

Complaint.

IN THE MATTER OF
JOHNSON PROCESS GLUE COMPANY.

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

Docket 1052—March 19, 1925.

SYLLABUS.

Where a corporation engaged in the manufacture and sale of flexible glues and allied products, gave and offered to give to superintendents, foremen and other employees of customers or prospective customers, without the knowledge or consent of their employees, substantial sums of money and other things of value as an inducement for them to purchase from it or recommend such purchase to their employers, or as a reward for having induced such purchase by their employers:

Held, That such gifts and offers to give, under the circumstances set forth, constituted unfair methods of competition.

Mr. E. J. Hornibrook for the Commission.

Mr. Emil Klein of Brooklyn, N. Y., 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 Johnson Process Glue Company, hereinafter referred to as the 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 and doing business under and by virtue of the laws of the State of New York, having its principal office and factory located in the City of New York in said State; and is now and for more than two years last past has been engaged in the business of manufacturing and selling glue and other kindred products. Respondent sells and offers to sell said commodities to printers, bookbinders, publishers, and others located in various States of the United States. Respondent causes said products when sold to be transported from its said factory in the State of New York through and into other States of the United States to the respective purchasers thereof. Respondent carries on its said business in direct active competition with other individuals, partnerships, and corporations similarly engaged.

PAR. 2. In the course of its said business respondent from time to time during a period of more than two years last past has been offer-

Findings.

8 F. T. C.

ing to give and giving to superintendents, foremen, bookbinding and gluing machine operators and other employees of the above-mentioned printing, bookbinding, publishing and other establishments by whom glue and other kindred products are used, and who had charge or supervision of the purchase of glue and kindred products for use, in such establishments, without the knowledge or consent of their respective employers, substantial sums of money and other things of equal value as an inducement to influence said employees to purchase the above described commodities from respondent for and on behalf of their respective employers and to recommend such purchases to and as promised rewards for having induced such purchases by their respective employers.

PAR. 3. The above acts and conduct of the respondent are prejudicial to the public and the 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, FINDINGS AS TO THE FACTS, AND ORDER.

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

The respondent having entered its appearance and filed its answer herein, hearings were had and evidence was thereupon introduced before William F. Dinnen, an examiner of the Federal Trade Commission theretofore duly appointed. The attorney for the Commission having filed brief herein, and the respondent having failed to file a brief and having failed to appear and orally argue this matter, although duly and timely notified as to its privilege so to do, and the Commission having fully considered the record and being duly advised in the premises, now makes this its findings as to the facts and conclusions:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. The respondent, Johnson Process Glue Company, is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of New York, with its principal office and place of business in the City of New York, in said State. It is engaged in the manufacture of flexible glues and allied products, and the sale thereof to bookbinders and other users thereof located at points in various States of the United States. It causes

said products, when so sold, to be transported from its said place of business in the City of New York, State of New York, into and through other States of the United States, to said purchasers at their respective points of location. In the course and conduct of its business respondent, Johnson Process Glue Company, is in competition with other individuals, partnerships and corporations also engaged in the manufacture and sale and transportation of flexible glues and other allied products between and among the various States of the United States in interstate commerce.

PAR. 2. In the course of its aforesaid business, respondent has from time to time and during a period of about three years immediately prior to the filing of the complaint herein, offered and given to superintendents, foremen and employees of respondent's customers, without the knowledge or consent of such customers, substantial sums of money and other things of value, as inducements to influence said superintendents, foremen or other employees to purchase said flexible glue and other allied products of the respondent for said customers, and has given and offered to give superintendents, foremen and employees of respondent's customers, without the knowledge or consent of such customers, substantial sums of money and other things of value, as inducements for such superintendents, foremen and other employees to recommend to such customers or prospective customers the purchase of such products of the respondent, and has promised to give and has given to such superintendents, foremen and other employees, as a reward for their influence in bringing about the purchase of such goods of the respondent by such customers, without the knowledge or consent of such customers, substantial sums of money and other things of value. These instances recited in this paragraph, involve the shipment of respondent's goods from the State of New York to purchasers thereof residing in other States of the United States. In making such gifts of money, respondent, in order to conceal such transactions and the identity of the donors, make remittances of aforesaid sums to the aforesaid donees by mailing letters direct to such donees, containing such remittances, without the knowledge or consent of the said employers of said donees.

PAR. 3. As an illustration of the cases described generally in paragraph 2 hereof, the following specific facts are found:

(1) On or about July 25, 1921, respondent had in its employ one I. Steinberg. At all times hereinafter mentioned and in all matters hereinafter described, the said Steinberg was the duly authorized and acting agent of the respondent. On or about July 25, 1921, the said I. Steinberg called upon the firm of R. R. Donnelly Sons & Co., of Chicago, Ill., for the purpose of demonstrating to and selling to the said R. R. Donnelly Sons & Co. a quantity of respondent's glue. On

Findings.

8 F. T. C.

or about that date, I. Steinberg proceeded to demonstrate the respondent's glue before Edwin Warner Greenman, efficiency engineer and buyer of the said Donnelly Company, Michael J. Rowan, operator of a binding machine of the said Donnelly Company, and Philip Frazier, superintendent of bookbinding of the said Donnelly Company. These last-named men had been designated by the said Donnelly Company to watch the demonstration of the glue of the respondent and make report thereon. On or about the 26th day of July, 1921, the said Steinberg accosted the said Michael J. Rowan and asked him to meet him that night at the Palmer House, in the city of Chicago, State of Illinois. Rowan immediately reported the incident to his superior, Frazier, and asked Frazier if he should keep the appointment. Frazier and Rowan concluded that they would go together. They met Steinberg as per appointment on or about the evening of July 26, 1921. The latter treated them to cigars and liquors and stated that he would make it attractive to them if they would influence R. R. Donnelly Sons & Company to use respondent's glue. Steinberg then and there offered Rowan and Frazier, on behalf of the respondent, one-fourth of a cent per pound commission on the purchase price of said glue for such influence. Upon being informed that they were not interested, the said Steinberg, on behalf of respondent, said he would give \$500 to Rowan and Frazier for the first carload which they persuaded R. R. Donnelly Sons & Company to purchase from them, and that he would take the matter up with his factory and see how much more it would allow on delivery.

(2) The said Steinberg then and there stated that he had made for the respondent the same arrangement with certain men in the employ of the Jersey City Printing Company, of Jersey City, N. J., and also with the Pictorial Review, of New York City, and further stated that these men were receiving their checks monthly from the respondent and that the checks which these men were receiving amounted to about \$5,000 per year; and further stated that these checks would be sent direct to the said Frazier and Rowan by respondent. These said offers were made by said Steinberg on behalf of the respondent, without the knowledge or consent of the employers of the said Rowan and Frazier.

That said Steinberg made the statements above recited was not disputed, nor was the truthfulness of said statements, or any of them, questioned.

PAR. 4. There are a number of manufacturers situated in the various States of the United States, engaged in the business of manufacturing and selling flexible glue and allied products in competition with the respondent, who cause their products to be transported from their several places of business into and through other States of the

519

Order.

United States to the purchasers thereof, who do not promise or give sums of money, or other things of value, as gratuities to employees of the purchasers of their said products as inducements to such employees to recommend or induce the purchase and use by their said employers of such products.

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."

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the complaint and respondent's answer thereto and the evidence adduced at the hearing thereof, and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,"

It is now ordered, That the respondent, Johnson Process Glue Company, its officers, agents, representatives and employees, do cease and desist from giving or offering to give, either directly or indirectly, to superintendents, foremen, or other employees of their customers or prospective customers, without the knowledge and consent of said customers, or prospective customers, any sum or sums of money, whether such money be given or offered—

(1) As an inducement to influence said employees to purchase from respondent glue or other products for and on behalf of the employers of said employees;

(2) As inducement to influence said employees to recommend such purchase to their employers;

(3) Or as a reward for having induced such purchase by their employers.

It is further ordered, That the respondent Johnson Process Glue Company, shall, within sixty days after the service upon them of a copy of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist hereinbefore set forth.

ORDERS OF DISMISSAL.

TWINPLEX SALES CO., ET AL.¹ August 1, 1924. (Docket 914.)

Charge: Resale price maintenance; in connection with the sale of razor stropping devices.

Dismissed, after answer, without assignment of reasons.

Appearances: *Mr. James T. Clark* for the Commission; *Covington, Burling & Rublee* of Washington, D. C., and *Smith & Percy* of St. Louis, Mo., for respondents.

B. J. GOLDSTEIN doing business under the trade name and style of AJAX FIRE ENGINE WORKS. August 12, 1924. (Docket 1121.)

Charge: Advertising falsely and misleadingly; in connection with the manufacture and sale of chemical fire extinguishers, including extinguishers made by other manufacturers.

Dismissed, after answer, without assignment of reasons.

Appearances: *Mr. E. J. Hornibrook* for the Commission; *Mr. William Paul Buchler* of New York City, for respondent.

FRIEDRICH-FRIEDRICH CHEMICAL Co. August 20, 1924. (Docket 1179.)

Charge: Advertising falsely and misleadingly and misbranding or mislabeling; in connection with the manufacture and sale of toilet preparations.

Dismissed, after answer, without assignment of reasons.

Appearances: *Mr. M. J. Doyle* for the Commission; *Mr. John P. Connelly* of Philadelphia, Pa., for respondent.

THE NATIONAL WHOLESALE DRUGGISTS' ASSOCIATION, ET AL., September 3, 1924. (Docket 168.)

Charge: Combining or conspiring with the purpose and effect of discouraging and suppressing competition and of unfairly hampering and obstructing certain competitors; in connection with the buying and selling of drugs, proprietary articles, and druggists' sundries.

¹ Respondents not specified in this case were as follows: Mrs. H. S. Gardner, H. S. Gardner, jr., and Charles H. Gardner, individually and as copartners doing business under the trade name and style of Twinplex Sales Company; H. S. Gardner, individually and as trustee of said business for said copartners, and J. Bryant Reinhart and Thomas L. Fouke, individually and as employees and agents of said partnership.

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

Appearances: *Mr. Edward L. Smith* for the Commission; *Mr. Harold Swain* of New York City for respondent Title Guarantee & Trust Co.; and *Everett, Clarke & Benedict* of New York City for other respondents.

OHIO DAIRY Co. September 24, 1924. (Docket 958.)

Charge: Cutting off competitors' supplies; in connection with the purchase of cream or butter fat.

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

Appearances: *Mr. M. Markham Flannery* for the Commission; *Mr. Arthur S. Burket* of Columbus, Ohio, for respondent.

KNICKERBOCKER KNITTING MILLS Co. October 10, 1924. (Docket 1228.)

Charge: Advertising falsely and misleadingly; in connection with the sale of knit goods.

Dismissed for the reason that "respondent Knickerbocker Knitting Mills Co., has amended its articles of incorporation so as to change its name to 'Knickerknit' Inc. * * *"

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

B. T. BARBITT, INC. October 13, 1924. (Docket 427.)

Charge: Guarantee against price decline; in connection with the manufacture and sale of soap, soap powder and other cleansing compounds.

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

Appearances: *Mr. William A. Sweet* for the Commission; *Rounds, Hatch, Dillingham & Debevoise* and *Elkus & Gleason* of New York City for respondent.

HYGRADE LAMP Co. October 15, 1924. (Docket 1022.)

Charge: Acquisition of stock of competitor in violation of Section 7 of the Clayton Act; in connection with the manufacture and sale of standard vacuum and gas filled tungsten lamps.

Dismissed, after answer, without assignment of reasons.

Appearances: *Mr. G. Ed. Rowland* for the Commission; *Mr. Simon Rasch* of New York City for respondent.

THE LARROWE MILLING Co. October 15, 1924. (Docket 1171.)

Charge: Discriminating in price in violation of Sections 2 and 5 of the Clayton and Federal Trade Commission Acts, respectively;

in connection with the manufacture and sale of animal feed products.

Dismissed without assignment of reasons.

Appearances: *Mr. Charles Melvin Neff* for the Commission; *Mr. Harry J. Gerrity* of Washington, D. C. and *Marshall & Fraser* of Toledo, Ohio, for respondent.

JEAN JORDEAU, INC. October 20, 1924. (Docket 1126.)

Charge: Misrepresenting product; in connection with the manufacture and sale of depilatories.

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

Appearances: *Mr. Richard P. Whiteley* for the Commission; *Mr. Thomas A. Davis* of Howe & Davis of Orange, N. J. and *Mr. John K. Brachvogel* of Munn, Anderson & Munn of New York City and Washington, D. C., for respondent.

DOUGLAS FIR EXPLOITATION & EXPORT COMPANY, INCORPORATED, AND ONE HUNDRED & SEVEN OTHERS.¹ October 22, 1924. (Docket 880.)

Charge: Combining and conspiring to hinder and obstruct competition in the sale and distribution of lumber.

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

¹ Persons and concerns joined as respondents, not specified above, were as follows: Aberdeen Lumber & Shingle Co.; F. W. Alexander; American Mill Co. (also called Hulbert Mill Co.); E. G. Ames; Anderson & Middleton Lumber Co.; Astoria Box Co.; A. A. Baxter; Bay City Lumber Co.; Bay Park Lumber Co.; Beaver Lumber Co.; Bloedel Donovan Lumber Mills; J. E. Bloedel; Bolcom-Canal Lumber Co.; W. H. Boner; P. J. Brix; Ralph H. Burnside; Bryant Lumber Co.; Buchanan Lumber Co.; Buehner Lumber Co.; Campbell Mill Co.; Canyon Lumber Co.; R. A. Christenson; Clark-Nickerson Lumber Co.; O. M. Clark; Clark & Wilson Lumber Co.; Clear Fir Lumber Co.; Clear Lake Lumber Co.; Columbia River Lumber Co.; Columbia County Lumber Co.; Crossett Western Lumber Co.; Crown Lumber Co.; Danaher Lumber Co.; Defiance Lumber Co.; Dempsey Lumber Co.; Ernest Dolge, Inc.; J. J. Donovan; Donovan Lumber Co.; William Donovan, sr.; Du Bois Lumber Co.; Ellis-Myrloio Lumber Co.; Eureka Cedar Lumber & Shingle Co.; Ferry Baker Lumber Co.; Eldalgo Mill & Lumber Co.; Fir Products Co.; Grays Harbor Commercial Company; Grays Harbor Lumber Co.; E. C. Griggs; A. B. Hammond; Hammond Lumber Co.; Hanify Lumber Co.; Charles E. Huddart; S. M. Hauptman; W. Yale Henry; Charles E. Hill; Hoquiam Lumber & Shingle Co.; Island Lumber Co.; Henry Kirk; Knappton Mills & Lumber Co.; W. J. Kuhl; Charles L. Lewis; Marine Lumber Co.; A. W. Middleton; Morrison Mill Co.; National Lumber & Manufacturing Co.; Nettleton Lumber Co.; North Bend Hill & Lumber Co.; Northwestern Lumber Co.; Oregon Box & Manufacturing Co.; P. & G. Lumber Co.; Pacific Box Co.; A. L. Palne; Peninsular Lumber Co.; Port Blakely Mill Co.; Portland Lumber Co.; Pudget Mill Co.; Puget Mill Co.; Puget Sound Lumber Co.; Puget Sound Mills & Timber Co.; Puget Sound Saw Mills & Shingle Co.; Quinault Lumber Co.; Raymond Lumber Co.; Raymond Veneer Co.; Schwager-Nettleton Mills; Silor Mill Co.; South Bend Mills & Lumber Co.; St. Helens Lumber Co.; St. Paul & Tacoma Lumber Co.; Tacoma Mill Co.; W. H. Talbot; C. A. Thayer; Tidewater Mill Co.; James Tyson; Walton Lumber Co.; Warrenton Lumber Co.; George K. Wentworth, jr.; Lloyd J. Wentworth; A. J. West Lumber Co.; West Oregon Lumber Co.; West Waterway Lumber Co.; eastern Lumber Co.; estport Lumber Co.; Weyerhaeuser Timber Co.; Wallapa Lumber Co.; The Whitney Company; Wilson Brothers & Co.; E. K. Wood Lumber Co.; and Myron C. Woodard.

Appearances: *Mr. Henry Ward Beer, Mr. Frank E. Doyle, and Mr. Alfred M. Craven* for the Commission; *Mr. Louis Titus and Mr. J. Barrett Carter* of Washington, D. C., for respondents; *Mr. John F. Logan* of Portland, Oreg., for respondents *Clark-Nickerson Lumber Co.*, and *O. M. Clark*; *Mr. Joseph N. Teal* of Portland, Oreg., for respondents *E. G. Griggs and St. Paul & Tacoma Lumber Co.*

Dissent by Commissioner Thompson.

I dissent from the decision of the Commission in the above-entitled cause of action for the reason that in my opinion the Douglas Fir Exploitation & Export Company and the 107 other respondents, comprising 79 lumber companies and 28 individuals, are guilty, both on the law and the facts, of unfair methods of competition done in the furtherance of a conspiracy contrary to Section 5 of the Federal Trade Commission Act.

This proceeding is the outgrowth of an extensive investigation of the entire lumber industry of the United States by the Commission, covering among others, activities of the West Coast Lumbermen's Association which includes in its membership most of the respondent lumber companies named in this complaint. The facts were reported to Congress on June 9, 1921, charging curtailment of production, price control of logs and lumber, concentration of supplies of Douglas Fir in the hands of a few, enhancement of prices, affiliating with British Columbia loggers for the purpose of continuing the advancement of prices, exchanging with southern pine and western pine manufacturers notices of price action for the purpose of securing harmonious prices, and other charges, all of which were supported by letters, documents, and data of the manufacturers of Douglas Fir and other lumber.

On May 3, 1922, the Federal Trade Commission issued a complaint against the Douglas Fir Exploitation & Export Company and 107 others charging them with a conspiracy to hinder and obstruct competition in the sale and distribution of lumber in interstate and foreign commerce. It should be noted at this juncture that the respondent Douglas Fir Exploitation & Export Company as named in the complaint is a corporation organized and existing under and by virtue of the laws of the State of Washington in 1913, and in active operation since 1916.

The respondents were charged with meeting together from time to time during the period covered from 1916 to 1922, fixing prices and terms at which they agreed to and did sell lumber in interstate and foreign commerce; and in furtherance of the conspiracy to hinder and obstruct competition, seventeen separate overt acts were alleged, including affiliation with the West Coast Lumbermen's Association

for the purpose of developing a monopoly in the manufacture and sale of lumber.

On February 21, 1923, with the approval of the Commission, the conspiracy charge of the complaint was amended by language charging an overt act to the effect that from 1915 to 1922, with the aid and assistance of the West Coast Lumbermen's Association, the Pacific Lumber Inspection Bureau, and the Douglas Fir Exploitation & Export Company, respondents did fix prices and terms at which they would agree and did agree to sell lumber and logs in commerce, compelling purchasers to buy upon a uniform price and upon uniform terms as fixed by them. The aforementioned association and bureau were not made parties to the suit, and hence would not be subject to any order of the Federal Trade Commission in the premises.

Practically all the respondents denied the allegations of the complaint and alleged, as a matter of defense, that the Douglas Fir Exploitation & Export Company was an organization engaged solely in export trade within the meaning of an Act of Congress approved April 10, 1918, known as the Export Trade Act (Webb-Pomerene Law). The respondents also moved to strike out said amendment which the Commission had approved, but their motion was overruled.

After taking 6,000 pages of testimony with over 1,200 exhibits, and after consideration of oral argument and written briefs, the Commission entered an order dismissing the complaint herein without prejudice.

It appears from the record in this case that the respondent companies and individuals heretofore referred to are engaged in and control to a large extent the manufacture and sale of Douglas Fir lumber on the Pacific Coast. About 80 per cent of their output is sold in the domestic market and distributed throughout the United States. The remaining 20 per cent is sold through the Douglas Fir Exploitation & Export Company to exporters, f. a. s. at Pacific Coast ports, for resale in foreign countries.

As to the 80 per cent sold in the domestic market, it is shown by a preponderance of evidence that respondents curtailed production, and agreed upon prices at which the lumber should be sold from 1915 to 1922, inclusive. In furtherance of the conspiracy respondents held meetings, exchanged correspondence, and operated an "Open Price Plan." Base price lists, discount sheets, weekly barometers and daily market bulletins were issued.

The West Coast Lumbermen's Association, although not named as a respondent in this case, served as a central agency through which meetings were arranged, price lists issued, the "Open Price Plan"

developed and maintained, the production of lumber curtailed, and information incident to the furtherance of the conspiracy was distributed. Some of the respondents were officers and many were active members of the association.

Base price lists were compiled by committees, of which the respondents were active members, and were formally approved and adopted by the lumbermen's associations. They were shown to have been in use in the rail trade (shipments by railroad from Pacific Coast States to inland and eastern points) and in the domestic cargo trade (shipments by water from Washington and Oregon ports to California and other domestic ports) since 1909; and in sales to exporters for resale to foreign countries since 1911. Prices on base price lists represented the market values on detailed specifications of lumber (fir, cedar, spruce and hemlock) as determined by respondents at the time the lists were compiled, and were revised from time to time as values increased. In some lists, freight rates also were computed.

