being to the interest of the public that this proceeding should have been begun or the order complained of made, said order must be reversed; and it is reversed accordingly.

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

(Circuit Court of Appeals, Third Circuit. June 24, 1924.)

No. 2721.

1. MONOPOLIES KEY NO. 24 (2)—EVIDENCE HELD NOT TO SHOW CREATION OF FRAUDULENT INDEBTEDNESS IN ORDER TO ACQUIRE ASSETS OF ANOTHER COMPANY.

On application by Federal Trade Commission for modification of a decree affirming Commission's order requiring A. Co. to divest itself of its stock in R. Co., so that decree may enjoin A. Co. from acquiring any of the physical assets of R. Co., evidence of an indebtedness resulting from A. Co. selling aluminum ingots to R. Co. for 32 cents a pound held not to show creation of a fraudulent indebtedness, though A. Co. charged aluminum ingots to its subsidiary, of whose stock it owned 100 per cent, at uniform figure of 18½ cents a pound, during a period of great changes in prices.

2. MONOPOLIES KEY NO. 24 (2)—THAT COMPANY HAD BEEN REQUIRED TO DIVEST ITSELF OF STOCK IN ANOTHER COMPANY HELD NOT TO PREVENT COLLECTION OF BONA FIDE DEBT.

That A. Co. had been required, under Clayton Act, sec. 7 (Comp. St. sec. 8835g), to divest itself of its stock in R. Co., held not to prevent A. Co. from collecting a bona fide debt, in any manner provided by law, though it involved acquisition of physical assets of R. Co., now insolvent.

(The syllabus is taken from 299 Fed. 361.)

Petition by the Federal Trade Commission for modification of a previous decree in the above entitled cause. Petition denied.

William H. Fuller, of McAlester, Okla., and Edward L. Smith, of Washington, D. C., for Federal Trade Commission.

George B. Gordon and S. G. Nolin, of Pittsburgh, Pa., for Aluminum Co. of America.

Francis W. Treadway, of Cleveland, Ohio, for Cleveland Metal Products Co.

Before Buffington, Woolley and Davis, Circuit Judges.

WOOLLEY, *Circuit Judge*:

Upon facts stated at length in an opinion reported at 284 Fed. 401,¹ this court sustained an order of the Federal Trade Commission commanding the Aluminum Company of America, on a finding that it had violated section 7 of the Clayton Act, 38 Stat. 730 (Comp. Stat. 8885g), to divest itself of all its stock in the Aluminum Rolling Mills Company, a corporation having an aluminum sheet-rolling plant at Cleveland, Ohio. Of the stock of this company the Aluminum Company owned \$400,000 and the Cleveland Metal Products Company owned \$200,000 par value. The Commission's order provided against sale of the stock to any person or corporation in any way related to the Aluminum Company but expressly permitted sale to the Cleveland Company, the logical and, in the circumstances, the only possible purchaser. The Aluminum Company obeyed the order by selling its stock to that company. The purchase price was \$1,000 but, as the Cleveland Company had lost about \$200,000 in the venture, the Aluminum Company, in addition, promised to reimburse it to an amount equal to one-half of its losses, not to exceed \$100,000.

After compliance with the order of the commission, this was the situation: The Cleveland Company owned all the stock of the Rolling Mills Company. The latter company had never made money. Indeed, it is wholly insolvent and its plant has been shut down for some time. Thus the Cleveland Company found itself in possession of a nominal asset with which it did not know what to do. Desiring aluminum sheets as a raw material in the manufacture of aluminum cooking utensils, the Cleveland Company had embarked in the business of rolling sheets at the outbreak of the war and made money at mounting prices for its surplus product. But upon the entrance of the United States into the war prices receded and the spread between the cost price of ingots and the selling price of sheets grew so small that it began to lose money. Thereupon the Aluminum Company appeared and with the Cleveland Company organized the Rolling Mills Company and engaged in the undertaking which the Federal Trade Commission found violated section 7 of the Clayton Act in that it substantially lessened competition, restrained commerce, and tended to create a monopoly. But now the Cleveland Company is out of the business of manufacturing aluminum cooking utensils; it no longer has need of aluminum sheets and has definitely determined never again to re-enter the aluminum industry.

¹ Also reported in 5 F. T. C. 529.

