

## Complaint.

IN THE MATTER OF  
THE DON-O-LAC COMPANY, INCORPORATED.

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

*Docket 924—November 4, 1924.*

## SYLLABUS.

Where a corporation engaged in the manufacture and sale of paints, varnishes, and substitutes for shellac varnish, sold a product which as first made contained none, and later only a very small proportion of genuine shellac gum, branded and labeled "American Shellac," in competition with concerns which sold their products labeled and branded in accordance with the spirit and purpose of a resolution adopted by the National Varnish Manufacturer's Association and other trade organizations, and designed to prevent the debasement of the term "Shellac" and to protect the purchasing public through providing for the use on labels and in advertising of products not composed exclusively of shellac gum dissolved in alcohol, of the word "compound" together with the word "shellac," where the latter content equaled or exceeded one-half of the total solid content, and for the use of the word "substitute" or "imitation" together with the word "shellac" in other cases; with the effect of misleading and deceiving a substantial part of the purchasing public into believing such products to be composed solely of genuine shellac gum dissolved in alcohol, and of inducing the purchase thereof in such belief:

*Held*, That the sale of such product, labeled as above set forth, constituted an unfair method of competition.

*Mr. William A. Sweet* for the Commission.

## 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 The Don-O-Lac Company, Inc., hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized under and by virtue of the laws of the State of New York, with its principal office and place of business in the city of Rochester, in said State. It is, and at all times hereinafter mentioned has been, engaged in the business of manufacturing, selling and distributing paints,

## Complaint.

8 F. T. C.

varnishes and shellacs and substitutes for shellac to painters, jobbers, dealers and the public generally throughout the United States. In the course and conduct of its business respondent causes its said products when sold to be transported from the State of New York through and into other States of the United States and the District of Columbia, to the purchasers thereof. In the course and conduct of its said business respondent is, and has been at all times herein mentioned, in competition with other persons, partnerships and corporations similarly engaged in the manufacture and/or sale of similar products in interstate commerce and with the trade generally.

PAR. 2. Respondent in the course of its business as aforesaid has caused for more than one year last past and causes to be manufactured and sold to jobbers, dealers and the purchasing public throughout the United States by means of traveling salesmen, mail orders and otherwise, a product used by consumers as and for shellac, and distributes said product from the State of New York to the said purchasers thereof in the various States of the United States and the District of Columbia. In the marketing of said product as aforesaid respondent sells, advertises and represents same to customers, prospective customers, and the purchasing public as "American Shellac" and so brands and labels said products. The truth and facts are that said product is not shellac as commercially known, that it contains no shellac gum, which gum is produced in, and obtained from, India, that it is not manufactured or composed of shellac gum and alcohol, and that it is inferior in quality and value to shellac as commercially known. The said representations, advertising, branding and labeling of said product by respondent as aforesaid are false and have the capacity and tendency to mislead and deceive the said purchasers thereof, the trade, and the purchasing public into the belief that the product so represented, advertised, labeled and branded is shellac as commercially known, that said product contains said shellac gum and that said product is manufactured and composed of said shellac gum and alcohol; and to cause said purchasers to purchase said product in said belief.

PAR. 3. There are a large number of manufacturers and distributors of shellac as commercially known which is composed entirely of aforesaid shellac gum and alcohol and who represent, advertise, brand, label, and sell the same under the name of "shellac" and also many manufacturers and distributors of shellac substitutes who do not represent, advertise, brand or label said shellac substitutes as "shellac" or otherwise indicate to the purchasing public that

such substitutes are manufactured or composed of shellac gum and alcohol.

PAR. 4. The above alleged acts and things done by respondent are all to the prejudice of the public and of respondent's 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, MODIFIED FINDINGS AS TO THE FACTS, AND MODIFIED 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 respondent, the Don-O-Lac Company, Inc., charging it with the use of unfair methods of competition in violation of the provisions of said act.

The respondent, The Don-O-Lac Company, Inc., having entered its appearance by its attorney, filed its answer, hearings were had and evidence introduced in support of the complaint and on behalf of the respondent before an examiner of the Federal Trade Commission theretofore duly appointed, at which hearings the respondent appeared and was represented by counsel.

And the Commission having made and entered a report containing its findings as to the facts and conclusion, and having issued and served on the respondent an order to cease and desist made thereon, dated July 18, 1923,<sup>1</sup> and thereafter it appearing to the Commission upon reconsideration of the matter that said findings as to the facts should be modified in certain respects;

*Now, therefore*, The Federal Trade Commission, having duly reconsidered the record, and being now fully advised in the premises, on its own motion under and by virtue of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," hereby modifies its findings as to the facts heretofore made in this proceeding on the 18th day of July, 1923, and the same is hereby modified so that, as modified, said findings as to the facts shall read as follows, to wit:

#### MODIFIED FINDINGS AS TO THE FACTS.

PARAGRAPH 1. The respondent is a corporation organized under the laws of the State of New York, with its principal office and

<sup>1</sup> Reported in 6 F. T. C. 283.