Base price lists were used as a basis for quotations, and current "discount sheets" were issued at more frequent intervals to cover market variations. These read "on" or "off" the prices quoted in the base list.

From 1915 to 1920 respondents agreed upon thirty-two uniform discount sheets in the rail trade. About 1920 there seems to have been some apprehension as to the legality of the uniform sheets and their compilation and adoption at price-fixing meetings. Thereafter respondents issued individual sheets, open meetings for the fixing of prices were less frequent, and more reliance was placed upon the information afforded by the "Open Price Plan" of their trade association, the West Coast Lumbermen's Association, which in respondents' opinion would serve the same purpose as the uniform discount sheet.

Under the "Open Price Plan" market information and trade statistics were collected and disseminated by the trade association. Weekly and daily reports were made by the respondents and other lumber manufacturers, and from these reports the weekly "barometer," the "daily market bulletin" and other reports were compiled.

The "barometer" took the place of the old-fashioned meetings for the purpose of curtailing production (of which meetings there is abundant evidence during 1915, 1916 and 1917). It is a compilation of statistics on volume of production and orders shipped and unshipped in the rail, domestic cargo, and export trade, and includes a graphic "barometer" showing at the center a point of "normal production" arbitrarily determined, with a colored mercury running up the barometer tube to represent the percentage

relationship of shipments and orders to production. If the point of "normal production" is approached too closely, this serves as a warning to curtail manufacture. Seven hundred and fifty copies of the barometer were distributed each week.

The "daily market bulletin" which took the place of the uniform discount sheet, was compiled from daily reports on prices, made by the respondents and other lumbermen to their trade association. The bulletin covered the total volume of sales during one day, the high price, the low price, and a "prevailing price" which was computed by the association from the combined reports; and these statistics were based on actual orders taken in the rail trade. Six hundred and ninety-one copies of the daily market bulletin were distributed each day to the general public, and 237 copies to the manufacturers contributing this information for compilation.

The extent of the respondents' affiliation with the West Coast Lumbermen's Association, and the value of the "Open Price Plan" and other facilities afforded by the trade association, are reflected in the fact that these respondent lumber companies pay to the association each year more than \$100,000 for membership dues alone.

The respondents' "Open Price Plan" is practically identical with the "Open Competition Plan" condemned by the Supreme Court in the *American Column & Lumber Company v. United States*, 257 U. S. 377. The barometer and sales reports are similar to those used by the Maple Flooring Manufacturers' Association and held to be unlawful in *United States v. Maple Flooring Manufacturers Association* (District Court of the United States for the Western District of Michigan, S. D., December 19, 1923). The same system of basic lists, discount sheets, barometers and market reports, was used by the Southern Pine Association and condemned by the Department of Justice in a bill in equity filed against that association and others in the District Court of the United States, Eastern District of Missouri in 1921.

Not only were prices fixed and price lists issued by the fir manufacturers, but the evidence in this proceeding shows numerous admissions by the respondents that they adhered to prices agreed upon. Respondents' salesmen and agencies are distributed throughout the United States. It is therefore apparent that home builders all over the country have been affected by this price control.

As to the remaining 20 per cent of the respondents' output which was sold to exporters on the Pacific Coast, there is evidence to substantiate the charge that in an effort to monopolize the business of manufacturing fir lumber for sale to exporters, and to control the prices and terms of sale at which said exporters must buy, the respondent individuals and companies conspired to hinder and obstruct the operation of independent competitive mills, and also restrained

the trade of export houses selling in competition with the respondent Douglas Fir Exploitation & Export Company.

On the one hand, respondents threatened and coerced independent competitive mills to join the conspiracy in order to curtail the supply of exporters buying from the independent mills. On the other hand, attempts were made to force exporters to deal exclusively with the respondents (later modified to 85% of the exporter's purchases, but all purchases were required to be at prices fixed by respondents) in order to curtail the market and control the prices of competitor mills. As stated by one respondent: "Our only hope is to make things so hard for them that they will be compelled to join us for their own salvation." Price cutting in special markets, price agreements with Canadian mills and with inland or "rail" mills in Oregon and Washington, an attempt to curtail steamship facilities of competitors, and other unfair means, were used in furtherance of the conspiracy to control the manufacture and sale of fir lumber to exporters and to hinder and obstruct the trade of competitive mills and of export houses selling in competition with the respondent Douglas Fir Exploitation & Export Company.

Respondents attempt to justify their acts by a plea that they are operating in accordance with the provisions of the Export Trade Act (Webb-Pomerene Law), and that the only course that the Commission may pursue is a proceeding under Section 5 of that Act. This contention is without support in the face of the facts presented. The Export Trade Act grants exemption from the antitrust laws to an association organized for the purpose of and solely engaged in export trade—

provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: And provided further, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

In view of this provision, the Export Trade Act can not be cited as a justification or excuse for the acts of these respondents in a conspiracy to fix prices and lessen competition in the domestic market, and to restrain the export trade of domestic competitors. Nor is there anything in that act that circumvents or limits or controls the powers of the Commission to proceed under the Federal Trade Commission Act, to prevent persons, partnerships or corporations

from using unfair methods of competition in interstate and foreign commerce.

In a proceeding under the Federal Trade Commission Act, the operation of the Douglas Fir Exploitation & Export Company as an association under the Export Trade Act is not at issue. That association is not a party to this proceeding. The respondents in this complaint are 28 individuals, 79 lumber companies, and the Douglas Fir Exploitation & Export Company as a corporation of the State of Washington incorporated in 1913 and in active operation since 1916. The violations charged cover a period from 1915 to 1922, beginning several years prior to the passage of the Export Trade Act in 1918, and include activities of the respondents far beyond those for which an export association might hope to claim exemption under the Export Trade Act, i. e.,

- (1) controlling the production and price of fir lumber for sale to domestic consumers throughout the United States, and,
- (2) hindering and obstructing the trade of competitors in an effort to monopolize the business of manufacturing fir lumber for sale to exporters and to control the price and terms of sale at which said exporters must buy for resale in their foreign business.

As to that portion of the respondents' business, twenty per cent, in which sales are made to exporters, respondents allege in defense that papers including a proposed "policy" were filed with the Federal Trade Commission, that the Commission neither approved nor disapproved the papers, and that therefore the silence of the Commission was a "complete justification" for respondents' acts. The mere filing of papers, however, did not place the Commission in a position to rule in advance upon the operation of the proposed policy. The motives that lay behind that policy were not divulged. The Commission was not advised that it was the purpose of respondents to force independent competitors out of business or into the respondents' organization, in order to form a monopoly so complete as to dominate the business of selling fir lumber to exporters and to control the price and terms of sale at which said exporters must buy. It was not possible to foresee the violations of law which are now brought out by the testimony and evidence in this proceeding. The silence of the Commission, or the failure to rule in advance, cannot now be cited as a "complete justification" or any justification of the respondents' acts.

Moreover this defense applies only to respondents' sales to exporters; it does not controvert charges of violation in manufacture and sale in the domestic market, which is 80 per cent of the respondents' business.

Respondents contend that the proceeding should be dismissed on the ground that the complaint was amended and that the amendment constituted an entirely new cause of action relating to an entirely new subject matter, and relating to entirely new persons who were not even made parties to the suit. The amendment however, as herinbefore stated, merely added an overt act to the conspiracy already charged. No new parties were added, and there can be no defense of surprise in view of the fact that the original complaint had charged the respondents with affiliation with the West Coast Lumbermen's Association, and considerable testimony and evidence had been introduced to show that respondents had obtained the aid and assistance of that association and of the Pacific Lumber Inspection Bureau. The association and the bureau were not made respondents, no order could be entered against them, and they could not be heard to complain as to the amendment. Can it be contended seriously that dismissals should be predicated upon such a defense as this?

In my opinion the evidence and the law in this case justified an order under section 5 of the Federal Trade Commission Act, requiring the 108 respondents to cease and desist from conspiring and doing the acts charged in the complaint, and the Commission erred in entering an order dismissing the complaint "without prejudice." Presumably the language "without prejudice" reserves the right to the Commission to reinstate the case at any time, using the evidence now at hand in addition to what may be hereafter taken, and does not determine whether the methods used by the respondents are disapproved.

CENTRAL RAILWAY SIGNAL CO. November 5, 1924. (Docket 863.)

Charge: Intimidating customers or prospective customers of competitors; in connection with the manufacture and sale of railway signal fuses.

Dismissed, after trial, without assignment of reasons.

Appearances: *Mr. Malcolm A. Coles* for the Commission; *Mr. Hiram Van Campen* of Findlay, Ohio, for respondent.

JOSEPH FELDMAN AND GERTRUDE FELDMAN, DOING BUSINESS UNDER THE NAME AND STYLE OF ROXFORD KNITTING MILLS. November 5, 1924. (Docket 1046.)

Charge: Adopting and using misleading trade name and simulating name and brand or label of competitor; in connection with the sale of knitted goods.

Dismissed without prejudice, for the reason that respondents can not be located.

Appearances: *Mr. Richard P. Whiteley* for the Commission.

INECTO, INC., November 12, 1924. (Docket 1086.)

Charge: Advertising falsely and misleadingly; in connection with the manufacture and sale of a hair dye.

Dismissed, after answer, for the reason that "respondent has been dissolved and has gone out of business."

Appearances: *Mr. Morgan J. Doyle* for the Commission; *Bell & Byard* of New York City, for respondent.

M. GOLDEN AND N. LICHTER, PARTNERS DOING BUSINESS UNDER THE TRADE NAME AND STYLE SHAWMUT KNITTING MILLS, November 12, 1924. (Docket 1114.)

Charge: Simulating trade name and trade mark of competitor; in connection with the manufacture and sale of knitted scarfs and sweaters.

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

Appearances: *Mr. Robert O. Brownell* for the Commission; *Mr. I. Richard Paris* of Washington, D. C., for respondent M. Golden.

ZELLERBACH PAPER CO., WESTERN NEWSPAPER UNION, AND CARPENTER PAPER CO. OF UTAH, December 16, 1924. (Docket 1124.)

Charge: Combining and cooperating to suppress competition and enhance prices; in connection with the sale of paper and paper products.

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

Appearances: *Mr. James M. Brinson* for the Commission; *Gustin & Pence* of Salt Lake City, Utah, for Zellerbach Paper Co., *Tenney, Harding, Sherman & Rogers* of Chicago, Ill., for Western Newspaper Union, and *Dickson, Ellis, Parsons & Adamson* of Salt Lake City, Utah, for Carpenter Paper Co. of Utah.

LAUTZ BROTHERS & Co., January 16, 1925. (Docket 424.)

Charge: Guarantee against price decline; in connection with the manufacture and sale of soap and washing powder.

Dismissed, after answer and trial, "for the reasons that the respondent is in the hands of a receiver and not engaged in business."

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

J. BERMAN AND B. BRENNER, PARTNERS, STYLING THEMSELVES BERMAN & BRENNER, January 24, 1925. (Docket 825.)

Charge: Misbranding or mislabeling; in connection with the manufacture and sale of clothing for men and boys.

Dismissed without assignment of reasons.

Appearances: *Mr. James T. Clark* for the Commission.

CURTICE BROTHERS Co., January 28, 1925. (Docket 428.)

Charge: Guarantee against price decline; in connection with the preparation and sale of canned food products including fruit, vegetables and meat.

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

Appearances: *Mr. Richard P. Whiteley* for the Commission; *Hubbell, Taylor, Goodwin & Moser* of Rochester, N. Y., for respondent.

CHARLES E. CORMIER RICE MILLING Co., INC., Docket 1024; PANAMA RICE MILLING Co., Docket 1027; RIVERSIDE RICE MILLING Co., INC., Docket 1130; January 28, 1925.

Charge: Adopting and using misleading trade or corporate name in connection with the purchase and sale of rice.

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

Appearances: *Mr. Richard P. Whiteley* for the Commission; *Mr. Burt W. Henry* of Henry, Cooper & Westerfield of New Orleans, La., for Charles E. Cormier Rice Milling Co., Inc.; *Mr. W. W. Young* of Terriberry, Rice & Young of New Orleans, La., for Panama Rice Milling Co.; and *Mr. W. J. Waguespack, Jr.* of Legier, McEnery & Waguespack of New Orleans, La., for Riverside Rice Milling Co., Inc.

TREMONT & SUFFOLK MILLS, ARTHUR J. CUMMOCK, SAMUEL S. WIDGER, ARTHUR R. SHARP, AND JOHN W. BLODGETT, COPARTNERS, TRADING AS CATLIN & Co., January 31, 1925 (Docket 1229).

Charge: Misbranding or mislabeling; in connection with the manufacture and sale of blankets.

Dismissed, after answer and stipulation, "without prejudice, for the reason that the practice complained of has been voluntarily discontinued." Commissioners Nugent and Thompson dissent.

Appearances: *Mr. Robert O. Brownell* for the Commission; *Munn, Anderson & Munn* of Washington, D. C., and *Webb, Patterson & Hadley* of New York City, for respondents.

FELS & Co., Docket 425; GLOBE SOAP Co., Docket 426; RUB-NOMORE Co., Docket 522, February 2, 1925.

Charge: Guarantee against price decline; in connection with the manufacture and sale of soap, soap powder and other cleansing compounds.

Dismissed, after answer and trial, "for the reason that the practice of guaranteeing the price of a commodity against decline is not in and of itself an unfair method of competition within the intent and meaning of the Federal Trade Commission Act."

Commissioners Nugent and Thompson dissent.

Appearances: *Mr. William A. Sweet* for the Commission; *Mr. Samuel Rosenbaum* of Philadelphia, Pa., for respondent Fels & Co.; *Mr. Joseph Wilby* of Cincinnati, Ohio, for respondent Rub-No-More Co.

Dissent by Commissioner Thompson.

The Commission (by majority vote) has issued orders to dismiss cases under Docket Numbers 425, 426 and 522, in each of which it was alleged that the respondent was using an unfair method of competition in agreeing to guarantee its jobbers against any subsequent decline in price of soap that it might name. The length of the time of the guarantee in the several cases differs. While not treating the cases as joined a majority of the Commission has dismissed them with identical orders which state that "the practice of guaranteeing the price of a commodity against decline is not in and of itself an unfair method of competition within the intent and meaning of the Federal Trade Commission Act."

I regret that I am unable to concur in the dismissals for several reasons. First, I believe that the members of the industry to which the respondents belong are victims of a system, not of their own desire, but inevitable in an industry when any corporation of sufficient financial power can put into practice a guarantee against decline in price, since all of the others are compelled to do likewise. Second, I dissent from the reason given for the dismissals, especially in view of the fact that it goes far beyond the position taken by the Commission on February 15, 1921, when, after a most exhaustive investigation in conference or "Trade Practice Submittal" with many industries in regard to the aforesaid practice, it is said that it would "consider each case of complaint of this character upon the facts shown in the specific case, applying the legal tests thereto." On that occasion more than 350 manufacturing and selling concerns, including trade associations, were represented and all the then members of the Commission were present. No testimony was taken, nor was there any one present representing the public or the retail trades. There were, however, among those present, many differing views expressed both for and against the practice.

Among the many statements made against the practice were the following: That it tended to produce overbuying and speculation on the part of the jobbers who purchase more than they would on a pure price competition basis; that manufacturers hold up the decline as long as possible if guarantees are out, thus producing higher prices than supply and demand justified; that on a rising market the jobber gets the profits and not the manufacturer, and therefore should bear the loss; that manufacturers do not get any guarantee

on the raw materials they purchase for their products, while they are put to the expense of providing for funds necessary to meet a decline in their manufactured article that may be forced upon them; that this expense is added to the cost of the manufactured article and eventually the ultimate consumer pays it; that the practice puts a premium upon ignorance, inefficiency, inexperience and incompetency eventually to the detriment of the ultimate consumer; that it gives a large manufacturer a decided advantage over a small one who may not have as large a surplus for emergency, but who is otherwise a good and efficient merchant; that it produces sales of a product on the basis of the merchant's credit rather than the quality of his product; that one manufacturer guaranteeing against decline in price forces the entire industry to follow, since the jobber will not patronize the one who does not guarantee when others do; that no benefit accrues to the purchasing public since the retailer, on a falling market, moves the goods on his shelf first, these goods having carried their part of the overhead expense of the guarantee from the manufacturer to the jobber; that under this system the least progressive and most speculative jobber benefits the most as he gets the largest rebates; that the final cost of all rebates paid by the manufacturer falls upon the consuming public; that since the practice encourages overbuying it brings on a reaction in the form of a slump thus producing over certain periods of time an unstabilized market, causes an increased number of failures, and thereby wipes out many competitors who have to pay rebates on a falling market and who were forced into the practice against their will.

There were a number of reasons given in favor of the practice and many of those present supported them. As none of the statements for or against the practice were based on the cross-examination of witnesses under oath, and as neither the public nor any of the representatives of the retail trade were present, some members of the Commission could not reach a final conclusion as to the propriety of the practice, and as there was also a difference of opinion among the members, it was resolved that in the future all cases coming before it would be tried on the facts in the particular case.

So far as I am aware no additional study had been made by the Commission.

In view of its declaration then made and the injunction laid upon the Commission in Section 5 of its act that it should consider unfair methods of competition in the light of "the interest of the public," I am of the opinion that we should not dismiss the cases under consideration or others that may come before us under the general declaration that regardless of the facts in a case the practice of guaranteeing the price of a commodity against decline is not an unfair method of competition.

If it is true that all merchants are required to give the guarantee when one starts it; if it causes an additional expense to the manufacturer which expense is carried on down to the ultimate consumer; if it causes careless buying on the part of the jobbers which does not benefit but injures the ultimate consumer and if the practice on a declining market causes a number of failures of competitors, then it would seem that in the public interest this practice should at least raise a question as to its fairness.

It has been asserted that this practice is a so-called economic one and is not of such a legal character that it would come within the jurisdiction of the Commission over unfair methods of competition. This same argument was made in regard to the so-called "Pittsburgh Base" method of competition in the steel industry when that method was under consideration in the case of the Commission *vs.* The United States Steel Corporation. There too a great conference was had with men engaged in that industry and many *ex parte* statements, made in good faith, were presented to the Commission. Upon considering these statements the Commission dismissed the case and thereby upheld the practice. At that time I dissented from the Commission's order and among my reasons gave the one that I now urge—that while the practice might be an economic one, yet it also might appear when witnesses were subjected to examination and cross-examination under oath, to be condemned by Section 5 of the Federal Trade Commission Act. Subsequently the Commission having before it the record of a most searching and careful trial of the facts, issued an order forbidding the so-called "Pittsburgh Base" practice. The final record in that case revealed the fact that the economic practice was at the same time an unfair method of competition.

It has been further asserted that when all those engaged in an industry indulge in a practice such as that involved herein, it can not be unfair to any of the competitors, but that idea was destroyed by the Supreme Court of the United States when it held in the case of the Winstead Hosiery Company *vs.* Federal Trade Commission that the test was whether the method there condemned was unfair to the public. Of course, the practice in the Winstead case was in no sense similar to the one here, but it would seem to me that the test would be the same.

In the practice here considered, if it were to appear, as it does in at least two of the cases under consideration, that the respondent was compelled to use the practice; that it caused loss and waste for which the ultimate consumer must pay; and that it had the effect of eliminating competitors who could not indulge in the practice, or, having so indulged against their will, were caught in a falling market and put out of existence, then I believe that there would be

reasonable grounds for considering this practice to be an unfair method of competition. It might be well also to consider in cases of this character whether modern business is not breaking down a principle born of long experience in the common law, namely, that once title and possession in property passes to another that there should be no legal responsibility cast upon those who no longer have possession or control of it.

In Docket 522 there was no testimony taken. There was a stipulation in the record signed by the respondent in which it stated its belief that there was little if any benefit derived by the general public or the retail trade as a result of the rebates paid to the respondents. It also admitted that the effect of its practice was to give the respondent an undue and unfair advantage over competitors who were unwilling or financially unable to extend the jobbers assurances or a guarantee against reduction in the price of the soap sold; that the practice encouraged jobbers to hold stocks in excessively large quantities in anticipation of a rise for the purpose of realizing a speculative profit to the injury of the public and it deterred respondents from reducing the price list on their soap in accordance with the reductions in the manufacturing cost all of which affected the public adversely.

In Docket 426 officers of the respondent company testified, in substance, that the company was forced to adopt the guarantee system because their competitors had done so; that while their guarantee system was on, the price rose from \$4 in April, 1916, to \$7.75 in November, 1921; that they were unable to discontinue the practice so long as others continued it; that the practice is more popular on a rising market than on a declining one and has a tendency to reckless buying; that the respondent was compelled to pay a number of guarantees with money which it could have well used for other purposes on a falling market; that jobbers bought more heavily on a rising market because they felt safe.