Therefore it has neither need nor place in its business for the plant of the Rolling Mills Company. In consequence it must either hold the plant, at growing costs, until it can find some use for it or sell it on a low real estate market. This is the situation as it bears on the Cleveland Company. As it bears on the Aluminum Company the situation is different but none the less acute. It is this:

The Rolling Mills Company is indebted to the Aluminum Company in approximately the sum of \$600,000 upon four promissory notes representing the unpaid balance due the Aluminum Company for aluminum ingots and pig aluminum purchased during the operation of the plant. It is conceded that the Rolling Mills Company is insolvent. Nothing else being in sight, the Aluminum Company now purposes to bring suit on the notes and, after judgment, levy on the plant and bid at the sheriff's sale. Of this intention it frankly informed the Federal Trade Commission. As the indebtedness is greater than the value of the plant, the Aluminum Company will inevitably acquire the plant for its indebtedness.

In the light of these undisputed facts the Federal Trade Commission, conceiving the proposed action of the Aluminum Company to be violative in principle of all that has been done, filed a petition asking this court to modify its decree by which it affirmed the order of the commission (requiring the Aluminum Company to divest itself of its stockholdings in the Rolling Mills Company) so that the decree may extend to and enjoin the Aluminum Company, its officers, subsidiaries, and affiliated companies from acquiring any of the physical assets of the Rolling Mills Company.

The commission grounds its petition for modification of the decree upon a fact—sharply disputed—that “the alleged indebtedness claimed by the Aluminum Company of America against the Aluminum Rolling Mills Company was created in violation of law; that it is entirely fictitious; that it is merely book indebtedness, and created for the purpose of claiming that the plant of the Aluminum Rolling Mills Company was unprofitable; and brought about for the very purpose of the indebtedness becoming the basis for a judgment to enable the Aluminum Company of America to acquire the plant at execution sale and thereby become the owner of 100 per cent of said plant rather than 66⅔ per cent as theretofore,” and maintains that “to permit the [Aluminum Company] to carry out its proposed action and buy the physical assets of the Aluminum Rolling Mills Company would be to allow the [Aluminum Company] to defeat the plain intent of section 7 of the Clayton Act, and [it would] constitute a plain and direct evasion of the order of the Federal Trade Commission, which, having been affirmed by this court, has now become the decree and judgment of this court.”

In a word the contention of the commission is that the indebtedness in question is wholly fictitious and therefore fraudulent, and, being fraudulent, it can not be used to evade the former decree of this court or to do indirectly what section 7 of the Clayton Act prescribes shall not be done.

From this relatively brief summary of the long petition it is clear that the question in this phase of the controversy turns on the character of the indebtedness, whether bona fide or fraudulent. On this issue a reference was ordered and much testimony taken. To this testimony we have given full and careful consideration. It being

quite impracticable to discuss the testimony at length in this opinion, we shall do no more than give its trend and state our conclusion.

The fact basis of the alleged fictitious and therefore fraudulent indebtedness of the Rolling Mills Company to the Aluminum Company, created, as claimed, for the purpose of ultimately obtaining the plant, is the price at which from time to time the Aluminum Company sold aluminum ingots to this ostensibly independent concern by comparison with prices at which it sold the same product to its subsidiaries. In this connection the first important thing is the origin of the Rolling Mills Company, the purchaser. This corporation was organized on February 15, 1918. It began business on March 20, 1918, under the stock and operative control of the Aluminum Company. A few days before, namely, on March 8, 1918, and necessarily before any transactions of sale between these corporations had taken place, the War Industries Board fixed the price of aluminum ingots at thirty-two cents a pound and aluminum sheets at forty cents a pound. At these prices the Aluminum Company sold ingots to the Rolling Mills Company and the Rolling Mills Company sold sheets to the trade. Moreover, the Aluminum Company sold ingots to everyone except its subsidiaries at this price, or at prices changed from time to time by the War Industries Board, until February 28, 1919, when Government price control ceased. The narrow spread between the purchasing price for ingots and the selling price for sheets caused losses to the Rolling Mills Company, though it is probable that so far as these losses extended to the Aluminum Company they were offset by profits of that concern in the sale of ingots. But this alone did not amount to fraud. Transactions of purchase and sale of aluminum ingots between the Rolling Mills Company and the Aluminum Company ran into millions of pounds. Payment was made for most and the four notes in question were given for the balance. These notes were given on different dates through a period of three years, one after the commission had begun investigating the aluminum situation and three after the commission had issued the complaint in this case against the Aluminum Company. Having kept clearly in mind the distinction between the acquisition of stock of one corporation by another, the effect of which is substantially to lessen competition and to restrain commerce (the issue involved in the main case), and the issue here whether the indebtedness in question is bona fide or fraudulent, we have not thus far discerned fraud.