## Complaint.

8 F. T. C.

varnishes and shellacs and substitutes for shellac to painters, jobbers, dealers and the public generally throughout the United States. In the course and conduct of its business respondent causes its said products when sold to be transported from the State of New York through and into other States of the United States and the District of Columbia, to the purchasers thereof. In the course and conduct of its said business respondent is, and has been at all times herein mentioned, in competition with other persons, partnerships and corporations similarly engaged in the manufacture and/or sale of similar products in interstate commerce and with the trade generally.

PAR. 2. Respondent in the course of its business as aforesaid has caused for more than one year last past and causes to be manufactured and sold to jobbers, dealers and the purchasing public throughout the United States by means of traveling salesmen, mail orders and otherwise, a product used by consumers as and for shellac, and distributes said product from the State of New York to the said purchasers thereof in the various States of the United States and the District of Columbia. In the marketing of said product as aforesaid respondent sells, advertises and represents same to customers, prospective customers, and the purchasing public as "American Shellac" and so brands and labels said products. The truth and facts are that said product is not shellac as commercially known, that it contains no shellac gum, which gum is produced in, and obtained from, India, that it is not manufactured or composed of shellac gum and alcohol, and that it is inferior in quality and value to shellac as commercially known. The said representations, advertising, branding and labeling of said product by respondent as aforesaid are false and have the capacity and tendency to mislead and deceive the said purchasers thereof, the trade, and the purchasing public into the belief that the product so represented, advertised, labeled and branded is shellac as commercially known, that said product contains said shellac gum and that said product is manufactured and composed of said shellac gum and alcohol; and to cause said purchasers to purchase said product in said belief.

PAR. 3. There are a large number of manufacturers and distributors of shellac as commercially known which is composed entirely of aforesaid shellac gum and alcohol and who represent, advertise, brand, label, and sell the same under the name of "shellac" and also many manufacturers and distributors of shellac substitutes who do not represent, advertise, brand or label said shellac substitutes as "shellac" or otherwise indicate to the purchasing public that

such substitutes are manufactured or composed of shellac gum and alcohol.

PAR. 4. The above alleged acts and things done by respondent are all to the prejudice of the public and of respondent's 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.

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The respondent, The Don-O-Lac Company, Inc., having entered its appearance by its attorney, filed its answer, hearings were had and evidence introduced in support of the complaint and on behalf of the respondent before an examiner of the Federal Trade Commission theretofore duly appointed, at which hearings the respondent appeared and was represented by counsel.

And the Commission having made and entered a report containing its findings as to the facts and conclusion, and having issued and served on the respondent an order to cease and desist made thereon, dated July 18, 1923,<sup>1</sup> and thereafter it appearing to the Commission upon reconsideration of the matter that said findings as to the facts should be modified in certain respects;

*Now, therefore,* The Federal Trade Commission, having duly reconsidered the record, and being now fully advised in the premises, on its own motion under and by virtue of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," hereby modifies its findings as to the facts heretofore made in this proceeding on the 18th day of July, 1923, and the same is hereby modified so that, as modified, said findings as to the facts shall read as follows, to wit:

#### MODIFIED FINDINGS AS TO THE FACTS.

PARAGRAPH 1. The respondent is a corporation organized under the laws of the State of New York, with its principal office and

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<sup>1</sup> Reported in 6 F. T. C. 283.

## Findings.

8 F. T. C

place of business in the city of Rochester, in said State. It is and has been since March 23, 1919, engaged in the business of manufacturing, selling and distributing paints, varnishes and substitutes for shellac varnish to painters, jobbers, dealers and the public generally throughout the United States, and in the course and conduct of its business causes its said products when sold to be transported from the State of New York through and into other States of the United States and the District of Columbia to the purchasers thereof, and in the course and conduct of its said business respondent is and has been at all times herein mentioned in competition with other persons, partnerships and corporations engaged in the manufacture, sale and distribution of paints, varnishes, shellac varnishes and substitutes for shellac varnishes in interstate commerce and with the trade generally.

PAR. 2. Respondent in the course of its business as aforesaid has caused, for more than one year last past, and now causes to be manufactured and sold to jobbers, dealers and the purchasing public throughout the United States by means of traveling salesmen, mail order and otherwise, a product used by consumers as and for shellac which said product the respondent markets under the name and label of "American Shellac."

PAR. 3. "Shellac" is a distinctive commodity produced by an insect, the *Tachardia Lacca*, found in India and a small portion of Tibet. This insect feeds upon leaves, or twigs, of certain trees and there exudes a substance which soon encloses the entire swarm. The twigs, when detached from the tree with the incrustation, are placed in bags, or sacks, and heated over a charcoal fire, the ends of the bags being twisted until a gum-like substance drips from the bag. This gum is collected on large flat stones, or other flat surfaces, and there hardens into cakes. These cakes are later broken up into small particles and are exported from India to the United States and various countries. The industry is quite an extensive one, and there was imported into the United States in 1910, 24,500,000 pounds; 1911, 16,333,000 pounds; 1912, 20,750,000 pounds; 1919, 23,750,000 pounds; 1920, 29,500,000 pounds; 1921, 28,200,000 pounds. The figures for the years of the European War are not given. The shellac imported into the United States all originates in India, and is used in the United States by manufacturers of furniture, electrical appliances, cables, whips, and hats, and is in the paint trade used for making a varnish which varnish when made from shellac cut in alcohol, is superior to any other varnish, and is known to the trade as "shellac" or shellac varnish.