Another witness in the same case testified that his company tried to shorten the period of time of guarantee and to cut off guarantees on a rising market; that it withdrew the unlimited guarantee in 1916 because there was an abnormal condition and they wanted to curb the enormously increasing purchases by the jobbing trade, which purchases he felt were for speculative purposes; that in 1919 it paid out \$150,000 direct losses on its guarantees; that increased purchases by the jobbers caused the retail merchants to do likewise.

In Docket 426 Mr. Lautz, formerly president of Lautz Bros. & Co. testified that the unlimited guarantee was a dangerous practice because, in abnormal times it promoted speculation; that his company had to give guarantees because other companies did.

In all of these cases the witnesses were either officers of the several respondents or representatives of other companies in the same industry. No witness from the retail trade or representing the public was examined.

I have discussed the aforementioned cases in a group, not because they have been joined by the Commission, but because the Commission has considered them together and has issued an order in each which is identical.

For the foregoing reasons I dissent from the orders of dismissal in each of the said cases.

Commissioner Nugent concurs.

LEASE MOTOR CO., INC., AND ACOMA MOTORS CO., INC., February 4, 1925. (Docket 904.)

Charge: Advertising falsely and misleadingly, selling rebuilt products as new and misrepresenting place of manufacture; in connection with the sale of motor trucks.

Dismissed by the following order: The above-entitled matter coming on to be heard on the motion of the chief counsel for the Commission, and the Commission now being fully advised in the premises,

It is ordered, That the complaint in the above-entitled proceeding be and the same is hereby dismissed for the reason that the acts and practices set forth in Docket 904 are included in the acts and practices set forth in the complaint in Docket 1276. [Robert M. Lease Co., Inc., et al., issued February 4, 1925, and not decided as of this writing.]

Appearances: *Mr. Charles Melvin Neff* for the Commission.

THE ILLINOIS AND WISCONSIN RETAIL COAL DEALERS' ASSOCIATION, ITS OFFICERS AND MEMBERS AND J. B. SANBORN & Co., February 5, 1925. (Docket 1092.)

Charge: Cooperating together to confine distribution of products involved to the "regular" channels; in connection with the sale of coal.

Dismissed, after answer and trial, "without prejudice, because of lack of evidence to sustain the complaint."

Appearances: *Mr. George E. Wallace* for the Commission; *Mr. Stanley B. Houck* of Minneapolis, Minn., and *Early & Early* of Rockford, Ill., for 'The Illinois and Wisconsin Retail Coal Dealers' Association, its officers and members.

SOUTH TEXAS WHOLESALE GROCERS' ASSOCIATION, ITS OFFICERS AND MEMBERS, February 6, 1925. (Docket 1222.)

Charge: Combining and undertaking to coerce a competitor's business policy through blocking or restricting his access to market; in connection with the sale of groceries and allied products.

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

Appearances: *Mr. Robt. N. McMillen* for the Commission.

PHILLIPS-JONES CORPORATION, February 12, 1925. (Docket 1054.)

Charge: Resale price maintenance; in connection with the manufacture and sale of a soft collar.

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

Appearances: *Mr. E. J. Hornibrook* for the Commission; *Hirsh, Newman & Reass* of New York City, for respondent.

THE BEST FOODS, INC., THE NUCOA BUTTER CO., February 12, 1925. (Docket 1164.)

Charge: Tying and exclusive contracts or dealings, in violation of Section 3 of the Clayton Act, and resale price maintenance; in connection with the manufacture and sale of a substitute for butter.

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

Appearances: *Mr. Richard P. Whiteley* for the Commission; *Mr. Francis E. Neagle* of New York City and *Mr. Jesse C. Adkins* of Washington, D. C., for respondent.

PENNSYLVANIA, NEW JERSEY & DELAWARE WHOLESALE GROCERS ASSOCIATION, ITS OFFICERS, MEMBERS OF EXECUTIVE COMMITTEE, AND MEMBERS, February 13, 1925. (Docket 952.)

Charge: Combining or conspiring to coerce manufacturers into guaranteeing against price decline; in connection with the purchase and sale of groceries and food products.

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

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

MCCORD MANUFACTURING CO., February 28, 1925. (Docket 987.)

Charge: Resale price maintenance; in connection with the manufacture and sale of automotive equipment including motor gaskets for use on cylinder heads, manifolds and other parts of automobiles.

Dismissed, after answer, without assignment of reasons.

Appearances: *Mr. James T. Clark* for the Commission; *Warren, Cady, Hill & Hamblen* of Detroit, Mich., for respondent.

HYGRADE LAMP CO., March 11, 1925. (Docket 1021.)

Charge: Tying and exclusive contracts or dealings, in violation of Section 5; in connection with the manufacture and sale of stand-

ard vacuum and gas filled tungsten lamps of various types and sizes.

Dismissed, after answer, Commissioners Nugent and Thompson dissenting, for the reason that "the practices charged in the complaint herein have been discontinued."

Appearances: *Mr. G. Ed. Rowland* for the Commission; *Mr. Simon Rasch* of New York City, for respondent.

MACK, MILLER CANDLE Co., March 14, 1925. (Docket 1125.)

Charge: Misbranding and mislabeling, advertising falsely and misleadingly, and misrepresenting products; in connection with the manufacture and sale of candles.

Dismissed, after answer and stipulation, Commissioner Thompson filing a dissenting opinion, concurred in by Commissioner Nugent, for the reason that "respondent has so modified its business practices as to remove the cause of the complaint."

Appearances: *Mr. Morgan J. Doyle* for the Commission; *White & Moore* of Syracuse, N. Y., for respondent.

Dissent by Commissioner Thompson

On the 21st day of February, 1924, the Federal Trade Commission issued and served a complaint on the respondent, Mack, Miller Candle Company, charging it with unfair methods of competition in the following particulars:

PARAGRAPH 1. Respondent is a corporation organized under the laws of the State of New York with its principal office and place of business in the city of Syracuse, in said State. It is engaged in the manufacture of candles and the sale thereof to purchasers located at points in the various States of the United States. It causes said candles when so sold, to be transported from its said principal place of business in the city of Syracuse, New York, into and through other States of the United States to said purchasers at their respective points of location. Among the candles thus manufactured and sold by respondent are candles designed and used for religious purposes, as hereinafter more fully described and hereinafter called "Altar" candles. In the course and conduct of its aforesaid business, respondent is in competition with other individuals, partnerships and corporations likewise engaged in the manufacture and/or sale of candles, including "altar" candles, in interstate commerce.

PAR. 2. "Altar" candles, referred to in paragraph 1 hereof, are candles used by various religious denominations and churches in religious ceremonies and more than fifty percentum of the total ingredients of said candles is, by the laws, rules, regulations

and customs of some of said religious denominations and churches, required to be beeswax. Respondent well knew and understood "altar" candles to be candles as described herein.

PAR. 3. Respondent, in the course of its business described in paragraph 1 hereof, manufactures, and sells to said religious denominations and churches so requiring "altar" candles to contain more than fifty percentum of beeswax, certain candles purporting to be "altar" candles as defined in paragraph 2 hereof, and as required by the said denominations and churches and which said candles were falsely branded, labeled, advertised and otherwise represented by respondent as complying with rules, laws, regulations and customs of said religious denominations and churches as to beeswax content, and to contain beeswax in an amount of more than fifty percentum of the total ingredients of said candles.

The fact is that the "altar" candles so being falsely branded, labeled, advertised, represented and so being sold by respondent as "altar" candles, do not comply with the rules, laws, regulations and customs of said religious denominations and churches, and do not contain an amount of beeswax which is more than fifteen percentum of their total ingredients.

The aforesaid false branding, labeling, advertising and representing of said candles by respondent, has the capacity and tendency to, and does, mislead and deceive purchasers and prospective purchasers of "altar" candles into the belief that said candles so manufactured and sold by respondent as and for "altar" candles, contain more than fifty per centum of beeswax as required by the aforesaid rules, laws, regulations and customs of the said religious denominations and churches and causes said purchasers to purchase said candles in that belief.

PAR. 4. Many of respondent's competitors referred to in paragraph 1 hereof manufacture and/or sell "altar" candles which contain beeswax in the required amount of more than fifty per centum of the total ingredients of said candles, and who do not represent and sell as "altar" candles, candles containing beeswax in an amount less than aforesaid required per centum.

On March 11, 1924, the respondent answered denying in toto the allegations contained in paragraphs 2, 3, and 4 of the complaint. The denial was given to the press and published.

Subsequent to the filing of the answer, the respondent executed a stipulation in which it admitted that prior to May 23, 1923, it sold throughout the United States, candles packed in boxes and labeled as follows: "Altar Beeswax Candles Manufactured by Mack, Miller Candle Company"; admitted that said candles contained less than fifty per cent of beeswax; admitted that said label had the tendency

and capacity to mislead and deceive purchasers into the erroneous belief that these candles did contain more than fifty per cent of beeswax and were candles constructed in accordance with the rules of the church specifying the beeswax content necessary in candles which were required to be used in certain religious services.

Respondent asserts that on May 23, 1923, an examiner of the Commission called at respondent's place of business and on that date respondent abandoned the use of said objectionable labels and destroyed all of such labels as were then on hand; that respondent replaced said labels with others which describe said candles containing less than fifty per cent of beeswax as "White Wax Candles". Respondent asserts that it has not since May 23, 1923, used the words "Altar Beeswax", or either of them, in branding or labeling any candles except those actually composed of more than fifty per cent beeswax.

In the above mentioned stipulation, respondent agrees that it will continue to refrain from using the words "Altar Beeswax" or either of them, in labeling, branding or describing any of its candles containing less than fifty per cent of beeswax, and respondent further agrees that "in the event this action shall be dismissed by the Commission without the issuance of a cease and desist order, this stipulation may be used against respondent at any future date, provided that respondent shall fail to abide by its aforesaid agreement."

Upon the submission of said stipulation, the Commission, by majority vote, on the 14th day of January, 1925, entered the following order:

It is ordered, that the complaint herein be and the same is hereby dismissed for the reason that the respondent has so modified its business practices as to remove the cause of the complaint.

The respondent has been in the business of manufacturing candles for a number of years and makes candles for illuminative, decorative and religious purposes. We are concerned here only with those candles intended for religious purposes.

The Roman Catholic Church, which purchases such candles, has certain rules (Rubrics) which require that certain candles are essential and must be burned upon the altar during various of its religious ceremonies (to wit, two candles at Low Mass, six at High Mass and fourteen at Benediction). Additional (nonessential) candles may be burned during these ceremonies and may or may not contain beeswax according to the will of the pastor. The aforesaid church rules (Rubrics) provide that the aforesaid essential candles must contain more than 50 per cent of beeswax. This requirement is not viewed lightly by the church since these candles are burned upon the

altar during the sacramental mass and other ceremonies and have a special significance.

Some of the candles manufactured by respondent and labeled "Altar Beeswax Candles" were secured in the open market by the Commission, and submitted to the United States Bureau of Standards for analysis, and the analyses showed that the candles contained only 11.5 per cent of beeswax.

It is asserted in the business world by some groups, and just as strongly contested by others, that the Commission can be more effective in correcting unfair business practices by dismissing complaints without a finding of fact and without the issuance of a cease and desist order in cases where the respondent has discontinued the practice complained of.

In creating the Federal Trade Commission, Congress intended to set up a body that would be corrective in the business world. The courts have since amplified this conception by using the word "prophylactic" in describing the Commission's attitude toward business—that is, not only corrective, but preventive, in its process.

Inasmuch as the present case is typical of many that come before the Commission, which it is insisted we should dismiss without any findings of fact and order to cease and desist, it becomes necessary to consider whether in doing so the Commission plays a prophylactic part in its method of handling such cases.

We have here a set of facts alleged in the complaint which was initiated by manufacturers in the same business and not by the Commission, showing that for some time previous to and while the investigation was in progress by the Commission, the respondent was carrying on a practice which it now admits "had a tendency and capacity to mislead and deceive purchasers." This practice was discontinued while the investigation was being made (respondent being aware that the investigation was under way) and prior to the time the complaint was issued. But the complaint, having been issued and served, the respondent filed an answer on March 11, 1924, denying all of the essential charges. This answer having been published, the business world, including the competitors of respondent, and the purchasers of its product who had been relying upon the representations of the respondent, were thus informed that respondent challenged and denied the Commission's charges. Subsequent to the filing of the answer by the respondent, and the publicity of the same, competitors of the respondent, through the press, began to call attention to the charges of the Federal Trade Commission and its complaint.

Ten months went by and then the Commission issued an order which is now made public, dismissing the complaint "for the reason

that the respondent has so modified its business practices as to remove the cause of complaint."

How can such an order, without any findings of fact, convey any information to the public relative to the facts, or advise other manufacturers engaged in this particular industry of the practices which the Commission deems to be unfair, and which will enlighten its members for their information and guidance and thus the Commission become prophylactic? While it is in no sense the duty or desire of the Commission to persecute business men, nevertheless, when a corporation has practiced a deception, it must inevitably suffer some hardship if there is to be established a legal precedent for the information and guidance of all members of the industry. This can not be done unless the Commission, after functioning in such a case as the present one, publishes the facts upon which the order is based. Such facts will then chart the sea of fair competition for the future on the practice complained of.

Moreover, it seems to me that competitors of respondent who have sold candles which were honestly branded, and who have lost trade and profit which should under fair competition have accrued to them and which were acquired by the respondent through unfair practices, have a right to expect this Commission to give to honesty and square dealing some measure of recognition and reward by publicly condemning unfair practices and those pursuing them. Moreover, the public has the right to know those who are dealing unfairly with it, so that it can use its choice and discretion in placing its future business. Only in this way will there come to be established in the business world a distinct esprit de corps which will at least make "honesty the best policy."

In the early period of the Commission's history, it tried to set up standards through what were known as "conference rulings." These rulings were brought about, when an informal complaint was made against a party, by the Commission going through the same procedure that it now employs except that the Commission did not name the offender when it gave out the findings. That practice, while much more valuable than the present one of not giving out any findings, was a failure—so much so that the Commission at the time was severely criticized for being inept. A reading of the conference rulings, of which there were many, explains the reason for this. These rulings were little heeded by the business world. In fact, there was often more than one conference ruling on almost identical subjects and situations. It was not until the Commission tied up the ruling with the name of the offender that it began to function with effect.

The making of wrong a personal matter, causes a shrinking by the offender and may be a hardship on him, but the rights of the con-

suming public to be put upon notice, and of the competitor to be protected from unfair business practices, far outweighs the damage done to the reputation of the one committing the wrong.

When the Commission learned that respondent's competitors, after respondent had filed its answer denying the charges, were using the complaint to advertise the charges against respondent, the Commission ordered this practice to cease. We would do well to consider that if the Commission continues its policy of issuing complaints and dismissing them, as in this case, without findings informing the public and the competitors as to what was done, it would be only human for the competitors to indulge in the practice of advertising the respondent's shortcomings in order that they may get even for the losses that they have sustained by reason of such practices.

In a statement with respect to practices involving deceit, bad faith, etc., the "Unfair Competition Bureau of the Paint and Varnish Industry," through its representative M. Q. Macdonald, says:

Publicity in proper cases quickens the conscience of the entire industry and leads to a concerted movement to correct the conditions all along the line. * * * The Commission should give greater weight to the welfare of the industry affected and the purchasing public, than the interests of the single respondent who has been guilty of fraudulent conduct.

For the above reasons, I am constrained to dissent from the order of the Commission.

Commissioner Nugent concurs.

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.

¹ This act has been annotated up to July 1, 1921, and may be found, so annotated, in Volume III of the Commission's Reports. Reported decisions of the courts for the period covered by this volume (July 21, 1924, to March 22, 1925) 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—VII, 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.

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.

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.

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 Congressmen Covington for (references to Congressional Record, 63d Cong., 2d sess., vol. 51), part 9, pp. 8840-8849; 9068; 14925-14933 (part 15); Dickinson for, part 9, pp. 9189-9190; Mann against, part 15, pp. 14939-14940; Morgan, part 9, 8854-8857, 9063-9064, 14941-14943 (part 15); Sims for, 14940-14941; Stevens of N. H. for, 9063 (part 9); 14941 (part 15); Stevens of Minn. for, 8849-8853 (part 9); 14933-14939 (part 15); and of Senators Borah against, 11186-11189 (part 11); 11232-11237, 11298-11302, 11600-11601 (part 12); Brandegee against, 12217-12218, 12220-12222, 12261-12262, 12410-12411, 12792-12804 (part 13), 13103-13105, 13299-13301; Clapp against, 11872-11873 (part 12), 13061-13065 (part 13), 13143-13146; 13301-13302; Cummins for, 11102-11106 (part 11), 11379-11389, 11447-11458 (part 12), 11528-11539,

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), 10376-10378 (part 11), 11081-11101, 11106-11116, 11594-11597 (part 12); Pomerehne for, 12870-12873 (part 13), 12993-12996, 13102-13103; Reed against, 11112-11116 (part 11), 11874-11876 (part 12), 12022-12029, 12150-12151, 12539-12551 (part 13), 12933-12939, 13224-13234, 14787-14791 (part 15); Robinson for, 11107 (part 11), 11228-11232; Saulsbury for, 11185, 11591-11594 (part 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. 564 at pp. 570-579.)

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

Commission may rent suitable offices.

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

Auditing of accounts.

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

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

Bureau of Corporations absorbed by Commission.

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

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

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

Principal office in Washington, but Commission may meet elsewhere.

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

May prosecute any inquiry anywhere in United States.

Sec. 4.—DEFINITIONS.

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

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

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

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

"Corporation."

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

"Documentary evidence."

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

"Acts to regulate commerce."

"Antitrust acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety;¹ 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.²

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

Unfair methods unlawful.

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

Commission to prevent. Banks and common carriers excepted.

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

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

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

Commission's findings. Conclusive if supported by testimony. Introduction of additional evidence, if reasonable grounds for failure to adduce theretofore.

May be taken before Commission.

Commission may make new or modified findings by reason thereof.

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

Petition by respondent to review order to cease and desist.

To be served on Commission.

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

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

Jurisdiction of Court exclusive.

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

Proceedings to have precedence over other cases.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.³

Liability under antitrust acts not affected.

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

Personal; or

At office or place of business; or

By registered mail.

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

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.

(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 transmit findings and recommendations to Attorney General.

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, together with 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 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.

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. 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.

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

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

May require attendance of witnesses and production of evidence.

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

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

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

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

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

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

Disobedience thereafter punishable as contempt.

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

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

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investi-

Commission may order depositions at any stage.

* 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 by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent.

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

Witness fees, same as paid for like services in United States courts. Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Incriminating testimony or evidence no excuse for failure to testify or produce. No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the 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 natural person shall not be prosecuted with respect to matters involved. 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.

Perjury excepted. Perjury committed in so testifying.

Sec. 10. PENALTIES.*

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

* Provisions and penalties of secs. 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.]

[H. R. 15657.]

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

Sec. 1. DEFINITIONS.

"Antitrust
laws."

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

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.*, 280 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,

299 Fed. 733 (see opinion and decision set forth in Appendix II of Volume VII at page 603 et seq.); *Aluminum Co. of America v. Federal Trade Commission*, 299 Fed. 361 (see opinion and decision set forth in Appendix II of Volume VII at page 618 et seq.); *Western Meat Co. v. Federal Trade Commission*, 1 F. (2d) 95 and 4 F. (2d) 223 (see opinions and decisions set forth in Appendix II of this volume at pages 589 and 623, respectively; *Butterick Co. et al. v. Federal Trade Commission*, 4 F. (2d) 910 (see opinion and decision set forth in Appendix II of this volume at page 602); *S. S. Kresge Co. v. Champion Spark Plug Co.*, 3 F. (2d) 415 and *Swift & Co. v. Federal Trade Commission*, 8 F. (2d) 595 (see opinion and decision set forth in Appendix II of this volume at page 616).

It should be noted in connection with this law—

That the so-called Shipping Board Act (sec. 15, ch. 451, 64th Cong., 1st sess., 30 Stat. 728 at 734) 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. 26, 1914, or under sec. 11 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved Oct. 15, 1914, and except when the Secretary of Agriculture, in the exercise of his duties hereunder, shall request of the said Federal Trade Commission that it make investigations and report in any case" 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 persona.” 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. 563.

⁵ For text of Sherman Act, see footnote on pp. 564-565. As enumerated in Clayton Act, see first paragraph thereof on p. 562.

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 antitrust^a 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.

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.

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

SEC. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws^a 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

^a 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.¹

Of other corporations. 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.

¹ 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. 566, 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.

⁸ 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.

or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director, officer, or employee under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank, banking association, or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director, officer, or employee has been elected or selected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter under said election or employment.