But the commission finds fraud not in the sale price for ingots per se but in comparison with the price at which the Aluminum Company sold ingots to the United States Aluminum Company. This corporation is a subsidiary of the Aluminum Company, of whose stock it owns 100 per cent, and to this concern it billed ingots during this period at eighteen and one-half cents per pound. Assuming that within these figures there was a profit, the commission points to fraud on the part of the Aluminum Company in building up a large indebtedness on the price of thirty-two cents charged the Rolling Mills Company when the price charged to another company was the smaller figure and urges also a violation of the decree of the District Court of the United States for the Western District of Pennsylvania, entered by consent in an action by the United States against the Aluminum Company enjoining that company from discriminating in prices between persons to whom it shall sell crude aluminum.

We pass by the latter point for, if substantial, it is a matter solely for the court whose decree is charged to have been violated. We are concerned only with discrimination by which an alleged fraudulent indebtedness has been built up. Was there discrimination amounting to fraud or was there discrimination at all? That depends upon the story of the figures eighteen and one-half cents.

These figures first came to view in 1912 and appeared as charge entries for ingots delivered to a fabricating subsidiary of the Aluminum Company. They have persisted without change from that date to the time in question. According to the testimony these figures did not, nor were they intended to, include profits. Neither did they fluctuate with the market. This is clearly shown by their lack of change through a period of great changes. Rather, they were static figures, arbitrarily selected, by which to gauge economy and efficiency in the fabrication for which a semiraw material was consigned and charged. They represented nothing more of profits and losses than the letter X, but were employed, like other figures, as a fixed and unvarying transfer price in intercorporation transactions running from ore to the finished product. Real profits and losses were reflected only in the consolidated balance sheet. This is the trend of the evidence and was, in our opinion, the purpose and meaning of the price which the Aluminum Company charged its subsidiary, the United States Aluminum Company, for ingots. If we are right in this, the discrimination on which the commission has built its charge of fraud falls out of the case. Without going into details, it will be sufficient to say that we have not been convinced that the Aluminum Company, looking years into the future, fraudulently created an indebtedness "for the very purpose" of taking advantage of a situation which it had all the while been fighting to prevent and which no one could reasonably conceive would arise.

Finding on this record that the indebtedness in question is not fraudulent, can this court amend its decree by restraining the Aluminum Company from proceeding in any manner provided by law for the collection of its debt? Certainly not unless empowered so to do by the Clayton Act, the source of its jurisdiction in this case. The seventh section of that act under which the Federal Trade Commission made its findings and this court affirmed its order concerns lessening of competition and restraint of trade. These we apprehend are issues no longer here involved. The Cleveland Company, the one stockholder of the Rolling Mills Company, has definitely withdrawn from the industry. The Rolling Mills Company is, in a competitive sense, dead. The plant is a shell rapidly falling into decay. It is, however, the only thing out of which a creditor, at one time offending against the Clayton Act, can recover what appears to be a bona fide debt. Does the Clayton Act, in a case like this, thus nullify other laws and deprive such a creditor of the right to resort to them? We have found nothing in its terms which indicates that it does.

Grounding our decision solely on the inability of the Federal Trade Commission to establish fraud in the indebtedness on which the Aluminum Company proposes to seek recovery at law in another court, we are constrained to deny its petition to amend the decree previously entered.

APPENDIX III.

RULES OF PRACTICE BEFORE THE COMMISSION.

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. The Commission may meet and exercise all its powers at any other place, and may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

Principal office.

Commission may exercise power elsewhere.

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, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, the Commission shall issue and serve upon the party complained of a complaint stating

Commission to investigate.

Issuance and service of complaint.

Notice. its charges and containing a notice of a hearing upon a day and at a place therein fixed, at least 40 days after the service of said complaint.

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

Deposition to be forwarded. by the officer. After the deposition has been so certified it shall, together with a copy thereof made by such officer or under his direction, be forwarded by such officer under seal in an envelope addressed to the Commission at its office in Washington, D. C. 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. Twenty copies of each brief shall be furnished for the use of the Commission, unless otherwise ordered. Filed with secretary with proof of service.

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

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