The essential and peculiar characteristics of shellac varnish are the rapidity with which it dries, its penetrating qualities into the grain of the wood, the fact that after it dries on being subjected to heat it becomes pliable and assumes the shape of the commodity on which it is used, and when cooled again, becomes rigid in a new shape.

No shellac gum is produced in America.

PAR. 4. "Shellac," as used and understood commercially with reference to a gum or raw material in the trade and among manufacturers, distributors, and painters, means the shellac gum imported from India and the term "Shellac" or "Shellac Varnish" is understood and does mean to manufacturers, distributors, painters, and a large portion of the public users thereof, the India gum, cut in alcohol.

PAR. 5. In the making of varnishes substitutes for shellac gum are used, such as rosin, acroides and copal. Reputable manufacturers and dealers who prepare such varnishes with the substitutes above referred to label the product put upon the market either "Imitation Shellac," or "Shellac Substitute," or put the product out under some fanciful name such as "Krystolac," "Zinlac," or other trade name. These substitutes for shellac varnish are inferior in quality and value to shellac but where no deception in branding is practiced, serve a useful purpose.

PAR. 6. The respondent, from about March 23, 1919, to April, 1922, manufactured and sold and placed upon the market a product named and branded "American Shellac," and labelled the containers in which the said product was put up with labels reading as follows:

American Shellac

White

Manufactured by

The Don-O-Lac Company, Inc.,

Rochester, N. Y.

And this product so labeled, branded, distributed and sold, contained no shellac, namely: No gum produced in India. After April 1, 1922, the respondent in the manufacture of its said product, incorporated one pound of India gum with forty-four pounds of other gums to each ten gallons of alcohol.

PAR. 7. In order to protect the purchasing public from deception through improper and false representation in the sale of paints, varnishes and shellacs, and to promote the sale thereof upon terms of fair competition, on or about November 13, 1922, the National Varnish Manufacturers' Association, a trade organization composed of about 100 members and embracing in its membership nearly

## Findings

8 F. T. C

place of business in the city of Rochester, in said State. It is and has been since March 23, 1919, engaged in the business of manufacturing, selling and distributing paints, varnishes and substitutes for shellac varnish to painters, jobbers, dealers and the public generally throughout the United States, and in the course and conduct of its business causes its said products when sold to be transported from the State of New York through and into other States of the United States and the District of Columbia to the purchasers thereof, and in the course and conduct of its said business respondent is and has been at all times herein mentioned in competition with other persons, partnerships and corporations engaged in the manufacture, sale and distribution of paints, varnishes, shellac varnishes and substitutes for shellac varnishes in interstate commerce and with the trade generally.

PAR. 2. Respondent in the course of its business as aforesaid has caused, for more than one year last past, and now causes to be manufactured and sold to jobbers, dealers and the purchasing public throughout the United States by means of traveling salesmen, mail order and otherwise, a product used by consumers as and for shellac which said product the respondent markets under the name and label of "American Shellac."

PAR. 3. "Shellac" is a distinctive commodity produced by an insect, the *Tachardia Lacca*, found in India and a small portion of Tibet. This insect feeds upon leaves, or twigs, of certain trees and there exudes a substance which soon encloses the entire swarm. The twigs, when detached from the tree with the incrustation, are placed in bags, or sacks, and heated over a charcoal fire, the ends of the bags being twisted until a gum-like substance drips from the bag. This gum is collected on large flat stones, or other flat surfaces, and there hardens into cakes. These cakes are later broken up into small particles and are exported from India to the United States and various countries. The industry is quite an extensive one, and there was imported into the United States in 1910, 24,500,000 pounds; 1911, 16,333,000 pounds; 1912, 20,750,000 pounds; 1919, 23,750,000 pounds; 1920, 29,500,000 pounds; 1921, 28,200,000 pounds. The figures for the years of the European War are not given. The shellac imported into the United States all originates in India, and is used in the United States by manufacturers of furniture, electrical appliances, cables, whips, and hats, and is in the paint trade used for making a varnish which varnish when made from shellac cut in alcohol, is superior to any other varnish, and is known to the trade as "shellac" or shellac varnish.

The essential and peculiar characteristics of shellac varnish are the rapidity with which it dries, its penetrating qualities into the grain of the wood, the fact that after it dries on being subjected to heat it becomes pliable and assumes the shape of the commodity on which it is used, and when cooled again, becomes rigid in a new shape.