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

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

Savings banks without capital (share) stock excepted.

shall apply to mutual savings banks not having a capital stock represented by shares: *Provided further*, That a

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

director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other: *And provided further*, That nothing contained in this section shall forbid

engaged in international or foreign banking, or banking in a dependency or insular possession of the United States," in the capital stock of which such member bank may have invested under the conditions and circumstances set forth in the Act.

On provisions of the Shipping Board Act, Packers and Stockyards Act, 1921, and Transportation Act, limiting the scope of the Clayton Act in certain cases, see 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.

SEC. 9. Every president, director, officer or manager of any firm, association or corporation engaged in commerce as a common carrier, who embezzles, steals, abstracts or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property or assets of such firm, association or corporation, arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be deemed guilty of a felony and upon conviction shall be fined not less than \$500 or confined in the penitentiary not less than one year nor more than ten years, or both, in the discretion of the court.

Penalty, fine, or imprisonment, or both.

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

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

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

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

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

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

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

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

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

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

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

Carrier to report transactions hereunder to Interstate Commerce Commission.

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

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

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

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

Penalty.

Effective date extended to Jan. 1, 1921.

The effective date on and after which the provisions of section 10 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October fifteenth, nineteen hundred and fourteen, shall become and be effective is hereby deferred and extended to January first, nineteen hundred and twenty-one: *Provided*, That such extension shall not apply in the case of any corporation organized after January twelfth, nineteen hundred and eighteen.¹²

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

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.

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

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

Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so

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.

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

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

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

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

Petition by respondent to review order to cease and desist.

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

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

Jurisdiction of Court of Appeals exclusive.

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

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

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust Acts.¹⁴

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.

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

Liability under antitrust acts not affected.

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

Personal; or

At office or place of business; or

By registered mail.

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.

SEC. 14. That whenever a corporation shall violate any of the penal provisions of the antitrust laws,¹⁵ such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding \$5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

A misdemeanor.

Penalty, fine or imprisonment, or both.

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

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.

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.

Sec. 17. PRELIMINARY INJUNCTIONS. TEMPORARY RESTRAINING ORDERS.

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

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-

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.

No preliminary injunction without notice.

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.

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

Sec. 263 of Judicial Code repealed.

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

Sec. 266 not affected.

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

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.

any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

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

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

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

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

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

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

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

Trial if alleged contempt not sufficiently purged by return.

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. 180 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
nor act, if not
in restraint of
trade within the
United States, or
of the export
trade of any domestic
competitor, and

If such associa-
tion does not
artificially or in-
tentionally en-
hance or depress
prices of, or sub-
stantially lessen
competition, or
restrain trade in
commodities of
class exported.

such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: *And provided further*, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

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

Lawful under
Clayton Act un-
less effect may be
to restrain trade
or substantially
lessen competi-
tion within
United States.

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

**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.

WESTERN MEAT COMPANY *v.* FEDERAL TRADE COM- MISSION.¹

(Circuit Court of Appeals, Ninth Circuit. September 2, 1924.)

No. 4064.

1. MONOPOLIES KEY No. 20—STOCK ACQUISITION HELD VIOLATION OF CLAYTON ACT.

Acquisition and continued control and ownership of capital stock of one packing company by another packing company, resulting in elimination of competition, *held* in violation of Clayton Act, Sec. 7 (Comp. St. Sec. 8835g).

2. MONOPOLIES KEY No. 20—CLAYTON ACT CONSTRUED.

The Clayton Act, Sec. 7 (Comp. St. Sec. 8835g), prohibits the acquisition by one corporation of other company's stock where effect may be to substantially lessen competition between the two, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

3. MONOPOLIES KEY No. 20—ACQUISITION OF COMPETITOR'S STOCK HELD VIOLATION OF FEDERAL TRADE COMMISSION ACT.

Acquisition by packing company of stock of other packing company, resulting in suppressing competition, *held* a violation of Federal Trade Commission Act, Sec. 5 (Comp. St. Sec. 8836e).

4. MONOPOLIES KEY No. 24 (2)—EVIDENCE HELD TO SUSTAIN FINDINGS THAT ACQUISITION OF OTHER COMPANY'S STOCK SUBSTANTIALLY LESSENE COMPETITION.

Evidence *held* to sustain findings of Federal Trade Commission that effect of one packing company's acquisition of stock of other packing company was to substantially lessen competition in violation of Clayton Act, Sec. 7 (Comp. St. Sec. 8835g).

(The syllabus is taken from 1 F. (2d) 95.)

Petition to review order of Federal Trade Commission. Petition denied.

¹ Reported in 1 F. (2d) 95. For decision of the court on petition for rehearing in this case upon the ground that the Commission's order exceeded its powers, handed down February 17, 1925, See 4 F. (2d) 223, or p. 623 in this volume.

Sullivan & Sullivan, Theo. J. Roche, and Edward I. Barry, all of San Francisco, Calif., and *Frank L. Horton*, of Chicago, Ill., for petitioner.

W. H. Fuller, Chief Counsel Federal Trade Commission, and *James M. Brinson*, Attorney Federal Trade Commission, both of Washington, D. C., for respondent.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

Ross, Circuit Judge:

The present respondent having issued and served its complaint against the present petitioner, wherein it was alleged that it had reason to believe that the Meat Company had been and then was using unfair methods of competition in interstate commerce, in 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" (38 St. 717), and Section 7 of the Act of Congress approved October 15, 1914, commonly known as the Clayton Act, entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes" (38 St. 730), and setting forth the particulars of such alleged violations, and the Meat Company having duly entered its appearance by answer admitting certain of the allegations of the complaint and denying others, and hearings in those proceedings having taken place before an examiner of the Commission, both sides having introduced evidence in support of their respective claims, and the matter having, after argument by the attorneys of the respective parties, been duly submitted to the Commission for consideration and decision, the latter, on the second day of February, 1923, made and entered the following findings of fact and conclusions:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. Respondent, Western Meat Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business in the city and County of San Francisco, in said State, now, and at all times herein mentioned, engaged in the business of purchasing live cattle, calves, hogs, sheep, and lambs, in various states and territories of the United States, and transporting same and causing same to be transported from such states to respondent's packing plant situated in the State of California, and after the slaughtering of said cattle, calves, hogs, sheep and lambs in said plant, has shipped the meat and meat products resulting therefrom from such packing plant to and through various distributing branches situated in the State of California and other states of the United States to the purchasers of said products in such various States and Territories of the United States, including the States of California and Nevada. On December 30, 1916, the outstanding capital stock of said Western Meat Company consisted of 12,500 shares of common stock of the par value of \$100 each, and the said concern at that time had assets of approximately \$5,000,000 in value.

PAR. 2. The Nevada Packing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its principal office and place of business in the city of Reno, in said State, now, and at all times herein mentioned, engaged in the business of purchasing live cattle, calves, hogs, sheep and lambs, in various states and territories of the United States and in transporting same and causing same to be transported from such states to its packing plant situated in the State of Nevada, and after the slaughtering of said cattle, calves, hogs, sheep and

lambs in said plant, has shipped the meat and meat products resulting therefrom from such packing plant to the purchasers of said products in various states and territories of the United States, including the States of Nevada and California.

PAR. 3. On December 30, 1916, respondent, Western Meat Company, acquired all of the issue and outstanding capital stock of the Nevada Packing Company, which consisted of 3,530 shares of common stock of the par value of \$100 each. At the time of said acquisition Louis F. Swift, president of Swift & Company, meat packers, and other stockholders of Swift & Company owned approximately 45 per cent of the stock of the Western Meat Company, and officers of Armour & Company, Morris & Company, Cudahy Packing Company owned in the aggregate of 30 per cent of said stock. Louis F. Swift was instrumental in causing said acquisition of said stock to be made by respondent, and said acquisition was made only after assurance of no objection on the part of Armour & Company.

PAR. 4. In January, 1914, Louis F. Smith was president and director of the Western Meat Co. and he resigned during that month at the annual meeting of the stockholders and F. L. Washburn was made president and director of the company. The following letter from Louis F. Swift to E. B. Shugert, treasurer of the Western Meat Co. dated January 6, 1914, is indicative of the Swift control of the Western Meat Co.:

Please have it understood with Mr. Washburn that it may be that we will want to change back again later on to the present officers, and I do not want him to feel hurt if such should prove to be the case. In the meantime want him to understand that there is to be no change in the manner of conducting the business from the present, viz, it will be directed from Chicago, as heretofore.

The said letter of instructions was received and accepted by the interested parties. Shortly after the stock of the Nevada Packing Co. was purchased by the Western Meat Co. with the approval of Louis F. Swift, president of Swift & Co., a letter was sent to F. L. Washburn, president of the respondent, by Louis F. Swift, under date of January 31, 1917, as follows:

I would suggest that you arrange that matters between the Nevada Packing Company, Reno, and Chicago, be handled similarly to those between the Western Meat Company and Chicago, viz.:

On all matters of policy, etc., communications should be addressed to Louis F. Swift, Chicago;

On sales and trading between the companies, satisfactory to address the departments interested?

Will you please arrange?

Kindly acknowledge receipt.

The instructions of said Swift as set forth in the foregoing letter were carried out and from that date the business policy of respondent was controlled by said Swift, president of Swift & Company.

PAR. 5. At the date of the acquisition of the capital stock of the Nevada Packing Company by the Western Meat Company, competition existed between said Nevada Packing Company and the Western Meat Company, particularly in the States of Nevada and California in the purchase of livestock and in the sale and shipment of meat products; buyers of livestock for the Nevada Packing Company and the Western Meat Company endeavored to purchase livestock from the same producers in the States of Nevada and California, and other states; and salesmen of both the Nevada Packing Company and the Western Meat Company solicited orders for meat and meat products from the same trade in the states of Nevada and California, and other states in competition with each other.

PAR. 6. From December 30, 1916, to the date of taking of testimony in this case in June, 1920, respondent, Western Meat Company, has operated the packing plant of the Nevada Packing Company, and, connected with the business of such operation, has continuously purchased and shipped to said plant from various points in the States of Nevada and California and adjacent states live cattle, calves, hogs, sheep and lambs, and after slaughtering same, sold and shipped the meat and meat products resulting therefrom to various purchasers in the States of Nevada and California, and elsewhere, and still continues so to do, and as a part of its said business respondent serves substantially all of the trade that was served by the Nevada Packing Company while it was in business in competition with respondent as hereinbefore set out.

PAR. 7. The effect of the acquisition by respondent of the capital stock of the Nevada Packing Company, and the control and operation of the Nevada Packing Company's plant and business by respondent which followed said acquisition and still exists, was and is an entire elimination and suppression of the competition which had theretofore existed between respondent, Western Meat Company, and said Nevada Packing Company in the buying of livestock and in the sale of meats and meat products resulting from the slaughtering thereof, throughout the States of Nevada and California, and was and is to restrain commerce in the purchase and sale of meat and meat products commonly known as the meat packing industry in the States of Nevada and California.

CONCLUSION.

The acquisition and continued control and ownership of the capital stock of the said Nevada Packing Co., a corporation, by respondent, and the total suppression of competition between the said Nevada Packing Co. and the respondent resulting from such control and operation by respondent under the conditions and circumstances set forth in the foregoing findings as to the facts, were and are unfair methods of competition within the meaning of Section 5 of an Act of Congress approved September 20, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and were and are in violation of the provisions of Section 7 of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes."

Subsequently the Meat Company filed the present petition to this Court to review and set aside that order.

The findings of the Commission are clear-cut, and, if sustained by the evidence, establish without doubt, in our opinion, that the acquisition and continued control and ownership of the capital stock of the Nevada Packing Company by the petitioner constituted a very clear violation of Section 7 of the Act of October 15, 1914, generally known as the Clayton Act, even if it could be properly held that the acts of the petitioner did not violate that of September 16, 1914, generally known as the Sherman Act, for the Clayton Act was enacted by Congress for the purpose, among other purposes, as expressly declared in its title, to supplement the then existing laws against unlawful restraints and monopolies—Section 7 being, so far as pertinent, as follows:

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

That language is too plain, we think, to admit of any sort of doubt that three things are thereby expressly condemned and prohibited, namely, the acquiring by any corporation engaged in commerce, 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 was 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.

If the evidence sufficiently sustained the findings of fact made by the Commission, we are also of the opinion that the conclusion of the Commission, that the acts committed by the petitioner also constituted a violation of Section 5 of the Sherman Act, was also proper. See *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. American Tobacco Co.*, 221 U. S. 179, and the numerous cases there cited.

It remains to consider the petitioner's contention that the evidence was insufficient to justify or to sustain the findings of fact made by the respondent Commission. Regarding that matter, the case, in our opinion, is equally clear.

It is contended on the part of the petitioner that the Packing Company (which was a corporation of Nevada, all of the stock of which, except 1,000 shares, was owned by one U. M. Slater, who had control of its property) operated a small meat-packing plant at Reno in that State, in connection with which it purchased livestock and sold meat and meat products—conducting its operations almost entirely within the State of Nevada; that at the same time he (Slater) conducted a wholesale meat business at Oakland, California, under the name of U. M. Slater, Inc.; that on account of the bad condition of his health he was desirous of selling the Nevada Packing Company property, to which end he, three years before the sale in question was made, approached the petitioner's representative, Mr. Washburn, but without success; that subsequently Slater, being still willing to sell, the matter was again taken up with the petitioner and the purchase in question consummated—the petitioner contending that the acquirement of the physical assets of the company and its appurtenances being the sole inducing cause of its purchase.

We think that contention wholly inconsistent with the evidence which, in our opinion, abundantly supports the findings of fact made by the Trade Commission. It is unnecessary to review the evidence in detail, but we will briefly refer to some of it and to a few of the pertinent circumstances.

Not only does the evidence of the witnesses McCullough, Westfall, Christensen, Moffat, Dorris, Fee, Beccas, Nichols and Cornmayer, show that there was, prior to and at the time of the purchase in question, active and substantial competition between the Nevada Packing Company and the petitioner, Western Meat Company, in the purchase of live stock particularly in the State of Nevada, but in the sale of the products of such stock, and which competition was carried on not only in the State of Nevada but in other States. And that it was substantial, the evidence shows that in the year 1916 the Packing Company slaughtered 10,777 cattle, 977 calves, 13,425 hogs and 22,478 sheep, and that its gross sales for the fiscal year 1915-1916 amounted to approximately \$1,277,954. Indeed, it appears from one of the exhibits introduced in evidence that upon the consummation of the purchase in question the following was published in the Reno Evening Gazette:

The Western Meat Company, which took over the plant of the Nevada Packing Company the first of the year, is now planning for greater cooperation with the ranchers and consumers of this State. To that end the company is

now outlining plans calling for the outlay of a large sum of money to enlarge the plant and improve the equipment.

"In acquiring the Nevada Packing Company," said F. L. Washburn, president of the concern, "we hope still further to increase the possibilities of the company which has become one of the big business houses of the state under the management of Mr. Slater.

"The line susceptible of the greatest development at present is the pork packing end of the business. Nevada ranchers are now producing hogs of good quality, but there is still room for improvement. Many lightweight hogs are being shipped in which should remain on the ranch until they have weight enough to make desirable packer hogs. We require an average weight of 175 to 250 pounds and animals of this weight are easily worth a cent more per pound at all seasons of the year than the lighter stock.

"To increase the hog-raising industry of this state and develop it to the fullest capacity, we must have the continued support of all Nevada consumers, as the success of this industry, as well as that of our own plant, lies in the demand that we can create in the community for hams, bacon, lard and fresh meats.

"The Nevada Packing Company also has a steadily increasing business in near-by points in California, and it is our aim to still further improve the quality of our products so that no products shipped in from the east will have any preference.

"Every consumer," continued Mr. Washburn, "by asking for our products can assist in developing a business that will eventually be of the greatest value to the purchasers of livestock, poultry and foodstuffs in Nevada. As soon as is possible we shall enlarge the present plant so that we may handle all the products that our ranchers in this state can produce."

The record shows that at the time of the purchase in question, Louis F. Swift was president of the meat packing firm of Swift & Company, and that he and other stockholders of that company owned approximately 45 per cent of the stock of the petitioner, Western Meat Company, and that officers of Armour & Company, Morris & Company, and Cudahy Packing Company, all meat packing concerns, owned in the aggregate about 30 per cent of the stock of the Western Meat Company, and that Louis F. Swift was instrumental in causing the purchase in question, having theretofore obtained assurance of no objection thereto on the part of Armour & Company.

Surely nothing more is needed to show that the true purpose of the purchase by the Western Meat Company of the stock of the Nevada Packing Company was the elimination of the competition of the latter company and the expansion of that business by the Western Meat Company, thereby strengthening its hold, than the letters of Mr. Swift to E. B. Shugert, treasurer of the Western Meat Company, and to F. L. Washburn, president of that company, that are set out in the findings of the Trade Commission.

That the direct result of the transaction was the complete elimination of the theretofore competition existing on the part of the Nevada Packing Company and the strengthening of the hold of the Western Meat Company on the meat packing business of Nevada and adjoining states is, in our opinion, further shown by other evidence not necessary to detail.

The petition is denied.

FEDERAL TRADE COMMISSION v. PURE SILK HOSIERY MILLS, INC.¹

(Circuit Court of Appeals, Seventh Circuit, December 8, 1924.
Rehearing Denied January 2, 1925.)

No. 3456.

TRADE-MARKS AND TRADE-NAMES AND UNFAIR COMPETITION KEY No. 80¼, NEW,
VOL. 8A KEY-NO. SERIES—CORPORATION HELD NOT TO HAVE COMPLIED WITH
ORDER PROHIBITING USE OF WORD "MILLS" UNTIL IT OPERATED FACTORY
OR MILLS.

Acquisition by corporation of less than one-sixth of outstanding stock of hosiery mill and the placing of one of its officers as one of seven directors of such mill was not a compliance with order of Federal Trade Commission, pursuant to Act of Congress, September 26, 1914 (Comp. St. Sec. 8836a et seq.), requiring it to cease using a name including word "mills" until it actually owned or operated a factory or mills.

(The syllabus is taken from 3 F. (2d) 105.)

Application for enforcement of an order of the Federal Trade Commission. Application granted.

James T. Clark, of Washington, D. C., for petitioner.

Joseph A. McInerney, of Chicago, Ill., for respondent.

Before ALSCHULER, EVANS, and PAGE, Circuit Judges.

ALSCHULER, Circuit Judge:

Pursuant to Act of Congress approved September 26, 1914, the Federal Trade Commission applies to this court for enforcement of an order by it made directing that "respondents cease and desist from carrying on the business of selling hosiery in commerce among the several States of the United States, under a trade name or corporate name which includes the word 'Mills,' in combination with the words 'Pure Silk Hosiery,' or words of like import, unless and until such respondents, or either of them, actually owns or operates a factory or mills in which hosiery sold by them, or either of them, is manufactured."

The nature of the charge may well be inferred from the order itself, but upon presentation of the petition to this court the facts with which we have to deal were stipulated between petitioner and respondent. From the stipulation it appears that respondent has acquired and owns 240 out of a total of 1,363 shares of the outstanding capital stock of the Browning Hosiery Mills, a Tennessee corporation, having hosiery mills at Chattanooga; that the respondent's secretary and treasurer is one of a board of directors of seven of the Browning Hosiery Mills, and that the secretary and treasurer of the latter is a director and vice president of respondent, and that, except as stated, respondent has no part in the management or control of the Browning concern; that respondent has no other interest or

¹ Reported in 3 F. (2d) 105.

ownership in any other hosiery mill; that its purchases from this mill in May and June, 1922, were 45 and 38 per cent respectively of the mill's total output, and thereafter, up to June, 1923, its monthly purchases of the mill's total output ranged from 27 to 5 per cent; that respondent buys and sells hosiery manufactured by others than the Browning Mills, and the latter sells its product also to jobbers, persons and firms other than respondent; that two of the styles handled by respondent were made for it exclusively by the Browning Hosiery Mills; that owing to the large quantity which respondent bought from the Browning Hosiery Mills it is allowed "a somewhat better price on its purchases than is made by the Browning Hosiery Mills to other purchasers."

It is further stipulated that since the Commission's order respondent has not discontinued the use of the word "Mills," but that it has continued to advertise that it manufactures its hosiery, and continues to use and prominently display in its advertising the words "Mill to Home," and to advertise that it thus eliminates jobbers', wholesalers', and retailers' profits, as well as advertising overhead, and enables it to sell to consumers at greatly less than usual retail prices.

If the condition of the order is not complied with by respondent's acquirement of the Browning Hosiery Mills stock, it is frankly conceded that there has been no compliance with the Commission's order, and practically no other reason is here advanced for respondent against granting the prayer of the petition.

That the acquirement of slightly more than one-sixth of the stock of an incorporated hosiery mill is compliance with the condition of the order that it actually "owns or operates a factory or mills in which hosiery sold by them is manufactured" is startling in its very statement. If the holding of this small minority of stock can justify public representation that respondent owns and operates the mills wherein its hosiery is made, then like representation could be justified by the ownership of any number of shares less than 240.