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PAR. 7. In order to protect the purchasing public from deception through improper and false representation in the sale of paints, varnishes and shellacs, and to promote the sale thereof upon terms of fair competition, on or about November 13, 1922, the National Varnish Manufacturers' Association, a trade organization composed of about 100 members and embracing in its membership nearly

## Findings.

S F. T. C.

one-half of the total number of manufacturers of varnish in the United States, producing over three-fourths of the total production of varnish in the United States, adopted the following standard system of nomenclature for shellacs in accordance with the following resolution passed by said association on said date:

*Whereas*, The term "shellac" has been applied not only to products composed of shellac gum dissolved in alcohol but also to compounds of shellac and other materials.

*And whereas*, These practices, if continued, will result in the debasement of the term shellac, confusion in the trade and deception of purchasers.

*Now, therefore, be it resolved* That the term "shellac" on labels or in advertising means only shellac gum cut or dissolved in alcohol; that if such shellac be reduced, reinforced or modified the term shellac shall likewise be modified by the addition of the word "compound" in conspicuous letters. That if the shellac content be less than 50 per cent of the solid content by weight of the material, the word shellac shall not be used on labels or advertising, except as a part of the formula, if printed, except in connection with the word substitute, or imitation.

*Be it further resolved* That this information shall be plainly shown on all containers, bills, contracts and letters of quotations. It is recommended that product containing less than 50 per cent by weight of shellac be sold under arbitrary trade names or brands.

On or about November 14, 1922, the above resolution was adopted by the Paint Manufacturers' Association of the United States, a trade organization composed of 140 paint manufacturers, and embracing in its membership about one-half of the total number of manufacturers of paint in the United States, producing about three-fourths of the total production of paint in the United States. The United States Shellac Manufacturers' Association of Chicago and the National Paint, Oil & Varnish Association of New York adopted similar resolutions.

In response to the spirit and purpose of this resolution a very large proportion of the manufacturers of shellac are labeling or branding their shellac, shellac compounds and shellac substitutes accordingly and are selling their products so labeled and branded throughout the United States, in competition with the products of the respondent labeled and branded as set out in paragraph 2 hereof.

PAR. 8. The word "pure" as applied to shellac indicates that the product so marked is free from adulteration, modification or reduc-

235

## Order.

tion of an entire content of shellac gum dissolved in alcohol; the word "shellac" standing alone or with a color adjective has the same meaning; the word "compound" indicates adulteration, modification or reduction to only such extent that the word "shellac" used in conjunction therewith denotes that shellac gum is the principal and predominant element of the compound and that the word "substitute" as a qualification for the word "shellac" indicates an adulteration, modification or reduction in the amount of shellac gum present to such an extent that shellac gum is not the principal and predominant element of the compound.

PAR. 9. The use by respondent of the labels "American Shellac" upon the containers of the varnishes composed of shellac gum mixed with a large quantity of substitutes, manufactured, sold and shipped by respondent as set forth in the foregoing findings, has the capacity and tendency to and does mislead and deceive a substantial part of the purchasing public into the belief that such products so labeled, are composed solely of genuine shellac gum dissolved in alcohol, and to induce said purchasers to purchase same in that belief.

## CONCLUSION.

The practices of the said respondent, under the conditions and circumstances described in the foregoing findings, are unfair methods of competition in commerce, and constitute a violation of the Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes."

## MODIFIED ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, the testimony and the evidence, and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," and the Commission having heretofore, to wit, on July 18, 1923, entered and served its order upon the respondent requiring it to cease and desist from certain practices; and it appearing to the Commission upon reconsideration of the matter that said order should be modified in certain respects:

*Now, therefore,* The Federal Trade Commission, on its own motion, under and by virtue of the provisions of Section 5 of an Act

## Dissent.

8 F. T. C.

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," hereby orders that an order to cease and desist, heretofore made in this proceeding on the 18th day of July, 1923, be and the same is hereby modified so that, as modified, said order shall read as follows, to wit:

*It is now ordered*, That the respondent, its officers, agents and employees, cease and desist from:

1. Using the words "Pure Shellac," "American Shellac," or "Shellac," alone or in connection with any other word or words, unless the product designated is pure shellac gum dissolved or cut in alcohol.

2. Using the words "American Shellac" or the word "Shellac," alone or in connection with any other word or words to designate a product which is not pure shellac but in which shellac gum is the principal and predominant element unless accompanied by the word "compound" in equally conspicuous letters.

3. Using the words "American Shellac" or the word "Shellac," alone or in connection with any other word or words to designate a product which is not pure shellac and in which shellac gum is not the principal and predominant element, unless accompanied by the word "substitute" in equally conspicuous letters.

*And it is further ordered*, That the respondent shall, within 60 days from the service upon it of a copy of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order herein set forth.

Commissioners Thompson and Nugent dissenting in attached memoranda.

*Dissent by Commissioner Thompson.*

I regret that I am unable to agree with the majority of the Commission in the proposed modified findings as to the facts and conclusions and the modified order, in the above-entitled case and cases of a similar nature in the same industry, particularly because I believe the majority of the industry, in the matter here considered, are seeking earnestly to clear up certain practices still indulged in by some of the industry.