But if, in any event, ownership by respondent of a majority or even all the stock of another corporation which owns a hosiery mill would satisfy the condition of the order, the stipulated situation falls very far short of any such relation. Respondent's minority stock holding and its single membership on a board of seven of the Browning Mills in no manner gives it such an advantageous position as its public representations state, and from the stipulation it appears that even the somewhat lower price it obtains on what it buys is not because of any proprietary influence or control it has, but solely because of its large purchases.

The stipulated evidence, far from showing compliance with the order, manifests its flagrant violation.

The prayer of the petition is granted, and it is ordered by the court: That the respondent, Pure Silk Hosiery Mills, Inc., its officers, agents, and employees, do cease and desist from carrying on the business of selling hosiery in commerce among the several States of the United States under a trade name or corporate name which includes the word "Mills" in combination with the words "Pure Silk Hosiery," or words of like import, and from making representations through advertisements, circulars, correspondence stationery, or in any manner whatsoever, designed to promote or otherwise affect interstate commerce, that it is the owner of or controls a hosiery mill

or mills, or that the hosiery by it sold comes direct from manufacturer to purchaser, unless and until the respondent actually owns and operates, or directly and absolutely controls a factory or mill wherein is made any and all hosiery by it sold or offered for sale under such title or name, or by or through any advertisement or other representation of ownership of such a mill or factory.

CHICAGO PORTRAIT COMPANY v. FEDERAL TRADE COMMISSION.¹

(Circuit Court of Appeals, Seventh Circuit. December 23, 1924.
Rehearing Denied March 2, 1925.)

No. 3276.

TRADE-MARKS AND TRADE-NAMES AND UNFAIR COMPETITION KEY No. 78—METHOD OF SELLING PORTRAITS HELD NOT SUCH AS TO AUTHORIZE A DESIST ORDER BY THE TRADE COMMISSION.

Sales talks of solicitors for a portrait company engaged in making and selling family portraits to customers, whereby, by means of false statements as to the customary price charged and by drawings in which the customer receives a trade check applicable in payment of his order, it is sought to make him believe that he is getting his work for less than the usual price, *held* not a deceit which injures the customer or competitors, and not such as to authorize a "desist" order by the Federal Trade Commission.

(The syllabus is taken from 4 F. (2d) 759.)

Petition for review of an order of the Federal Trade Commission. Order vacated.

John T. Evans, of Chicago, Ill., for petitioner.

William A. Sweet, of Washington, D. C., for respondent.

Before ALSCHULER, EVANS, and PAGE, Circuit Judges, ALSCHULER, J., dissenting.

PAGE, Circuit Judge:

Petitioner (called Company) asks that the order to cease and desist entered against it by respondent (called Commission) in 1923, be set aside (*Federal Trade Commission v. Chicago Portrait Co.*, Docket No. 840²).

The Company, the largest concern of its kind in the United States, for more than thirty years has been engaged in taking orders for and making portraits of parents and other near relatives of its customers by coloring and finishing photographs enlarged from old photographs furnished by the customers. In the years 1919 to

¹ Reported in 4 F. (2d) 759. Petition for writ of certiorari by the Commission, docketed in the Supreme Court on May 27, 1925, denied on October 12.

² 5 F. T. C. 396.

1921, it did a business annually of from \$2,500,000 to \$4,000,000, the smallest business being in 1921. It had annually 250,000 to 300,000 customers, some in every state.

The order covers two things only, and they are to cease and desist:

From representing to customers or prospective customers that the usual prices which it receives, or has received for its portraits, are greater than the prices at which similar portraits are offered, to such customers or prospective customers, when such is not the fact.

From using any trade check or other device, in such a way as to directly or indirectly represent to customers or prospective customers that portraits offered by respondent have greater selling prices than the prices at which same are offered, when such is not the fact.

There were many charges in the Commission's complaint and many findings of fact. The evidence was taken before an examiner, and not before the Commission. There was much evidence upon which there were no findings, and some of the findings are not justified by the evidence, nor material under the complaint.

The matters covered by the order were representations made in two "sales talks," one of which was discontinued sixty days after the complaint was filed in September, 1921, and the other in January, following. There is no evidence that the misrepresentation as to the usual sale price was made after the "sales talks" were discontinued, but in its answer the Company asserted its right to use, and that it was continuing to use, the envelope drawing method. The "sales talk," discontinued in January, 1922, shown in the margin,* contains all the alleged misrepresentations excepting the following, taken from the "sales talk" discontinued in 1921: "When we sell this work we get \$20 for each painting."

* COMMISSION'S EX. No. 2. Discontinued (Stamped). Moseley's Method Abridged.

Approach: Good morning, this is the Myer farm, I believe. (Yes.) Thank you. I understood it was. I was sent here to see you. (Enter.)

Introduction: Pardon me, how do you spell your name? (M-y-e-r.) I wasn't sure. My name is Moseley. I came out from Bloomington to see our old friends and customers.

Mission: I am advertising some new Art work. Mrs. Brown and Mrs. Sims say it is the finest they have ever seen. (Open case.) Isn't that fine?

Explain sample: Mrs. Myer, there are many things which make this painting beautiful. You will notice it is oval with a raise in the center showing a natural rounded forehead and chest. Notice how the artist has brought out the features. Notice how the hair is painted. You can see every stroke of the artist's brush, with just enough color in the face to give it life and warmth. The background is taken from our famous Sepia paintings. It seems to set the person right out into space. This wonderful painting is our Special Hand-made Tritone.

Method of advertising: Now, Mrs. Myer, all concerns advertise in one way or another, but instead of our company paying the money for advertising in newspapers, magazines, and farm journals, we decided to come right among the people and give them the benefit of the advertising money.

Satisfied customer: We believe that a satisfied customer is our best advertiser. Don't you think that is true?

Distribution: I might come out here and place these paintings in the first homes I came to, but if I did, some of our old customers would feel that we did not give them fair treatment, so we have arranged to treat everybody alike.

Explain contest: Now, Mrs. Myer, the way we are distributing these paintings is through an old-fashioned contest like you have in church affairs. Take one. Just advertising. I have a big surprise for you if you are fortunate. We will just lay this one down. Each home is entitled to two envelopes free. Now I will tell you what a grand thing it is if you are fortunate.

Explain price: We have made paintings like these for schools, colleges, and other institutions, only instead of selling them for \$50 or \$100 we are selling them for \$20, but if you get a check it is worth \$10 to you.

Good photographs: But we reserve two rights. You must have a good clear photograph and it must be a member of your family or a near relative.

Show photographs: Here is what I mean by good photographs. These are Mrs. Smith's two little girls and here is Mrs. Brown's father and mother. Mrs. Brown certainly was fortunate. She got a big check and is getting her mother's free.

Customer has check: Now for the big laugh. Too bad! You are not very fortunate, are you? Well, it didn't cost you anything. I declare! And it is a big one. You get one painting free. I congratulate you. Now bring out three or four of your best pictures and I will see if we can accept any of them. I have my tester here.

With reference to the trade checks, the Commission found that—

"Checks" or trade checks mentioned herein were printed slips issued by respondent and countersigned by its sales agents, purporting to represent \$10 or \$15, as shown by the face of the check, in payment for the standard portraits sold by respondent. Whether placed in the hands of prospective customers through the device of "a drawing" from the salesman, as was sometimes done, or given directly to the prospective customer by the salesman, every prospective customer for standard portraits thought desirable to do business with was given such a check. This check was merely a device for getting the attention of the customer and thus aiding in making the sale.

That is precisely the claim made for it by the Company.

The Commission also found that the representation made "that respondent ordinarily and usually sold its standard portraits for \$20 each," was a false representation—

Deliberately made for the purpose of deceiving and misleading such customers and prospective customers and had a capacity and tendency to mislead and deceive, and did mislead and deceive, such customers and prospective customers into the belief that the prices then being asked for such standard portraits were far less than the usual prices obtained by respondent for such portraits, and far less than the usual and actual selling or market value of such portraits.

No salesman, customer, or other person who might have known the effect of that representation upon any customer testified and, except that the Commission had before it the evidence that the representations were made, just as we have all the evidence before us, there is nothing to show that anyone was deceived or misled.

The complaint alleges that the Company carries on its business in direct competition with others. There is a finding:

Respondent is the largest concern in the United States in its field of activity, * * *. Among its competitors are the Syracuse Portrait Company, of Syracuse, New York, and the Roman Oil Portrait Company, the Commercial Portrait Company, the Aetna Copying Company, and the Pacific Portrait Company, all of Chicago, two or more of which do similar business along similar lines in the various States of the United States.

The evidence, in so far as it shows anything about competitors, is that they were using the same alleged objectionable methods used by the Company. In the "sales talk" shown in the margin, supra, is the following:

Method of advertising: Now, Mrs. Myer, all concerns advertise in one way or another, but instead of our company paying the money for advertising in newspapers, magazines and farm journals, we decided to come right among the people and give them the benefit of the advertising money.

Accepting photographs: This is a picture of your father and this of your mother. They are all right. We can accept them in fine shape. You get this one of your father in this \$20 work for \$10, and we are going to make you a \$20 painting of your mother absolutely free. Forty dollars' worth of work for \$10.

Closing point: But we are going to ask one favor of you, that you will tell your neighbors and friends who made the work. You will certainly do that, won't you?

Write-up order: What is the number of your trade check? And your route number is 3, isn't it? What is your husband's name and initial? All right.

Receipt: Now, Mrs. Myer, here is a receipt for your photographs, showing a credit of \$10 on your father's painting and that you get a painting of your mother absolutely free for boosting.

Date of delivery: This receipt also shows that your painting will be delivered soon after -----

(Delivery date)

Customer signs. This is my name. Please place your name on this line and I will leave this copy with you.

Explain frames: Now, Mrs. Myer, these paintings will be delivered in suitable frames. If the style and the price of the frame suit you, you can buy the frames. Otherwise just pay \$10 in cash and the trade check which I have made payable to you for the paintings.

Salesman's verification: Now let us see that there is no misunderstanding. What are the paintings to cost you in cash? And what did I tell you about the frames? (Yes, that is correct.) We are going to make you two fine paintings and I know you will be a good booster for us. Good day.

The Commission found that statement false, and that some advertising was done. It also appears that the Company said it had the best equipped studios and laboratories in the world. No attempt was made to show that was not true. Neither of those matters was made the subject of any charge in the complaint. The latter was not referred to in any finding and neither was noticed in the order to cease and desist, so we may dismiss them from consideration.

It seems clear that, in all the authorities cited, the unfair method of competition was found in false advertising touching or affecting the relation between the advertiser and his competitors.

In *Sears, Roebuck & Co. v. Federal Trade Comm.*, 258 Fed. 307, in the majority opinion, this court said (p. 311):

The commissioners, representing the government as *parens patriae*, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or tendency to injure competitors directly or through deception of purchasers, * * *.

In *Federal Trade Comm. v. Sinclair Refining Co.*, 261 U. S. 463, 475, the practice of Sinclair Company was challenged as an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act. The court said:

The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes (Clayton and Federal Trade Comm. Acts) 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.

In *Kinney-Rome Co. v. Federal Trade Comm.*, 275 Fed. 665, 669, this court held:

Unless that which petitioner did fraudulently affected some competition in which either or both were interested, then the order to cease and desist was improvidently entered.

It is urged that *Federal Trade Comm. v. Winsted Hosiery Co.*, 258 U. S. 483, broadens and extends the interpretation of the words "unfair methods of competition." In that case the court said:

The findings here involved are clear, specific and comprehensive: the word "Merino" as applied to wool "means primarily and popularly" a fine long-staple wool, which commands the highest price. The word "Australian Wool" means a distinct commodity, a fine grade of wool grown in Australia. The word "wool" when used as an adjective means made of wool. The word "worsted" means primarily and popularly a yarn or fabric made wholly of wool. A substantial part of the consuming public, and also some buyers for retailers and sales people, understand the words "Merino," "Natural Merino," "Gray Merino," "Natural Wool," "Gray Wool," "Australian Wool," and "Natural Worsted," as applied to underwear, to mean that the underwear is all wool. By means of the labels and brands of the Winsted Company bearing such words, part of the public is misled into selling or into buying as all wool, underwear which in fact is in large part cotton. And these brands and labels tend to aid and encourage the representations of unscrupulous retailers and their salesmen who knowingly sell to their customers as all wool, underwear which is largely composed of cotton. Knit underwear made wholly of wool, has for many years been widely manufactured and sold in this country and constitutes a substantial part of all knit underwear dealt in. It is sold under various labels or brands, including "Wool," "All Wool," "Natural Wool" and "Pure Wool," * * *. The Winsted Company's product, labeled and branded as above stated, is being sold in competition with such all wool underwear, and such cotton and wool underwear.

The Winsted Company used, in branding its cartons, words indicating that the contents were all wool and some of the markings indicated an all-wool content of very high quality, whereas, none of the packages contained underwear that was all wool. The court further said:

The facts show that it is to the interest of the public that a proceeding to stop the practice be brought. And they show also that the practice constitutes an unfair method of competition as against manufacturers of all-wool knit underwear and as against those manufacturers of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods. * * *

As a substantial part of the public was still misled by the use of the labels which the Winsted Company employed, the public had an interest in stopping the practice as wrongful; and since the business of its trade rivals who marked their goods truthfully was necessarily affected by that practice, the Commission was justified in its conclusion that the practice constituted an unfair method of competition.

In the case before us there is nothing comparable to the facts in the Winsted Case. There are here no facts, nor findings of fact supported by evidence, that anyone was in any way injured, or could have been. The falsehood about the usual sale price was reprehensible, and an unworthy device to be employed in trade; but it had no tendency to injure any competitor.

That which was said was about the Company's own selling price. The portraits had no commercial value, as illustrated by a witness who said:

The value of a portrait I would judge it in this manner. Suppose you had a portrait made of your grandfather, which was a very good portrait. You thought it was very good, a fine portrait. I would not give you two cents for it, it would be worth nothing to me, but you might say it was worth one hundred dollars to you.

The Company was selling family portraits, not to be worth so much money but to be of the kind and quality of the sample there exhibited. There is no evidence or finding that any purchaser was dissatisfied because the portrait delivered was not equal to the sample exhibited. The finding as to price paid is that—

Thousands of such portraits were sold at the price of two for \$10 or \$10 for one with one free, and no such portrait was sold for \$20 by respondent in the ordinary course of its business. Respondent, in the course of its business, at times in 1920 and 1921, did sell such "Tritone" portraits and like standard portraits known as the "auratone," for \$12.50 or for \$15, in each case giving with the portrait so sold another similar portrait free, so that the actual prices at which such portraits were sold were at no time greater than \$6.50 or \$7.50 each.

The drawing of the trade check was made before a sale was even talked about, and nothing was paid then or afterwards for the privilege of drawing. The drawer might have thought he was taking a chance, but in fact he was not. The agent had said, "We have arranged to treat everybody alike," and every purchaser drew a trade check. The purchaser might have been deceived in some small way, but certain it is that he was not injured, nor was any competitor injured.

From the forbidden acts there seems to us to be no possibility of injury to competitors, and we are of opinion that they are neither within the letter nor the spirit of the act.

The order is vacated.

ALSCHULER, Circuit Judge:

I can not concur in the result. The alleged "drawing" is a sham device conceived for the sole purpose of making prospective customers believe that if they draw lucky numbers they will have the advantage of securing pictures at prices greatly below what petitioner's other customers must and do pay for them, while in fact there is no chance or lottery about it. Every prospect is approached in the same way, and all pay the same price, all through this scheme beguiled into believing they are of the exceptional few whom fortune favored. While it is a rather mild sort of fraud, to my mind it is none the less of the very essence of unfair competition toward all who make or sell, interstate, enlarged photographs, falling fairly within the corrective provisions of the Federal Trade Commission Act.

BUTTERICK COMPANY ET AL. v. FEDERAL TRADE COMMISSION.¹

(Circuit Court of Appeals, Second Circuit. January 5, 1925.)

No. 6.

1. **MONOPOLIES KEY No. 17 (2)—CONTRACT BETWEEN MANUFACTURER OF PATTERNS AND DEALER HELD ONE OF SALE, NOT OF AGENCY, AND VIOLATIVE OF CLAYTON ACT.**

Contract whereby manufacturer agreed to supply standard patterns and advertising matter at price and on conditions named, which fixed resale price and restrained dealer from selling competitor's patterns, *held* a contract of sale, violative of Clayton Act, Sec. 3 (Comp. St. Sec. 8835c), and Federal Trade Commission Act, Sec. 5 (Comp. St. Sec. 8836e), notwithstanding use of terms "principal and agent" to characterize relation of parties.

2. **MONOPOLIES KEY No. 17 (1)—CONTRACT FIXING RESALE PRICES CONTRARY TO LAW.**

Contracts fixing prices for resale are not only contrary to general law and void, but there is no power to make them, even in the case of patented articles, because of their monopolistic tendencies.

3. **MONOPOLIES KEY No. 17 (2)—MANUFACTURER HELD NOT TO HAVE DESISTED FROM UNFAIR METHODS, WHERE CERTAIN OF FORMER CONTRACTS STILL IN FORCE, AND NEW FORM OF CONTRACT EQUALLY VICIOUS.**

A manufacturer, after order of Federal Trade Commission to desist from selling patterns under contracts fixing resale prices and restricting dealers from dealing in other patterns, cannot be held to have discontinued offensive methods, where it is shown that many old forms of contract are still in use, and that new form of so-called agency contract is equally vicious.

4. **MONOPOLIES KEY No. 12 (1)—SIMILAR VIOLATIONS OF CLAYTON ACT BY COMPETITORS IS NO DEFENSE OR JUSTIFICATION.**

That competitors are engaged in similar violations of the Clayton Act is no defense or justification for such violations.

¹ Reported in 4 F. (2d) 910. Petition for writ of certiorari denied by the Supreme Court on March 16, 1925.

5. COMMERCE KEY NO. 40 (1)—DISTRIBUTION AND SALE OF PATTERNS, CATALOGUES, AND FASHION SHEETS HELD INTERSTATE COMMERCE WITHIN THE MEANING OF CLAYTON ACT.

The distribution or sale of standard patterns to retail dealers, the sale of catalogues, fashion sheets, and other advertising matter to the same dealers, inseparably connected with the sale or agreements regarding delivery of patterns to retail distributors throughout the country, *held* interstate commerce, within the terms of the Clayton Act.

6. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY NO. 80½, NEW, VOL. 8A, KEY NO. SERIES—JURISDICTION OF CIRCUIT COURT OF APPEALS IN REVIEWING ORDERS OF FEDERAL TRADE COMMISSION, ORIGINAL RATHER THAN APPELLATE.

Jurisdiction of Circuit Court of Appeals to review order of Federal Trade Commission, commanding manufacturer to desist from unfair business practices, is original rather than appellate, and its decree may protect rights of parties in such form as will be enforceable by it.

7. TRADE-MARKS AND TRADE NAMES AND UNFAIR COMPETITION KEY NO. 80½, NEW, VOL. 8A, KEY NO. SERIES—FEDERAL TRADE COMMISSION GRANTED DECREE ENFORCING ITS ORDER AGAINST MANUFACTURER, CONTINUING TO FIX RESALE PRICES AND BINDING RETAILERS TO DISTRIBUTE ONLY ITS PRODUCTS.

Where a manufacturer continues the practice of fixing the resale price of its goods, and requiring retail distributors to deal only in its patterns, in violation of Clayton Act, Sec. 3 (Comp. St. Sec. 8835c), and Federal Trade Commission Act, Sec. 5 (Comp. St. Sec. 8836e), after being ordered by the Federal Trade Commission to desist, the Circuit Court of Appeals, on cross-petition of the Commission, will decree enforcement of Commission's order as prayed.

(The syllabus is taken from 4 F. (2d) 910.)

Petition to revise an order of the Federal Trade Commission, requiring the petitioners to cease and desist from the use of certain methods of unfair competition in the industry relative to the designing, distribution, and sale of tissue paper patterns in making dresses and wearing apparel, and cross petition by the Commission to enjoin petitioners from further violations of law. Order affirmed and cross petition granted.

Julius M. Mayer, Herbert Noble, and Scott Scammell, all of New York City, for petitioners.

W. H. Fuller, of McAlester, Okla., *Edward E. Reardon*, of New York City, and *E. C. Alvord*, of Washington, D. C., for respondent.

Before ROGERS and MANTON, Circuit Judges, and LEARNED HAND, District Judge.