Since, however, the action of the majority of the Commission in this case is, in my opinion, beyond the jurisdiction granted to the Commission by the act creating it, and, as the method proposed for eliminating the troubles presented is, in my opinion, impracticable of regulation or enforcement, I am unable to concur with the majority opinion.

The history of the movement for the proper branding and advertising of shellac varnish in connection with the Commission's work reveals the fact that complaints were issued in 1923 and 1924 against seven companies, the docket numbers being 924, 1014, 1047, 1055, 1056, 1062, and 1095;<sup>1</sup> Docket 924, The Don-O-Lac Company, Inc., being the first case in which an order was issued.

The substance of the order, so far as the point considered in this dissent is concerned, was that there should be stated on labels names and percentages of all substances, ingredients or gums other than shellac gum used. None of the respondents in the aforementioned cases ever made any objection to this ruling. At the present time the respondent in Docket 1062 objects to the changing of the order, saying in a letter to the Commission:

We understand that since the arrangement of putting our formula label on the shellac was more acceptable to us and since it covered the matter for you as well, if not better, we thought it would be agreeable to you if we continued putting our formula on the labels. If this is agreeable to you we see no necessity for signing the new stipulation as the old one will hold.

On June 4, 1924, the secretary of the Unfair Competition League and the Associate Counsel, Associated Advertising Clubs of the World appeared before the Commission in an informal hearing and suggested that the proposed findings and order in Docket 1047, American Shellac Company, be modified so as to eliminate the requirement of placing upon labels, etc., the names and percentages of all other elements than shellac gum and that the findings and order be amended as hereinafter set forth.

Subsequent to this action a majority of the Commission ordered in the Don-O-Lac case that the findings and order which had been issued in July, 1923, should be redrawn so as to correspond to those in the American Shellac case; i. e., to eliminate the order requiring the formula to be placed on the labels, and add paragraph 8 to the findings. That paragraph recites in substance that "pure shellac" indicates an article free from adulteration, etc., that the word "shellac," without qualification, except as to color, has the same

<sup>1</sup> Respondents, dates of orders, and citations, where available, in the group of cases above referred to, follow: Dock. 924—the instant case—original order, July 18, 1923 (6 F. T. C. 283); Dock. 1014, Dings & Schuster, Aug. 14, 1923 (6 F. T. C. 340), modified, Apr. 23, 1925; Dock. 1047, American Shellac Co., Inc., Nov. 18, 1924 (8 F. T. C. 256); Dock. 1055, Baer Bros., Oct. 19, 1923 (6 F. T. C. 481), modified, Apr. 23, 1925; Dock. 1056, H. O. Greenbaum, trading as Technical Color & Chemical Works and Victory Shellac Works, Nov. 14, 1923 (7 F. T. C. 49), modified, June 30, 1925; Dock. 1062, L. F. Cassoff, doing business as Central Paint & Varnish Works and Central Shellac Works, Mar. 5, 1924 (7 F. T. C. 382); and Dock. 1095, DeGolyer Varnish Works, Apr. 23, 1925 (9 F. T. C. 101).

Dissent.

S F. T. C

meaning. I am in accord with these declarations, as they are obviously correct, I dissent from the use of the following language in paragraph 8:

That the word "compound" indicates adulteration, modification or reduction to only such extent that the word "shellac" used in conjunction therewith denotes that shellac gum is the principal and predominant element of the compound.

In the same modified findings there is a resolution passed by the Varnish Manufacturers' Association on November 13, 1922, which is apparently the basis, and, so far as the findings of fact is concerned, the only basis, for the statements contained in paragraph 8. The language of that resolution is as follows:

*Whereas* the term "shellac" has been applied not only to products composed of shellac gum dissolved in alcohol but also to compounds of shellac and other materials,

*And whereas* these practices, if continued, will result in the debasement of the term shellac, confusion in the trade and deception of purchasers,

*Now, therefore, be it resolved,* That the term "shellac" on labels or in advertising means only shellac gum cut or dissolved in alcohol; that if such shellac be reduced, reinforced or modified the term shellac shall likewise be modified by the addition of the word "compound" in conspicuous letters. *That if the shellac content be less than 50 per cent of the solid content by weight of the material,* the word shellac shall not be used on labels or advertising, except as a part of the formula, if printed, except in connection with the word substitute or imitation.

Attention is called to the following language:

That if the shellac content be less than 50 per cent of the solid content by weight of the material, the word shellac shall not be used on labels or advertising, except as a part of the formula, if printed, except in connection with the word substitute or imitation.

It seems to me obvious that the language from which I dissent in paragraph 8 is not responsive to the statement quoted from the resolution of the association. In the resolution the shellac content is fixed at 50 per cent "of the solid content by weight of the material." The Commission's finding in this connection leaves out "50 per cent" and "solid content by weight" and uses in place of them the words "principal and predominant element."

There are, in my opinion, two fatal objections to the words "principal" and "predominant." In the first place they are ambiguous and not specific. For example, an article might be adver-

tised as shellac compound that would contain only 35 per cent shellac and the other elements might well be 25 per cent copal, 25 per cent resin, and 15 per cent Manila gum. Can any one say that 35 per cent shellac is not the "dominant" element as compared with the other elements in such a compound and would it not be the "principal" element? Yet this percentage falls short of "50 per cent of the solid content by weight of the material," as declared by the resolution of the association. Would it not be possible for an element to be the principal and predominant one in a compound under paragraph 8 of the findings and yet weigh less than "50 per cent of the solid content by weight of the material"?

The second objection is that the difficulties in regulating such a situation created by the language used with the many and constant tests that would have to be made of a competitor's product where any amount less than 100 per cent was used would be so burdensome upon the industry and upon the Commission in enforcing the regulation that it would be impractical.

The objectionable language referred to and that part of the order based upon it contained in paragraph 2 of the order forbidding the use of the words "American Shellac" or "Shellac," unless to "designate a product which is not pure shellac but in which shellac gum is the *principal* and *predominant* element, unless accompanied by the word 'compound' in equally conspicuous letters," is, in my opinion, not based upon "testimony" taken in accordance with the requirements of section 5 of the Federal Trade Commission Act. In the proposed modified findings now before us for consideration the only support for the objectionable declaration in paragraph 8 is found in the said resolution of the association.

The association passing this resolution represents, according to the findings, three-fourths of the production of the varnish industry. But, there is no testimony in the case as to what the ultimate consumer understands by the word "compound" as defined in the resolution of the association, or as set forth in paragraph 8 of the findings. After all, while Section 5 of this Act has to do with the protection of business competitors, it is, in its last analysis, for the protection of the ultimate consumer.

It is argued that a United States District Court has declared that the word "compound," with a descriptive term of an element attached, would be understood by the ultimate consumer to mean that the compound contained 50 per cent of the descriptive element. But it is obvious that the court's ruling could not be made the basis for the use of the words "principal" and "predominant" in connection

with a compound, for the element named might be 35 per cent and still come within the meaning of the words "principal and predominant."

There is, however, a still more serious objection which confronted us when we consider the ultimate consumer under Section 5. Undoubtedly the Commission has the discretionary power, after a complaint has been issued, to *dismiss* a case based upon a stipulation of facts entered into by the Commission and respondent. This discretion also extends to the issuance of an order where the facts alleged in a complaint, stating a cause of action, have been admitted by respondent in a stipulation. But this discretion does not extend to a situation where an issue has been raised by a complaint and answer and the stipulation, finding, and order, present a state of facts not covered by or responsive to any allegation of the complaint. The issue in this case under the allegations is narrowed down to the charge of misbranding. Since under the "Gratz" decision there is no allegation in the complaint to which the language objected to is responsive than the Gratz decision, should exclude the same from the findings and order. Moreover the statute says:

The findings of the Commission as to the facts, if supported by testimony, shall be conclusive.

The word "Testimony," according to "Words and Phrases," means "A statement made by a witness under oath in a legal procedure" and "It does not include documents."

Let us suppose that in one of these cases there is an appeal taken to the Circuit Court of Appeals by a respondent. Will the court say there is any testimony there upon which the language objected to is based which makes the testimony conclusive upon the court?

There has been no testimony as to what the ultimate consumer understands by the language referred to in paragraph 8 and the resolution of the association as to the use of the word "compound" is an *ex parte* declaration of producers.

For the foregoing reasons, while I concur in that part of paragraph 8 of the modified findings referring to "pure" and "shellac," I dissent from the language wherein the word "shellac," when associated with the words "compound," denotes that shellac is the "principal and predominant element," and I dissent from the language used in paragraph 2 in the modified order finding American Shellac or Shellac to wit: "A product which is not pure shellac but in which shellac gum is the principal and predominant element, unless accompanied by the word 'compound' in equally conspicuous letters."

*Dissent by Commissioner Nugent.*

I am not in agreement with a majority of my colleagues in this matter.

Section 8 of the modified findings of fact and the modified order entered against the Don-O-Lac Company, are, obviously, based upon a resolution adopted by the National Varnish Manufacturers Association, on or about November 13, 1922. The association, according to the findings of fact, is composed of manufacturers "producing over three-fourths of the total production of varnish in the United States."

I quote the resolution referred to:

*Whereas* the term "shellac" has been applied not only to products composed of shellac gum dissolved in alcohol but also to compounds of shellac and other materials,

*And whereas*, these practices, if continued, will result in the debasement of the term shellac, confusion in the trade and deception of purchasers.

*Now, therefore, be it resolved*, That the term "shellac" on labels or in advertising means only shellac gum cut or dissolved in alcohol; that if such shellac be reduced, reinforced or modified the term shellac shall likewise be modified by the addition of the word "compound" in conspicuous letters. That if the shellac content be less than 50% of the solid content by weight of the material, the word shellac shall not be used on labels or advertising, except as a part of the formula, if printed, except in connection with the word substitute or imitation.

*Be it further resolved*, That this information shall be plainly shown on all containers, bills, contracts and letters of quotations. It is recommended that product containing less than 50 per cent by weight of shellac be sold under arbitrary trade names or brands.