MANTON, *Circuit Judge*:

The industry affected by this order, has for its purpose the enabling of a woman to purchase a pattern for a dress or other piece of wearing apparel, and to use it as a pattern upon a sufficient amount of material to make the article in her own home, thus avoiding the outside tailoring or purchasing of ready made garments. This, it is said, reduces the cost of women's garments very materially. She contributes her own labor and skill using the pattern

as her guide. The manufacturer creates a design and from it a master pattern is made. Other patterns are cut out of tissue paper and these are then placed in envelopes and then sold as herein described. The petitioners, who are manufacturers, in connection with their method of advertising to the trade, published a magazine called "The Delineator" for circularization among women readers. There are published in that magazine, pictorial representations of pattern designs. The woman sees the pattern thus pictorially represented, makes her selection, and later her purchase. Her identification is by the number marked on the pattern. The business practice of publishing patterns is not confined to a single magazine. They may be found in various magazines such as the "Ladies Home Journal," the "McCall Magazine," and other publications. Patterns are on sale at stores in various cities and towns in the United States, principally department stores. The petitioners' business has grown to very considerable proportions, the last reported distribution of the petitioners being twenty-seven millions annually, and the magazine has a circulation of over nine hundred thousand.

It is established that the petitioners have contracts with about twenty thousand retail dry-goods dealers and other stores throughout the United States. Each contract binds the dealer to maintain the resale price fixed on the labels, and binds such dealers not to sell or permit to be sold on their premises, the patterns of competitors. They are permitted to enforce these provisions by refusing to sell to dealers who refuse to make such agreements or to be bound by them as well as by threats of suit and the actual institution of suits for damages. The complaint as filed, alleged that this business method constituted unfair competition and charged violation of Sec. 3 of the Clayton Act of October 15, 1914 (Comp. Stat. 8835) and Sec. 5 of the Federal Trade Commission Act (Comp. Stat. 8836E). Hearings were held and testimony taken, after which the Commission entered an order commanding the petitioners to cease and desist,

from selling the patterns manufactured by them or any of them, for resale to the public upon any contract, agreement or understanding that the distributor shall maintain the resale price fixed by the maker and/or that such distributor shall not deal in patterns produced by any other maker than the respondents or any of them.

The petitioners contend that while the pattern manufacturers practiced this method of fixing resale prices, that they were not engaged in unfair competition. They say that they are using "the same methods as their competitors" and that "those methods are inherent in this business and have in no manner hindered competition between the pattern manufacturers" and that in point of fact "competition has been more keen and successful in each succeeding year." It is argued that because of the unique character of the business, this industry presents distinctiveness from that of others where price fixing has been condemned (*Miles v. John D. Park*, 220 U. S. 373; *Bauer v. O'Donnell*, 229 U. S. 1; *United States v. Schrader's Sons, Inc.*, 252 U. S. 85; *Beech-Nut Packing Co. v. Federal Trade Comm.*, 257 U. S. 453). It is said that protection to the public is achieved by the label price, and that in the cases referred to of price fixing, there was a show of monopolistic control or suppression of competition planned through the fixing of resale prices in conjunction with the nature of business and the means employed in maintaining the price.

The respondent has filed an answer to the petition to review the order and in it contends that (1) the court should affirm the order, and (2) that the court should enjoin the petitioners from continuing the violations of law found by the Commission to have been committed.

This presents the question of whether the form of contract which is now used by the petitioners as superseding the contract above referred to, still violates Sec. 5 of the Federal Trade Commission Act. The new contract fixes the resale price and restrains the dealer from selling the goods of competitors. It is claimed for it, that it is a contract of agency and not a contract of sale, and that, therefore, it is not within the terms of the act. We think both the contracts are the same in substance and by their terms are in violation of Sec. 3 of the Clayton Act, which forbids contracts of sale made upon the agreement or understanding of price fixing or that the purchaser shall not deal in goods of competitors, both of which may substantially lessen competition or tend to create a monopoly. This form of contract was considered in *The Standard Fashion Co. v. Magrane-Houston Co.* (258 U. S. 346) where it was held that a contract between the manufacturer and retailer creating an agency for the retailing of goods made by the manufacturer to be purchased by the retailer, with provisions for periodical exchange of old goods for new or less value, and for repurchase by the manufacturer of stock on hand, was a contract of sale within Sec. 3 of the Clayton Act, and it was further held that such a contract granting an agency to the store for selling the goods and forbidding the retailer from assigning or transferring the agency, or removing it from its original location, without the manufacturer's consent, and forbidding the retailer to sell on the premises goods of the manufacturer's competitors under the terms of the contract, and to sell the same at label prices fixed thereon, was a general restriction not confined to the particular shop and such clauses were in violation of Sec. 3 of the Clayton Act.

While the latter contract is a modification of the former and is sought to be regarded as one of agency, it is apparent to us that it is a contract of sale. (*Straus v. Victor Talking Machine Co.*, 243 U. S. 490; *Standard Fashion Co. v. Magrane-Houston Co. supra*) Section 3 of the Clayton Act condemns sales or agreements of sales made under terms as to substantially lessen competition or tend to create a monopoly in any lines of commerce. It must of necessity deal with the consequences flowing from contracts, as here considered, which have restrictive covenants limiting the rights of the purchaser to deal with the goods of the seller only. The president of one of the petitioners said in his testimony, that eighty-five per cent of the business transacted by it was under the form of contract thus condemned in *Standard Fashion Co. v. Magrane-Houston Co. (supra)*.

We think the form of contracts used in that case are the same in substance as the present ones. By their terms they are for the resale of patterns, and they fixed a price at which they must be sold. They contain a restrictive clause against the sale of competitors' goods and provide that the patterns on hand at the expiration of the contract "will be returnable for repurchase" and the consideration for the patterns is referred to as "Purchase price of patterns" and "patterns returned in exchange or for redemption must have been purchased hereunder." Indeed, all of the contracts of the peti-

tioners are in their terms substantially the same and the business method pursued was in keeping with the terms of these contracts and in compliance therewith. The officers of the petitioner who testified substantiated this. These contracts provide means for a real or substantial lessening of competition. The petitioners are one of seven of the largest concerns engaged in this industry. There are about fifty thousand pattern agencies in the United States and the petitioners, by their contracts, control about twenty thousand. They restrict these dealers by their contract. The application of this contract is not only a potential evil but, indeed, is an actual and powerful restraint upon trade by the petitioners.

We do not distinguish between the old form and present form referred to in respondent's answer. We think they have the same injurious effect. Indeed, the record practically shows the effect of such restraint of competition. There are instances where the dealer has been cut off by the petitioners for handling the goods of the competitor. Contracts fixing prices for resale are not only contrary to the general law and void, but there is no power to make them because of their monopolistic tendencies even in a patented article. (*The Boston Store of Chicago v. American Graphophone Co.*, 246 U. S. 8.)

It is urged that the petitioners have ceased the use of their former contract by substituting therefor the new form referred to. (Exhibits 25, 26, 27 of this record.) However, it is established that many of the old forms of contract are still in use and of binding force. Because the petitioners are making the new form of so-called "agency contracts," it can not be argued that they have discontinued the methods found by the commission to be offensive to the Act. (*Sears, Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 207.)

The argument that other competitors are doing substantially what the petitioners do has no effect. It is not important. (*Standard Fashion Co. v. Magrane-Houston Co. supra.*)

The contracts adopted by the petitioners in the form of Exhibits 25, 26, and 27, differ only from the terms of the former in calling the petitioners "principal" and the retail dealer "agent"; and the principal agrees to supply f. o. b. its patterns and advertising matter at the price and on the conditions named on the reverse side; and instead of the dealer agreeing to purchase, the "agent" agrees to accept from the principal and keep on hand for sale at all times its patterns. The exact terms of payment, as in the former contract, provide that one-half of the agreed price for the patterns is to be paid by a certain date and the balance is debited to the retail dealer, called "a standing credit," on which interest is charged to the retail dealer and the retail dealer is, immediately on signing the contract, obliged to pay this balance which is due and payable at the termination of the contract. As in the former contracts, all other patterns or goods charged under the contract are to be paid for on or before the tenth of the following month succeeding the date of shipment, whether the goods are sold on that date or not.

This we regard as an effort to avoid the passing of title and thus attempt to create an agency. But there is nothing to indicate a qualified sale and there was no transfer of a limited right to use these goods. The dealer had the title and the right to use the article purchased. He could sell and dispose of it. His sole obligation was to

pay for it. In the meantime, he had full possession and authority over the patterns when the title passed to him. (*Bauer v. O'Donnell*, 229 U. S. 1; *Straus v. Victor Talking Machine Co.*, *supra*.) We regard this new form of contract as an effort to modify the form and not the substance of the petitioner's business methods. We do not think the contracts successfully make out an agreement of agency as distinguished from a contract of sale. This studied effort to avoid the use of the word "sale" can not aid the petitioners in carrying out this practice which the Commission has justly condemned as obnoxious to the public interest. This record is replete with evidence justifying the conclusion of the Commission. It is in large part admitted by the officers of the petitioners to be their business method.

The distribution or sale of patterns of the petitioners to the retail dealers, the sale by the petitioners of the catalogues, fashion sheets and other advertising matter referred to in the contracts of the petitioners, and purchased by the retail dealers, is inseparably connected with the sale or agreements regarding the delivery of the patterns by the petitioners to the retail distributors and is a part of the same transaction in commerce. The contract, in so far as it is a sale of the catalogues, fashion sheets, and other advertising matter by the petitioners to the retail distributors in other States, is a transaction in interstate commerce. The sale of these publications and advertising matters are so connected in use with the disposal of the patterns themselves, as to indicate that the whole business is one affair of commerce. (*Davis v. Commonwealth of Virginia*, 236 U. S. 697; *Dozier v. State of Alabama*, 218 U. S. 124; *Caldwell v. North Carolina*, 187 U. S. 622.)

We are urged by the respondent to grant relief upon this answer which is a cross petition seeking the enforcement of the order of the Commission so as to include therein a command to the petitioner to cease and desist from its business practices in the sale of these products by them or any of them, and from enforcing its business methods requiring the distributor to maintain the resale price fixed by the petitioners, and requiring such distributor to deal only in patterns purchased from the petitioners or any of them. The jurisdiction of this court in this proceeding is original rather than appellate, and since it is the former, we may, in our own decree, protect the rights of the parties and in such form as it would be enforceable by us. (*Silver Co. v. Federal Trade Commission*, 292 Fed. 752.) The decree should be along the lines adopted by the courts of equity in hearing suits of injunction. It is the general practice in such cases, that if the defendant is continuing or threatening acts, there will be an injunction, but if whatever was unlawful, ceased long before the bill was filed, and there is no reason to apprehend its renewal, the bill will be dismissed without prejudice. But here the petitioners are not only doing business under the original contract, but the new forms of contract are both deemed a violation of Section 3 of the Clayton Act. The command of the order to cease and desist is broad enough to include both forms of contract. Both are offensive to the act and fall within the enforcement of the order to cease and desist.

Concluding as we do, that the Commission's order was properly made, it is affirmed, and the respondent may have an order entered on its cross petition.

**PACIFIC STATES PAPER TRADE ASSOCIATION ET AL.
v. FEDERAL TRADE COMMISSION.¹**

(Circuit Court of Appeals, Ninth Circuit. February 9, 1925.
Rehearing Denied March 9, 1925.)

No. 4217.

- 1. MONOPOLIES KEY NO. 17 (1)—INDEPENDENT USE OF ASSOCIATION PRICE LISTS BY SALESMEN OF PAPER DEALERS IN MAKING SALES IN OTHER STATES HELD NOT IN VIOLATION OF ANTITRUST ACT.**

The use of price lists of local associations of wholesale paper dealers by salesmen of their members in making sales in other states, where such use is made independently, and not through any combination or agreement, and where the salesmen are not bound by them in making sales in other states by any rule of the associations, but are free to vary therefrom, *held* not to establish a combination to fix prices or limit competition, in violation of the Antitrust Act (Comp. St. Secs. 8820-8823, 8827-8830).

- 2. COMMERCE KEY NO. 40 (1)—SALE BETWEEN LOCAL PARTIES IS NOT INTERSTATE COMMERCE, THOUGH THE GOODS ARE SHIPPED TO THE BUYER FROM ANOTHER STATE.**

A sale by a wholesale dealer in paper products to a local dealer in the same state is not a transaction in interstate commerce, because the seller causes the order to be shipped from the manufacturer in another state.

- 3. COMMERCE KEY NO. 60 (1)—TRADE COMMISSION WITHOUT AUTHORITY TO PROHIBIT DISCUSSION OF PRICES BY DEALERS' ASSOCIATIONS.**

While the Trade Commission may prohibit agreements between dealers for the fixing of prices for goods to be sold in interstate commerce, it is without authority to forbid discussion of uniform terms, discounts, and prices by associations of dealers, in the absence of evidence that such discussions result in agreements fixing interstate prices.

- 4. MONOPOLIES KEY NO. 17 (2)—ATTEMPT BY COMBINED DEALERS TO INDUCE MANUFACTURERS NOT TO SELL TO CERTAIN DEALERS, OR TO SELL ONLY AT FIXED PRICES, IS IN VIOLATION OF ANTITRUST ACT.**

An attempt by an association of dealers to prevent dealers or consumers from buying direct from manufacturers, or to influence manufacturers or wholesalers not to sell to certain dealers, or to sell only at fixed prices, in interstate commerce, though by persuasion only, is an attempt to restrain such commerce in violation of Antitrust Act, Sec. 1 (Comp. St. Sec. 8820).

(The syllabus is taken from 4 F. (2d) 457.)

On petition to review order of Federal Trade Commission. Order reversed in part.

Edward J. McCutcheon, Warren Olney, Jr., and McCutcheon, Olney, Mannon & Greene, all of San Francisco, Calif., *Hamblen & Gilbert*, of Spokane, Wash., and *Chriss A. Bell*, of Portland, Oreg., for petitioners.

¹ Reported in 4 F. (2d) 457. Petition for writ of certiorari by the Commission, docketed in the Supreme Court on April 18, 1925, granted May 25, 1925.

W. H. Fuller, chief counsel of Federal Trade Commission, of Washington, D. C., and *D. N. Dougherty*, of San Francisco, Calif., for respondent.

Before GILBERT, HUNT, and RUDKIN, Circuit Judges.

RUDKIN, *Circuit Judge*:

These are petitions to review and set aside certain portions of an order of the Federal Trade Commission. The portions of the order challenged by the several petitions are the following:

It is ordered, that * * * (b) The Spokane Paper Dealers, Portland Paper Trade Association, Paper Trade Conference of San Francisco, Los Angeles Wholesale Paper Jobbers' Association, and their officers and members, or any of them, forever cease and desist from using, directly or indirectly, either separately or in combination, in the making or soliciting of sales in interstate commerce, the price list of any local association, or any price list the prices wherein have been fixed by agreement or understanding between two or more of respondent jobbers or wholesalers, or from compiling, publishing and distributing any joint or uniform list or compilation of prices for use or used or intended to be used in making sales of paper products in interstate commerce.

(c) Each and all of the respondent local associations, their officers and members, forever cease and desist from entering into or acting under any agreement or understanding, express or implied, among each other or others, which fixes the prices for sales designated and described in the findings herein as "mill shipments" in carload quantities or less than carload quantities, where the article sold by respondent jobber or wholesaler is one supplied by the manufacturer from a point without the state wherein such jobber or wholesaler is located, or from compiling, publishing, and distributing any joint or uniform compilation of prices for use or intended to be used in making such sales.

* * * (e) The Seattle-Tacoma Paper Trade Conference, Spokane Paper Dealers, Portland Paper Trade Association, their officers and members, the Pacific States Paper Trade Association and its officers, forever cease and desist, through the medium of meetings of the so-called Northwest Paper Dealers, or in any similar manner, from discussing uniform terms, discounts and prices, agreeing upon prices by resolution or otherwise, or employing any similar device, which fixes or tends to fix the prices at which paper or paper products shall be sold in interstate commerce, or which is designed to equalize or make uniform the selling prices, terms, discounts, or policies of such respondent jobbers in the sale of paper or paper products in interstate commerce.

* * * (g) All of respondent associations and their officers and members cease and desist from conspiring, combining, or agreeing among themselves, or with each other or others, or through respondent associations, or any other organization or association, or in any way whatsoever, to hinder or prevent any wholesaler, jobber, dealer, or consumer from purchasing paper or paper products in interstate commerce directly from the manufacturer or wholesaler thereof or from anyone else selling or desiring to sell such products.

(h) All of respondent associations and their officers and members forever cease and desist from any attempt or effort through such associations or by concert of two or more of their members, or through any other organization or association, to hinder or prevent, by intimidation, coercion, withdrawal or threatened withdrawal of patronage or custom, either express or implied, or promises or agreements to increase such patronage or custom, any person, firm, partnership, or corporation, or any agent or representative thereof, from buying and selling paper or paper products in interstate commerce, from or to whomsoever, or at whatsoever price or terms may be agreed upon between the seller and the purchaser; or by combination or agreement, express or implied, to communicate directly or indirectly with any manufacturer, wholesaler, or retail dealer, or any agent or representative thereof, for the purpose of inducing, coercing, or compelling such manufacturer, wholesaler, or retail dealer, not to sell paper or paper products in interstate commerce to any person, firm, partnership, or corporation whether or not recognized or classified by respondents as a legitimate dealer or otherwise entitled to such purchases.

The desist order was based upon an agreed statement of facts from which the following appears:

The petitioners represent five local associations of wholesale dealers and jobbers in paper and paper products in the states of Washington, Oregon and California; two associations or conferences, made up of two or more of the local associations and one general association, the membership of which is drawn from all five of the local associations. The Seattle-Tacoma Paper Trade Conference is an association of wholesalers and jobbers in paper and paper products, having their places of business in Seattle and Tacoma, Washington, and selling their products in the northwestern portion of that state, and in the territory of Alaska; the Spokane Paper Dealers is an association of dealers and jobbers in paper and paper products, having their places of business in Spokane and selling their products in the eastern part of Washington, the northern part of Idaho, and the western part of Montana; the Portland Paper Trade Association is an association of wholesalers and jobbers in paper and paper products, having their places of business in Portland and neighboring cities, and selling their products in Oregon, the southern part of Washington, and parts of western and southern Idaho; the Paper Trade Conference of San Francisco is an association of wholesalers and jobbers in paper and paper products, having their places of business in San Francisco and neighboring cities, and selling their products in the southern part of Oregon, the northern part of California, and parts of Nevada; the Los Angeles Wholesale Paper Jobbers' Association is composed of wholesalers and jobbers in paper and paper products having their places of business in Los Angeles and San Diego, and selling their products in the southern part of California, and parts of Nevada and Arizona; members of the Portland, Seattle-Tacoma, and the Spokane associations have an informal organization known as the Northwest Paper Dealers, and members of the San Francisco and Los Angeles associations have a similar organization known as the California Paper Trade Association. All five local associations are united in the Pacific States Paper Trade Association, the membership of which is drawn largely from members of the five local associations. Certain large wholesale paper houses doing business on the Pacific Coast have branches in all three states and are members of the five local associations. The members of these several associations do about 75 per cent of the wholesale paper business of the Pacific Coast, exclusive of roll newsprint which is sold directly by the mills to the consumer.

Each local association publishes and distributes among its members uniform price lists to be observed in the sale of wholesale paper and paper products within the state, and from the prices thus fixed the members are not at liberty to depart. This price list of each local association is used by such of its members as do business without the state in which the jobbers or wholesalers comprising the association are located, in quoting prices and making sales, and such price list is habitually carried and used by salesmen of such members when traveling without the state for the purpose of securing business. But no association has any rule or requirement that the price list be observed or carried in quoting prices or making sales without the state and the quoting of lower prices or the making of sales at different prices is not deemed an infraction of any rule or trade regula-

tion of which any jobber or wholesaler can complain. Against the practice of using these price lists for sales without the state subdivision (b) of the desist order is directed.

Among the prices fixed by each local association for sales within the state, wherein is located the jobbing center from which the association takes its name, are prices on mill shipments. Mill shipments signify sales upon orders not requiring immediate delivery, which are capable of being filled by shipment from the place of manufacture. Mill shipments are of two kinds: Those in carload lots and those in less than carload lots. Shipments at less than carload lots are combined in actual shipments from the mill with other paper or paper products, so as to make up a carload which is shipped by the mill to the jobber or wholesaler as a single consignment. Upon arrival of the shipment at the point of destination, delivery of the shipment is taken by the jobber or wholesaler who in turn delivers to the purchaser the portion or consignment intended for him. Mill shipments in carload lots are made upon bills of lading naming the place where delivery is to be made to the purchaser from the jobber or wholesaler. In some instances the jobber or wholesaler is named in the bill of lading as the consignee to whose order delivery is to be made by the carrier. In other cases the purchaser is named in the bill of lading as such consignee. Where the jobber or wholesaler is named as the consignee, upon arrival of the shipment at the point of destination, he either takes delivery from the carrier and in turn delivers to the purchaser or indorses or delivers the bill of lading to the purchaser who takes delivery direct from the carrier. In those cases where the purchaser is named in the bill of lading as the consignee the purchaser takes delivery direct from the carrier upon arrival of the shipment at destination. In all cases of carload shipments the jobber or wholesaler orders the subject of sale from the mill and pays for the same, and there is no relation between the mill and the purchaser. Mill shipments and prices fixed by the local association for sales by their members include shipments from mills located both within and without the state. Against this practice subdivision (c) of the desist order is directed.

The Northwest Paper Dealers Association is composed of members of the Portland, Seattle-Tacoma, and Spokane local associations and meets once or twice annually. It has no formal organization, the presiding officer of each meeting being designated at the time of meeting. Its minutes are distributed to the membership of the three associations. Meetings of this association are from time to time attended by the president and secretary of the Pacific States Paper Trade Association. At such meetings the following subjects were discussed: Uniformity of discounts; the establishment of resale prices by the manufacturers; the guarantee of prices against decline for specified periods; the question of making sales for certain items under the term "close outs"; the advertising by members in newspapers or other periodicals; and, prices to be observed by the members of the Seattle-Tacoma Association, and the Spokane Association within the State of Washington. This forms the basis of subdivision (e) of the order complained of.

The paper jobbers and wholesalers of the Pacific Coast States have been and are subjected constantly to competition by paper manufacturers selling direct to the retail trade and to large users of paper,

and by paper brokers who negotiate or make sales for direct shipment from the mills to the purchaser. Such competition is for large orders not requiring immediate delivery and which, therefore, need not be supplied from local stocks on hand, but can be supplied by shipment from the mills. The paper jobbers and wholesalers of the Pacific Coast States strongly oppose and object to such competition, and, both individually and through the Pacific States Trade Association and the local associations named in the complaint, acting through their officers and committees and on behalf of their members, have sought by argument and persuasion and also by promises to increase their purchases from the manufacturers, and by argument and persuasion and such promises combined, to induce paper manufacturers to refuse to sell their products direct to the retail trade or to users of paper or to or through brokers. Such efforts have been directed both to inducing the manufacturers not to extend the practice of making sales of the above character and to inducing them to cease selling in the above described ways to those to whom they were already selling and accustomed to sell. This forms the basis of subdivisions (g) and (h) of the order complained of.

As already stated, the case was submitted to the commission on an agreed statement of facts. Outside of and in addition to the agreed statement, however, the commission made certain findings or deductions of its own. These additional findings will be accepted by the court in so far as they are based upon proper and legal inferences from the facts stipulated, but otherwise they must be disregarded. Thus, in addition to the stipulated facts as to the use made of the price lists adopted by the several local associations, in making sales in other states, the commission found that such use has a natural tendency to limit competition and fix prices in such other states. We may say at the outstart that so much of the desist order as forbids the use of these price lists in combination would be proper if justified by the facts, but use in combination is neither stipulated nor found. There is no division of territory between the different local associations but the members of each habitually serve a loosely defined territory in which the bulk of their business is done and which is regarded by them as peculiarly within the sphere of their merchandizing activities. Such territory is that which is naturally tributary to the jobbing center where the members of such associations are located and within which jobbing or wholesale dealers so located have an advantage over similar dealers elsewhere in competition with them, by reason of such factors as lower freight rates, nearness of distance, and accustomed trade channels.

The use of a price list of some kind for the information and guidance of salesmen in taking orders and making sales is almost a necessity and it is going very far to say that the mere use, without combination or agreement, of a particular price list which the salesmen are not bound to follow and which differs or may differ from the price lists used by other salesmen in the same locality has such a tendency to fix prices or limit competition as to bring it within the condemnation of the Anti Trust Act. The principle involved is perhaps more important than the right to use any particular price list, but we do not think that the prohibition is justified by the stipulated facts or by any proper or legal inferences therefrom.

Again, the commission supplemented the stipulated facts as to mill shipments by a finding that such shipments are injected into the channels of interstate commerce and continue in such commerce until delivery to the purchaser, and the inclusion of fixed and uniform prices in the published price lists of the various local associations eliminates price competition in the purchase and sale of these products in interstate commerce.

The line of demarcation between interstate commerce and intrastate commerce is not easily defined, nor is it easy to say where the former ends or the latter begins. The question has been many times before the Supreme Court and it seems there, well settled, in tax cases at least, that a sale by a wholesaler or jobber in one state to a purchaser in the same state under circumstances such as are disclosed by this record is not a subject of interstate commerce. Thus, in *Ware & Leland v. Mobile County*, 209 U. S. 405, 413, the court said:

When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one State to the place of delivery in another State. And though it is stipulated that shipments were made from Alabama to the foreign State in some instances, that was not because of any contractual obligation so to do. In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in interstate traffic, because of the contracts made by the brokers.

These contracts are not, therefore, the subjects of interstate commerce, any more than in the insurance cases, where the policies are ordered and delivered in another State than that of the residence and office of the company. The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce.

So here, there were no contractual relations of any kind between the manufacturer and the purchaser from the wholesaler or jobber, and no agreement of any kind between the wholesaler or jobber and the purchaser, that the merchandise should be shipped in interstate commerce, or at all. The seller was at liberty to fulfill the contract from merchandise on hand within the state and adopted the method complained of as a mere matter of convenience because time and opportunity made delivery in that way feasible and satisfactory. See also *Banker Brothers v. Pennsylvania*, 222 U. S. 210; *Public Utilities Commission v. Landon*, 249 U. S. 236; and, *Ward Baking Co. v. Federal Trade Commission*, 264 F. 330.

It is claimed by the respondent that these cases are qualified and explained in *Western Union Telegraph Co. v. Foster*, 247 U. S. 105; *Dahne-Walker Co. v. Bondurant*, 257 U. S. 282; and *Lemke v. Farmers Grain Co.*, 258 U. S. 50. We do not so construe them. In the *Western Union case*, the New York Stock Exchange contracted with certain telegraph companies to furnish them continuous stock quotations, to be furnished by them in turn to their subscribers by ticker service, and it was held that the transmission of the quotations remained interstate commerce until they reached their final destination. But there transmission and delivery to the subscriber was a part of the service contracted for. In *Dahne-Walker Co. v. Bondurant*, and, *Lemke v. Farmers Grain Co.*, it was held that where goods are purchased in one state for transportation to another, com-

merce includes the purchase quite as much as the transportation. No doubt a restriction on the purchase or sale of goods which are to become or have been the subject of interstate commerce may be illegal, but before such a result can be declared it must appear that the restriction in some way tends to restrain or monopolize commerce among the states, as in *Swift and Company v. United States*, 196 U. S. 375. No such case is presented here. The contracts in question relate solely to sales within the state by parties within the State, and so far as we can see they do not and cannot affect directly, or even remotely, commerce among the states. Practically all the paper and paper products sold in the Pacific Coast States has been the subject of interstate commerce. The commission apparently concedes that it is without power to forbid or condemn agreements fixing prices within the state where delivery is to be made from stocks within the state, but it asserts the power in this particular instance merely because of the time, place, and mode of delivery. The distinction thus sought to be made is subtle to say the least.

As already stated, paragraph (e) of the order forbids the discussion of uniform terms, discounts, and prices by the Northwest Paper Dealers, the Pacific Coast States Paper Trade Association, their officers and members, their agreeing upon prices by resolution, or otherwise, or the employing of any similar devices which fixes or tends to fix the price at which paper or paper products shall be sold in interstate commerce. On first reading, it might seem that the qualifying phrase, "which fixes or tends to fix the prices at which paper or paper products shall be sold in interstate commerce," applies to the discussion of terms, discounts, and prices, as well as to any similar device, but, correctly speaking, it does not. Furthermore, the petitioners contend that the order, by its terms, prohibits any discussion whatever of these subjects. The commission accepts that view and seeks to uphold the order in all its breadth. In this respect we think the order goes too far. As said by the Supreme Court in *Federal Trade Commission v. Sinclair Refining Co.*, 261 U. S. 463:

The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. 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.

Nor was it the purpose of the statutes to reduce trade organizations to the status of mere social clubs, or to restrict the conversation of members to mere idle gossip. *United States v. Southern Wholesale Grocers' Ass'n.*, 207 F. 434. The stipulated facts state the subjects discussed at these meetings, without more. What was said we are not informed and so far as the record discloses, the discussion may have resulted in a disagreement instead of an agreement. What is here said, of course, has no reference to the resolution fixing the price for cutting, but beyond an agreement on this single item the record is entirely silent. Our attention has been directed to numerous cases in which injunctions as broad as this have been sustained, but in all such cases agreements in restraint of trade were found to exist and

in order to prevent a repetition or recurrence of the evil the courts were warranted in forbidding acts which in and of themselves would not justify injunctive or other relief. No doubt, discussion at such meetings which tend to monopolize trade or fix prices in interstate commerce come within the prohibition of the statute, but neither court nor commission is justified in presuming the unlawful purpose without proof. The discussion in question may have had the tendency claimed, and such may have been their express object, but no such tendency or purpose appears from the stipulated facts.

Paragraph (g) of the order is directed against conspiracies and combinations to hinder or prevent any wholesaler, jobber, dealer, or consumer from purchasing paper or paper products in interstate commerce directly from the manufacturer or wholesaler thereof, or from anyone else selling or desiring to sell such products; and,

Paragraph (h), against like conspiracies and combinations to hinder or prevent by intimidation, coercion, withdrawal, or threatened withdrawal of patronage or custom, either express or implied, or by promises or agreements to increase such patronage or custom, any firm, partnership, or corporation, or representative thereof, from buying or selling paper and paper products in interstate commerce from or to whomsoever, or at whatsoever prices or terms may be agreed upon between the seller and the buyer, or by combination or agreement, express or implied, to communicate, directly or indirectly, with any manufacturer, wholesaler, or dealer, or representative thereof, for the purpose of inducing, coercing, or compelling such manufacturer, wholesaler, or retail dealer, not to sell paper or paper products in interstate commerce to any firm, partnership, or corporation, whether or not recognized or classified by the respondents as a legitimate dealer or otherwise entitled to such purchases.

The petitioners concede that they have no right, in combination, to resort to intimidation, or coercive measures, to enforce their demands, such as blacklisting or boycotting, but they do insist that they have a right to resort to peaceable persuasion. We are not convinced, however, that there is not an element of coercion in a demand made upon wholesalers by the representatives of dealers in 75 per cent of the paper and paper products in a number of the states. Furthermore, as said by the Supreme Court, in *Duplex Printing Co. v. Deering*, 254 U. S. 443:

It is settled by these decisions that such a restraint produced by peaceable persuasion is as much within the prohibition as one accompanied by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or to their associates which possibly they might have been at liberty to pursue in the absence of the statute.

For the foregoing reasons, paragraphs (b) and (c) of the order are reversed, paragraph (e) is reversed in so far as it forbids the mere discussion of uniform terms, discounts, and prices, and as to the remaining paragraphs the petitions are denied.

SWIFT & CO. v. FEDERAL TRADE COMMISSION.¹

(Circuit Court of Appeals, Seventh Circuit. February 16, 1925.)

No. 3215.

1. EVIDENCE KEY No. 11—COURTS WILL TAKE JUDICIAL NOTICE OF AGITATION AND DISCUSSION PRECEDING ENACTMENT OF SHERMAN LAW AND CLAYTON ACT.

Agitation and discussion preceding enactment of Sherman Law (Comp. St. Secs. 8820-8823, 8827-8830) and supplementary Clayton Act are matters of history, of which courts will take judicial notice in construing such acts.

2. CONSTITUTIONAL LAW KEY No. 70 (3)—COURTS, IN CONSTRUING LEGISLATION, ARE NOT CALLED UPON TO PASS JUDGMENT ON ITS WISDOM.

Courts, in construing legislation, are not called upon to pass judgment upon its wisdom.

3. STATUTES KEY No. 181 (1)—CANONS OF STATUTORY CONSTRUCTION CALL FOR EXPRESSION OF LEGISLATIVE INTENTION, AND EFFECTUATE THOUGHT CONVEYED BY PLAIN AND UNAMBIGUOUS LANGUAGE.

Canons of statutory construction call for an expression of legislative intention, and at same time effectuate thought conveyed by plain and unambiguous language.

4. CONSTITUTIONAL LAW KEY No. 210—MONOPOLIES KEY No. 20—DISTINCTION BETWEEN CORPORATIONS AND INDIVIDUALS MADE BY CLAYTON ACT NOT ARBITRARY CLASSIFICATION.

Distinction between corporations and individuals made by Clayton Act, Sec. 7 (Comp. St. Sec. 8835g), prohibiting corporation engaged in commerce from acquiring stock of another corporation, also engaged in commerce, where effect of acquisition is to lessen competition, is not arbitrary classification.

5. CONSTITUTIONAL LAW KEY No. 296 (1)—MONOPOLIES KEY No. 20—PROVISION OF CLAYTON ACT AGAINST ACQUISITION OF STOCK OF COMPETING CORPORATION CONSTRUED, ACT HELD NOT VIOLATIVE OF DUE PROCESS CLAUSE.

Clayton Act, Sec. 7 (Comp. St. Sec. 8835g), prohibiting corporation from acquiring stock in another corporation, where effect of such acquisition may be to substantially lessen competition, is applicable, irrespective of whether competition prior to consolidation was substantial, and whether effect of acquisition was injurious to public, nor is it, when so construed, violative of due process clause.

(The syllabus is taken from 8 F. (2d) 595.)

Petition by Swift & Co., to set aside an order of the Federal Trade Commission. Petition denied.

James M. Sheean, of Chicago, Ill., for petitioner.

Adrien F. Busick and *Everett F. Haycraft*, both of Washington, D. C., for respondent.

¹ Reported in 8 F. (2d) 595. Rehearing denied Oct. 13, 1925. Petition for writ of certiorari by the company granted by the Supreme Court on Nov. 23, 1925.

Before ALSCHULER, EVANS, and PAGE, Circuit Judges.

EVANS, *Circuit Judge*:

Petitioner seeks to set aside an order of the Federal Trade Commission directing it to:

(1) Cease and desist from further violating Section 7 of the Clayton Act by continuing to own or hold, either directly or indirectly, by itself or by anyone for its use and benefit, any of the capital stock of the Moultrie Packing Co. and of the Andalusia Packing Co., or either of them, and cease and desist from holding, controlling and/or operating, or causing to be held, controlled and/or operated by others for its use and benefit, the former property and business either of the said Moultrie Packing Co. or of the said Andalusia Packing Co., which have been held, controlled and operated by respondent and its employees and agents, following and as a result of respondent's unlawful acquisition of the capital stocks of said named corporations; and to that end, respondent shall

(2) So divest itself of all the capital stock heretofore acquired by respondent, including all the fruits of such acquisitions, in whatever form they now are, whether held by respondent or by anyone for its use and benefit, of the Moultrie Packing Co., a corporation, and of the Andalusia Packing Co., a corporation, or either of them, in such manner that there shall not remain to respondent, either directly or indirectly, any of the fruits of said acquisitions, including the control and/or operations of said corporations, or either of them, resulting from such acquisitions and/or holdings of such capital stocks.

(3) In so divesting itself of such capital stocks respondent shall not sell or transfer, either directly or indirectly, any of such capital stocks to any officer, director, stockholder, employee or agent of respondent, or to any person under the control of respondent, or to any partnership or corporation either directly or indirectly owned or controlled by respondent. * * *

A record of inexcusable length discloses facts almost free from controversy.

Petitioner, in June, 1917, acquired all of the stock of the Moultrie Packing Co. of Moultrie, Ga., and in July, 1917, all of the capital stock of the Andalusia Packing Co., of Andalusia, Ala. It immediately went into possession of both plants and managed and operated them.

The Moultrie Packing Co. was organized in 1913 by local business men of Moultrie, Ga., and its growth was rapid, its business prosperous, and its profits large and increasing.

The Andalusia Co. of Andalusia, Ala., was similarly organized in October, 1915, with a somewhat larger capitalization, and its brief history was one of growth and profit. Both packing companies slaughtered cattle and hogs. Their history is briefly written by the following table:

Moultrie Packing Co.	1914	1915	1916	1917 (five months)
	<i>Pounds</i>	<i>Pounds</i>	<i>Pounds</i>	<i>Pounds</i>
Pork.....	200, 598	2, 199, 441	7, 305, 506	3, 907, 900
Beef.....	24, 739	442, 221	196, 333	252, 280
Lard.....	20, 320	326, 580	1, 171, 875	827, 575

In the five months of 1917, its profits exceeded 60 per cent of its paid-up capital.

Andalusia Packing Co.		1916 (part of year)	1917 (five months)
		<i>Pounds</i>	<i>Pounds</i>
Pork		3,065,341	2,914,692
Beef		6,426	189,523
Lard		388,774	584,298

For the year ending May 1, 1917, its profits were \$62,646.80 or about 50 per cent of its paid-up capital.

Petitioner was in direct competition with these two packing companies, although the hogs slaughtered by the Moultrie and Andalusia companies were not corn fattened, and the pork was known as "soft." The two packing companies, however, furnished all of the competition which petitioner and the four other large Chicago packing houses met in southeastern United States. Though the total number of hogs and cattle slaughtered at these two packing houses was but a small fraction of 1 per cent of that killed in the United States, the competition in fresh pork sales which they furnished in this territory was substantial and direct.

Section 7 of the so-called Clayton Act provides:

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.

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 acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

The Commission found—and no other finding could have been made—that the purchaser was engaged in interstate commerce; that while so engaged it purchased all the stock of the Moultrie Packing Company and the stock of the Andalusia Packing Company, both of which companies were also engaged in interstate commerce; and that the effect of such acquisition was to substantially lessen competition between the corporation whose stock was acquired, and the corporation making the acquisition.

These findings would necessarily dispose of the application were it not for petitioner's insistent urge that the statute does not mean what it says, and that the court should read into it "the rule of reason" and insert additional requirements, viz: that the competition between the two companies prior to consolidation was substantial, and the effect of the acquisition was injurious to the public.

It further contends that said Section 7 is unconstitutional unless these essential facts are read into it.

The general object and purpose of this statute is so evident that it is hardly necessary to state it. It and the parent legislation, the Sherman Law, sought to maintain a wholesome competition between those engaged in competitive interstate commerce. The agitation and discussion preceding their enactment are matters of history of which we must take judicial notice. In its title to this legislation, the Congress stated its purpose, thus:

An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.

It particularly referred to a previous act "to protect trade and commerce against unlawful restraints and monopolies."

The report of the Senate Judiciary Committee confirms this conclusion.

Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890, or other existing antitrust acts, and thus by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipency and before consummation.

The Clayton Act, "Was intended to supplement the Sherman Act and within its limited sphere established its own rule." *United Shoe Mach. Co. v. United States*, 258 U. S. 451. As was stated in *Standard Co. v. Magrane-Houston Co.*, 258 U. S. 346, "The Clayton Act sought to reach the agreements embraced within its sphere in their incipency, and in the section under consideration to determine their legality by specific tests of its own." * * *

The statute does not prohibit all acquisitive contracts. It is only when such acquisition produces "the effect" described that the statute condemns. It is worthy of note that such effect may be either to,—(a) substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition; (b) restrain such commerce in any section or community; or (c) tend to create a monopoly of any line of commerce, (a) can not be construed without considering (b) and (c). If the court were to read into (a) the elements which petitioner has asked us to insert, what would become of the requirements of (b) and (c)?

Nor are we, in construing this legislation, called upon to pass judgment respecting its wisdom. Conceding that the Congress was authorized under the commerce clause and other sections of, or amendments to, the Constitution, to deal with the subject matter, it alone could determine the wisdom of such legislation and make such exceptions or reservations as it deemed the needs of commerce, and the welfare of the public, required.

We are, therefore, confronted with a simple legal question, one of statutory construction. We must divorce it from the associated economic questions.

The canons of statutory construction call for an expression of legislative intention, and at the same time effectuate the thought conveyed by plain and unambiguous language.

In the present case there is, fortunately, not the slightest conflict between the obvious intention of Congress and the language chosen to convey the thought. Under such circumstances to search for avenues of escape, to conjure up hardships that might possibly result from the enforcement of such legislation, or even to anticipate and avoid constitutional objections, is not a proper judicial function.

It is also urged by petitioner that had it first purchased the assets of these two packing companies rather than the stock, the transaction would have avoided the condemnation of the statute. With this assumption as the major premise of its syllogism, it contends that the transaction was, in fact, the acquisition of the assets of the Moultrie and Andalusia companies.

We are not prepared to, nor called upon to express an opinion respecting the legality of a purchaser's acquisition of the assets of competitors engaged in commerce. The facts in this case do not make it necessary for us to even discuss the question. Petitioner bought the stock. After it acquired the stock, it made its servants and employees, officers and directors of these companies. It took over the active management, and conducted the business so that existing competition was eliminated.

If petitioner's major premise be accepted, then the distinction between acquiring the stock and purchasing the assets can not be ignored when the evidence is examined to ascertain whether petitioner purchased stock or assets.