Paragraph 8 of the modified findings of fact, approved by a majority of the Commission, reads, in part, as follows:

the word "compound" indicates adulteration, modification or reduction to only such extent that the word "shellac" used in conjunction therewith denotes that shellac gum is the principal and predominant element of the compound, and that the word "substitute" as a qualification for the word "shellac" indicates an adulteration, modification or reduction in the amount of shellac gum present to such an extent that shellac gum is not the principal and predominant element of the compound.

Dissent.

8 F. T. C.

with a compound, for the element named might be 35 per cent and still come within the meaning of the words "principal and predominant."

There is, however, a still more serious objection which confronted us when we consider the ultimate consumer under Section 5. Undoubtedly the Commission has the discretionary power, after a complaint has been issued, to *dismiss* a case based upon a stipulation of facts entered into by the Commission and respondent. This discretion also extends to the issuance of an order where the facts alleged in a complaint, stating a cause of action, have been admitted by respondent in a stipulation. But this discretion does not extend to a situation where an issue has been raised by a complaint and answer and the stipulation, finding, and order, present a state of facts not covered by or responsive to any allegation of the complaint. The issue in this case under the allegations is narrowed down to the charge of misbranding. Since under the "Gratz" decision there is no allegation in the complaint to which the language objected to is responsive than the Gratz decision, should exclude the same from the findings and order. Moreover the statute says:

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There has been no testimony as to what the ultimate consumer understands by the language referred to in paragraph 8 and the resolution of the association as to the use of the word "compound" is an *ex parte* declaration of producers.

For the foregoing reasons, while I concur in that part of paragraph 8 of the modified findings referring to "pure" and "shellac," I dissent from the language wherein the word "shellac," when associated with the words "compound," denotes that shellac is the "principal and predominant element," and I dissent from the language used in paragraph 2 in the modified order finding American Shellac or Shellac to wit: "A product which is not pure shellac but in which shellac gum is the principal and predominant element, unless accompanied by the word 'compound' in equally conspicuous letters."

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Dissent.

8 F. T. C.

with a compound, for the element named might be 35 per cent and still come within the meaning of the words "principal and predominant."

There is, however, a still more serious objection which confronted us when we consider the ultimate consumer under Section 5. Undoubtedly the Commission has the discretionary power, after a complaint has been issued, to *dismiss* a case based upon a stipulation of facts entered into by the Commission and respondent. This discretion also extends to the issuance of an order where the facts alleged in a complaint, stating a cause of action, have been admitted by respondent in a stipulation. But this discretion does not extend to a situation where an issue has been raised by a complaint and answer and the stipulation, finding, and order, present a state of facts not covered by or responsive to any allegation of the complaint. The issue in this case under the allegations is narrowed down to the charge of misbranding. Since under the "Gratz" decision there is no allegation in the complaint to which the language objected to is responsive than the Gratz decision, should exclude the same from the findings and order. Moreover the statute says:

The findings of the Commission as to the facts, if supported by testimony, shall be conclusive.

The word "Testimony," according to "Words and Phrases," means "A statement made by a witness under oath in a legal procedure" and "It does not include documents."

Let us suppose that in one of these cases there is an appeal taken to the Circuit Court of Appeals by a respondent. Will the court say there is any testimony there upon which the language objected to is based which makes the testimony conclusive upon the court?

There has been no testimony as to what the ultimate consumer understands by the language referred to in paragraph 8 and the resolution of the association as to the use of the word "compound" is an *ex parte* declaration of producers.

For the foregoing reasons, while I concur in that part of paragraph 8 of the modified findings referring to "pure" and "shellac," I dissent from the language wherein the word "shellac," when associated with the words "compound," denotes that shellac is the "principal and predominant element," and I dissent from the language used in paragraph 2 in the modified order finding American Shellac or Shellac to wit: "A product which is not pure shellac but in which shellac gum is the principal and predominant element, unless accompanied by the word 'compound' in equally conspicuous letters."

*Dissent by Commissioner Nugent.*

I am not in agreement with a majority of my colleagues in this matter.

Section 8 of the modified findings of fact and the modified order entered against the Don-O-Lac Company, are, obviously, based upon a resolution adopted by the National Varnish Manufacturers Association, on or about November 13, 1922. The association, according to the findings of fact, is composed of manufacturers "producing over three-fourths of the total production of varnish in the United States."

I quote the resolution referred to:

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*And whereas*, these practices, if continued, will result in the debasement of the term shellac, confusion in the trade and deception of purchasers.

*Now, therefore, be it resolved*, That the term "shellac" on labels or in advertising means only shellac gum cut or dissolved in alcohol; that if such shellac be reduced, reinforced or modified the term shellac shall likewise be modified by the addition of the word "compound" in conspicuous letters. That if the shellac content be less than 50% of the solid content by weight of the material, the word shellac shall not be used on labels or advertising, except as a part of the formula, if printed, except in connection with the word substitute or imitation.

*Be it further resolved*, That this information shall be plainly shown on all containers, bills, contracts and letters of quotations. It is recommended that product containing less than 50 per cent by weight of shellac be sold under arbitrary trade names or brands.

Paragraph 8 of the modified findings of fact, approved by a majority of the Commission, reads, in part, as follows:

the word "compound" indicates adulteration, modification or reduction to only such extent that the word "shellac" used in conjunction therewith denotes that shellac gum is the principal and predominant element of the compound, and that the word "substitute" as a qualification for the word "shellac" indicates an adulteration, modification or reduction in the amount of shellac gum present to such an extent that shellac gum is not the principal and predominant element of the compound.

Dissent.

8 F. T. C.

It is plainly apparent to my mind that the association intended that a commodity which contains less than 100 per cent, and 50 per cent or more "of the solid content by weight of the material" of shellac gum cut in alcohol, shall be marketed as a "compound" and that the word "compound" shall appear on the label in conspicuous letters, where the word "shellac" is used to indicate the product. Also that a commodity containing "less than 50 per cent of the solid content by weight of the material" of shellac gum cut in alcohol, shall be sold as a "substitute," or "imitation," and when the word "shellac" appears on the label, the word "substitute" or "imitation" in conspicuous letters shall appear thereon.

Paragraphs 2 and 3 of the modified order made and entered herein by majority vote of the Commission, are as follows:

2. Using the words "American Shellac" or the word "Shellac," alone or in connection with any other word or words to designate a product which is not pure shellac but in which shellac gum is the principal and predominant element unless accompanied by the word "compound" in equally conspicuous letters.

3. Using the words "American Shellac" or the word "Shellac," alone or in connection with any other word or words to designate a product which is not pure shellac and in which shellac gum is not the principal and predominant element, unless accompanied by the word "substitute" in equally conspicuous letters.

It will be observed that the words "principal" and "predominant," in paragraph 8 of the findings, and in paragraphs 2 and 3 of the order, do not appear in the resolution adopted by the National Varnish Manufacturers Association above set out.

I am in accord with the statement contained in Chairman Thompson's dissenting memorandum that:

an article might be advertised as shellac compound that would contain only 35 per cent shellac and the other elements might well be 25 per cent copal, 25 per cent rosin and 15 per cent Manila gum. Can any one say that 35 per cent shellac is not the "predominant" element as compared with the other elements in such a compound and would it not be the "principal" element? Yet this percentage falls short of "50 per cent of the solid content by weight" of the material as declared by the resolution of the association.

## Dissent..

Would it not be possible for an element to be the principal and predominant one in a compound under paragraph 8 of the findings and yet weigh less than "50 per cent of the solid content by the weight of the material"?

The same argument would apply with equal force where the constituent elements contained in the product are, for the purpose of illustration, shellac 35 per cent, copal 32 per cent and rosin 33 per cent.

In other words, in my judgment, any product in which shellac is the "principal and predominant element," can, under the modified order herein, be labeled and marked as a "compound" even though the quantity of shellac gum therein be far "less than 50 per cent of the solid content by weight of the material."

The findings approved and the order entered in this case are similar to those in a considerable number of like cases, and I am of the opinion that they do not fully remedy conditions prevailing in the varnish industry, and are not in accordance with the resolution adopted by the National Varnish Manufacturers Association above quoted.

For the foregoing reasons, I dissent from the action taken by a majority of my colleagues in approving that portion of paragraph 8 of the modified findings of fact above set out, as well as in making and entering paragraphs 1 and 2 of the modified order to cease and desist.

Complaint.

8 F. T. C.

IN THE MATTER OF  
MITCHELL BLANK DOING BUSINESS UNDER THE  
TRADE NAME AND STYLE OF HAGEN IMPORT COM-  
PANY OF NEW JERSEY.

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

*Docket 1217—November 7, 1924.*

**SYLLABUS.**

Where an individual engaged in the sale at retail of various products made in the United States and bought by him from concerns located therein,

- (a) Used and featured the trade name "Hagen Import Company of New Jersey" in his catalogues, circulars and other advertising literature;
- (b) Designated as "Imported Bavarian Old Time Barley Malt Extract" an extract of barley malt which did not originate in Bavaria but was a purely domestic product, and featured said name in advertising and labeling such product;

With the effect of misleading and deceiving purchasers into believing his products to be imported and of inducing them to purchase the same in that belief, and of thus diverting trade from competitors who truthfully marked their merchandise:

*Held*, That such practices, under the circumstances set forth, constituted unfair methods of competition.

*Mr. T. John Butler* for the Commission.

*Mr. Joseph Varbalow* of Westcott & Varbalow of Camden, N. J., for respondent.

**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 Mitchell Blank doing business under the trade name and style Hagen Import Company of New Jersey, hereinafter referred to as respondent, has been and is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

PARAGRAPH 1. Respondent is an individual doing business under the trade name and style "Hagen Import Company of New Jersey" with his place of business in the city of Camden, State of New Jersey, and is engaged in selling various kinds of merchandise at retail to consumers residing and located at points in various States of the United States. He causes said merchandise when so sold to be transported from his said place of business in the city of Camden,