Constitutionality. It is first urged that the distinction made between corporations and individuals is arbitrary.

But was there not a basis for the classification? Congress was dealing with business consolidations of large size. It was endeavoring to prevent the creation of trusts and monopolies. Corporations are the instrumentalities commonly used by those engaged in large enterprises. They lend themselves handily to activities of large proportions. Their control can be readily acquired. Hence the classification has some basis for its existence.

Does the legislation violate any of petitioner's right of "life, liberty or property without due process of law"? This is, in view of our construction of the statute, the real question in the case.

Recognizing, as we do, that the prohibition relates only to those contracts the effect of which is to lessen competition between competing corporations engaged in commerce, we are confronted with the narrow question of petitioner's right (as against the public) to make contracts for the acquisition of a competitor's capital stock, the necessary effect of which is to lessen, or to eliminate entirely, competition from this source.

Courts are constantly called upon to consider deprivation of "liberty" or "property," in the light of changing economic conditions, due to the increase and congestion of population, as well as to

changes in methods of business. "Due process," "liberty of contract," and "property rights" are somewhat relative terms, incapable of accurate, precise and lasting definition. In fact, changes in our living, in methods of business, and in the ever-increasing functions of government, must be recognized in construing decisions rendered at widely varying periods of our national history. Legislation which under certain conditions may be found to be an arbitrary and capricious interference with the individual's right to "life, liberty or property," at a later period in the light of experience and changed conditions, may be upheld.

If, as petitioner's counsel concedes, the section is free from "constitutional objection," if "the powers and activities of its ministerial agency" (the Federal Trade Commission) are properly "circumscribed," the query arises to what circle should such powers be confined?

We are still dealing with words of general meaning and make no progress. Must Congress act only when the child has grown to the stature of a giant? If authority exists to curb,—or to dissolve,—a corporation when it has reached the trust stage, may Congress not take steps to arrest the corporation's growth before the final stage has been reached? Is our national defense policy based upon an impending conflict, or a desire to prevent one? In order to build the Panama Canal, the mosquito was eliminated before the yellow fever appeared. The Government may, under the commerce clause of the Constitution, forbid every contract "which is reasonably calculated to injuriously affect the public interest." *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 202. It may act to anticipate or prevent an unfortunate situation as well as deal with one that existed.

As before stated, the Clayton Act supplemented the Sherman law, the practical enforcement of which was found difficult and often resulted in hardships to innocent parties. The section under consideration sought by means, which the Congress deemed expedient and effective, to prevent a condition which the Sherman law was designed to overcome when once it existed. Certainly courts should hesitate to say that the means selected are not "appropriate" or "primarily adapted" to accomplish the desired end when it is conceded that the prevention of such "ends" through dissolution is within the recognized powers of Congress.

In other words, the issue is not one of authority of Congress to deal with an undesirable condition, but rather an asserted want of power to prevent that result through the means resorted to for that purpose. And the answer seems to be that Congress, having the authority to regulate interstate commerce, may do so by such means as to it seems appropriate, to prevent a condition which is contrary to the settled public policy of the Government and inimical to the welfare of its people.

If competing corporations may not consolidate, it naturally follows that it will be difficult for one corporation ever to monopolize an industry. So it may be said that the "means" are "appropriate," and "primarily adapted" to accomplish the end. Whether such

"means" may not, when strictly enforced, lead to "evils" greater than the "cure" is another question—one which the Congress only may determine.

It was also urged that paragraph 3 modified the first paragraph of Section 7, and thus amended, aids the petitioner.

It may well be that the third paragraph of Section 7 modifies the first and limits it, but we find in the evidence nothing to support a finding that petitioner acquired the stock of its competitors "*solely* for investment and not using the same, by voting or otherwise, to bring about or attempting to bring about the substantial lessening of competition."

It would be difficult to conceive of any case where one corporation purchased all of the stock of its competitor *solely* for investment. Such a case would be a rare one. Certainly petitioner herein did not purchase this stock solely for investment.

In conclusion it might be suggested to respondent that delay in instituting proceedings of the character here under review frequently works an unnecessary hardship to the aggrieved party. Certainly a limitation of time should be fixed, by statutory enactment or otherwise, during which these proceedings must be instituted. The purchasing company would not then (as appears was done in the case before us) invest vast sums of money enlarging and improving the acquired property before respondent took steps to restore the status of the companies.

The petition is denied.

ALSCHULER, *Circuit Judge*:

The apparent considerable benefit to the localities from the increased manufacturing activities there, which followed the transactions complained of, illustrates the possible hardship and resultant embarrassment in strictly applying the statute in accordance with its plain and comprehensive terms. But the very defense here made would tend to show the same local benefit would have accrued had the stock purchases in question not occurred. In large measure the acquirement of the stock is sought to be justified by contention and proof that petitioner would in any event have established plants of its own there or thereabout. Had this been done the localities would have had not only new plants of this large and well-established concern, but the existing plants as well. But it is strongly urged that the ones already there would not likely have withstood the added competition, and that in any event they would not long have survived. Be this as it may, this can not suspend or avoid the very broad and sweeping statute which denounces acquisition by one corporation of the stock of another, or of the stock of two or more other corporations, where this may substantially lessen competition between them, or restrain commerce in any section or community, or tend to create monopoly in any line of commerce. If an exception to the operation of the statute ought and is to be raised in cases where the concern whose stock is acquired is comparatively small, or weak, or for any reason unlikely long to endure, it must come through statutory enactment, and not by judicial construction.

WESTERN MEAT COMPANY v. FEDERAL TRADE COMMISSION.¹

(Circuit Court of Appeals, Ninth Circuit. February 17, 1925.)

No. 4064.

1. MONOPOLIES KEY No. 20—TRADE-MARKS AND TRADE-NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY—No. SERIES—ACQUISITION OF STOCK OF ONE CORPORATION BY ANOTHER; SCOPE OF POWERS OF TRADE COMMISSION.

Clayton Act, Sec. 7 (Comp. St. Sec. 8835g), makes it unlawful for one corporation engaged in commerce to acquire the stock of another corporation, also engaged in commerce, only where the effect may be to substantially lessen competition between them, or to restrain such commerce, or tend to create a monopoly; and the Federal Trade Commission has authority to command a corporation to desist from holding stock of another to the extent only that it is in violation of such provision.

2. TRADE-MARKS AND TRADE-NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY—No. SERIES—ORDER OF TRADE COMMISSION HELD IN EXCESS OF ITS AUTHORITY.

An order of the Federal Trade Commission requiring a corporation to divest itself of all capital stock of another corporation, and of the plant of such corporation and all property necessary to the conduct and operation thereof, and ordering that none of such property should be sold or transferred to any stockholder, officer, employe, or agent of respondent or of any of its subsidiaries, held to go beyond the authority of the Commission.

(The syllabus is taken from 4 F. (2d) 223.)

On rehearing of petition to review order of Federal Trade Commission. Order modified.²

Sullivan & Sullivan and *Theo. J. Roche*, of San Francisco, Calif., for petitioner.

W. H. Fuller, chief counsel Federal Trade Commission, of McAlister, Okla., and *James M. Brinson*, of Butte, Mont., for respondent.

Before GILBERT, ROSS, and HUNT, Circuit Judges, ROSS, J., dissenting.

GILBERT, *Circuit Judge*:

A rehearing of the above-entitled cause was ordered upon the contention of the petitioner that the order of the Federal Trade Commission exceeded its powers. The order required the petitioner to cease and desist from violating the provisions of section 5 of the act creating the Federal Trade Commission, and the provisions of section 7 of the Clayton Act, and to divest absolutely of all capital

¹ Reported in 4 F. (2d) 223.

² For former decision, see 1 F. (2d) 95 or p. 589, ante.

Petition for writ of certiorari by the Commission, docketed in the Supreme Court on May 1, 1925, granted on June 1, 1925.

stock of the Nevada Packing Company so as to include in such divestment the Nevada Packing Company's plant and all property necessary to the conduct and operation thereof, and further ordered that in such divestment no stock or property so mentioned to be divested "shall be sold or transferred, directly or indirectly, to any stockholder, officer, director, employe, or agent of, or any one otherwise directly or indirectly connected with or under the control or influence of respondent or any of its officers, directors or stockholders, or the officers, directors or stockholders of any of respondent's subsidiaries or affiliated companies." Section 7 of the Clayton Act forbids one corporation engaged in commerce to hold stock in other corporation also engaged in commerce where the effect of such acquisition may be to substantially lessen competition between the two corporations, or tend to create a monopoly; but it provides that the section shall not apply to corporations purchasing such stock solely for investment and not to lessen competition, nor prevent a corporation engaged in commerce from forming subsidiary corporations for carrying on their business or from owning and holding stock in such subsidiary corporations when the effect thereof is not to substantially lessen competition. Section 11 empowers the Commission when convinced that any of the provisions of the act have been violated to order the persons so violating the same "to cease and desist from such violations * * * in the manner and within the time fixed by said order." Thus is clearly expressed in the Clayton Act the evil which so far as concerns the present case is intended to be remedied, namely, the holding by one corporation of stock in another corporation engaged in commercial business where the effect thereof is substantially to lessen competition, restrain commerce, or tend to create a monopoly, and no enlargement of the Commission's power is contained in the authority given it to fix a time and prescribe the manner of ceasing and desisting from such violation.

The act is remedial and not punitive. Its purpose is to protect the public. It gives the Federal Trade Commission no authority other than the authority to command the offending corporation to desist from holding stock in another corporation in violation of section 7. Nor is any authority given by the Federal Trade Commission Act to require the petitioner here to do more than to divest itself of its stock in the Nevada Packing Company. Section 5 of the Federal Trade Commission Act directs the Commission to prevent persons, partnerships or corporations from using unfair methods of competition, and it provides that such persons, partnerships or corporations complained of shall have the right to appear and show cause why they shall not be required "to cease and desist from the violation of the law so charged in said complaint." And in dealing with such unfair methods the power of the Commission is limited to an order requiring such person, partnership or corporation to cease and desist from using such unfair method of competition. There is in the Federal Trade Commission Act no expansion of the Trade Commission's powers, beyond the powers conferred by the Clayton Act, to deal with the petitioner here. Said the court in *Federal Trade Commission v. Beech-Nut Co.*, 257 U. S. 441, 453: "That act declares unlawful 'unfair methods of competition' and gives the

Commission authority after hearing to make orders to compel the discontinuance of such methods."

We think the order in the present case goes beyond the authority conferred on the Federal Trade Commission in requiring the petitioner to divest itself of the Nevada Packing Company's plant and all property necessary to the conduct and operation thereof, and ordering that none of such property shall be sold or transferred directly or indirectly to any stockholder, officer or employee of the petitioner. Section 7 of the Clayton Act provides that nothing contained therein shall 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 or legitimate branches or extensions thereof. It does not prohibit the petitioner from acquiring the plant and property of the Nevada Packing Company, or from carrying on the business thereof so long as the effect is not substantially to lessen competition.

The order of the Federal Trade Commission will be so modified as to eliminate therefrom the injunction against the acquisition by the petitioner of the plant and property of the Nevada Packing Company.

Ross, *Circuit Judge*, dissenting:

I adhere to the views expressed in and by the opinion and judgment rendered by this Court when this case was last under consideration (*Advance Sheets*, Fed. Rep. Nov. 20, 1924, p. 95³), and therefore dissent from the modification now made of that opinion and judgment. It is, I think, in effect leaving the theretofore active and substantial competition between the parties entirely eliminated, with the return of stock worth only the paper on which it is printed.

JOHN C. WINSTON CO. *v.* FEDERAL TRADE
COMMISSION.¹

(Circuit Court of Appeals, Third Circuit. February 27, 1925.)

No. 3223.

1. TRADE-MARKS AND TRADE-NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—ORDER OF TRADE COMMISSION TO CEASE PRACTICE WHICH HAD BEEN ABANDONED BEFORE COMPLAINT UNAUTHORIZED.

Complaint by Federal Trade Commission to compel a respondent to cease a practice which respondent had on advice of counsel abandoned, and offered to stipulate it would never do again, can not be sustained.

2. TRADE-MARKS AND TRADE-NAMES AND UNFAIR COMPETITION KEY No. 68—METHOD OF SELLING ENCYCLOPEDIA, TOGETHER WITH ENCYCLOPEDIA AND RESEARCH SERVICES, HELD NOT UNFAIR COMPETITION.

³ 1 Fed. (2d) 95. See ante, p. 589.

¹ Reported in 3 F. (2d) 901. Petition for writ of certiorari by the Commission, docketed in the Supreme Court on May 26, 1925, denied October 12.

In proceedings before Federal Trade Commission, under Act September 26, 1914 (Comp. St. Sections 8836a-8836k), sale of set of encyclopedias, together with an encyclopedic cumulative loose-leaf service and research service, by subscription blank, on which price was written in red ink, rather than printed, *held* insufficient to constitute unfair competition, as a representation that price to be paid was for the two services, and that purchaser was to receive volumes of encyclopedias free.

(The syllabus is taken from 3 F. (2d) 961.)

Petition for review of an order of the Federal Trade Commission. Order vacated.

Joseph J. Brown and *Henry P. Brown*, both of Philadelphia, Pa., for appellant.

Edwin H. Cassels, of Chicago, Ill., amicus curiae.

Edwin E. Reardon, of Washington, D. C., and *W. H. Fuller*, of McAlester, Okla., for appellee.

Before *BUFFINGTON*, *WOOLLEY*, and *DAVIS*, Circuit Judges.

WOOLLEY, Circuit Judge:

The John C. Winston Company, respondent in proceedings instituted by the Federal Trade Commission, brings here for review an order of the Commission commanding it to cease and desist from trade practices which it found to be unfair and therefore unlawful methods of competition. Act of September 26, 1914, 38 Stat. 717, 719, 720. All findings by the Commission are based on a stipulation of facts entered into by the parties. As the facts are not in dispute we are concerned only with their inferences.

Before the Commission filed the complaint, the Winston Company, a publishing concern, was putting on the market a work entitled "Winston's Cumulative Loose-Leaf Encyclopedia in Ten Volumes." The loose leaf arrangement was adopted so that the books could be supplemented from time to time by additional leaves supplied by loose leaf services going with the sale of the the books. One service was called "Winston's Cumulative Loose-Leaf Annual Service," intended to supply encyclopedic information for a period of ten years; and the other was known as "International Bureau of Research Service," intended to supply for the same period information in response to questions propounded by subscribers. There was nothing unfair about these trade offerings. The trouble arose in the method of their sale. This, briefly, was as follows:

The company furnished its salesmen with printed subscription blanks which described the loose-leaf encyclopedia and the two loose-leaf services and stated by printed figures the price of the first to be \$55 and the price of the two services, together, to be \$49, and the price of all \$104. At the top of the subscription blank the words "Special Contract" were written in red ink, and in red ink the supposed regular prices of \$55 and \$49 and the total of \$104 were stricken out and the figures \$49 written in at the bottom, thus indicating to one who contemplated subscribing that he would get the three things for the price of two; or, in other words, he would get

the two services at the regular price, and the ten volumes of the encyclopedia free.

Contemporaneously with the furnishing of these blanks to its salesmen, the company caused to be inserted in the Review of Reviews an advertisement purporting to show that the price of the encyclopedia with the ten-year revision service was \$104 when, as a matter of admitted fact, the price of the books with the two services was never higher than \$49. (There is another subscription blank in question but as it differs in no material respect from the one we have described it will not be necessary to refer to it.)

When the Federal Trade Commission inquired into its practices the company consulted counsel who gave it the sound advice to stop this method of sale. This it did at once; and it did it in evident good faith. Later, however, the company adopted another method which consisted of furnishing its salesmen with subscription blanks containing substantially the same words as the former but omitting the printed prices. The price of \$49 for all three things—books and services—was written in red ink, indicating, perhaps, a special price, but the Commission thought it indicated more, namely; that \$49 was the price of the two services and that a person subscribing for them would get the ten volumes of the encyclopedia free. On this belief the Commission filed a complaint against the company charging it with unfair practices in respect to both methods of sale, the one abandoned and the one substituted, and, after hearing, entered the order now on review, commanding the company to cease and desist from both practices.

Whether the method of sale first pursued by the company and then abandoned on the suggestion of the Commission was an unfair method of competition is a question which, in the circumstances, is more academic than real and therefore is one on which we do not feel called upon to express an opinion. It will be enough to say that the evidence shows that the company itself had ceased and desisted from the practice before the Commission filed the complaint, and on this evidence the order of the Commission to cease and desist from doing what the company had already ceased and desisted from doing—and what it offered to stipulate never to do again—can not be sustained.

The second method of sale—the one pursued at the time of the hearing before the Commission—is very different from the first, both in character and in its probable effect upon the purchasing public. In this one there is no deception in respect to an offer at a price below the figures of an advertised price. True, the price was written in the blank and so might make an unthinking subscriber believe that he was being favored. Yet it would be going rather far to require vendors of wares, in order to avoid the appearance, or to avoid the fact, of unfair competition in commerce, to conduct their dealing with vendees in printed figures.

The main vice of the offending blank, as the Commission sees it, is the charge of \$49 for the encyclopedic and research services and the absence of any charge specifically for the encyclopedia. The Commission says this induces the buyer to think that he is getting the books free, or, in other words, that he is getting something for nothing. We have difficulty in following this reasoning for certainly the buyer knows he is getting three things for one price—\$49. More-

over, that is the only price named in the blank, and it is named immediately after a descriptive statement of the encyclopedia and the services. He also knows that each costs money to supply and that in each, or in the three taken together, there is a profit to the vendor; and, similarly, he thinks that the three have a value to him, otherwise he would not buy them.

Whether in a transaction of this kind the profit of the vendor is large or the value to the vendee is small are matters with which, in the absence of fraud, the Commission, we surmise, would not concern itself. The sole question is whether hidden in the transaction there is an inducement, based on an untruth, that the purchaser is getting ten volumes of the encyclopedia for nothing. This is difficult to believe when, obviously, he knows that the encyclopedia is the principal thing to which, of necessity, the services are merely incidental. It is conceivable that a very stupid person might be misled by this method of selling books, yet measured by ordinary standards of trade and by ordinary standards of the intelligence of traders, we can not discover that it amounts to an unfair method of competition within the sense of the law.

The order of the Commission is vacated.

HERMAN HEUSER *v.* FEDERAL TRADE COMMISSION.¹

(Circuit Court of Appeals, Seventh Circuit. March 2, 1925.)

No. 3396.

1. **TRADE-MARKS AND TRADE-NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—ORDERS OF TRADE COMMISSION MUST BE SUPPORTED BY FINDINGS OF FACT.**

Under Federal Trade Commission Act, Sec. 5 (Comp. St. Sec. 8836e), there should be a sufficient complaint issued and served, and the facts found by the Commission should furnish a sufficient basis for its orders.

2. **TRADE-MARKS AND TRADE-NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—ORDER OF TRADE COMMISSION, NOT BASED ON ANY FINDING OF FACT, HELD UNWARRANTED.**

Where the complaint issued and served by the Trade Commission charged that letters sent by respondent warning of infringement of patent and threatening suits were not sent in good faith, with the intention of bringing suits, but for the purpose of injuring competitors, but no finding was made on such charge, an order to desist from threatening suits without intending in good faith to institute such suits and without bringing such suits within a reasonable time, *held* not warranted.

3. **TRADE-MARKS AND TRADE-NAMES AND UNFAIR COMPETITION KEY No. 80½, NEW, VOL. 8A KEY-NO. SERIES—EVIDENCE HELD NOT TO WARRANT A FINDING OF UNFAIR COMPETITION.**

The sending of letters by the owner of a patent for a process, through its attorneys, to certain manufacturers, who were licensees under other patents, warning of infringement and threatening suits, *held* not sufficient, in the

¹ Reported in 4 F. (2d) 632.

absence of other proof, to warrant a finding of bad faith, and that the letters were sent for the purpose of injuring the business of a competitor, or to justify an order by the Trade Commission to desist.

(The syllabus is taken from 4 F. (2d) 632.)

Petition to review order of Federal Trade Commission. Order set aside.

Geo. A. Chritton, of Chicago, Ill., for petitioner.

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

Before ALSCHULER, EVANS, and ANDERSON, Circuit Judges.

ANDERSON, *Circuit Judge*:

This is an application to review an order of the Federal Trade Commission directing the petitioner to cease and desist from certain practices in the conduct of his business.

The act creating the Commission prescribes the procedure before it and upon an application here to enforce or review its orders. Section 5 provides that the commission shall issue and serve a complaint stating its charges in respect to the unfair methods complained of. Notice and an opportunity to answer is to be given and a hearing had. "The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission." If upon the hearing the commission shall be of the opinion that such method is prohibited by the act, "it shall make a report in writing in which it shall state its findings as to the facts," and shall issue its order accordingly. If the order is not complied with, the commission may make application to the proper circuit court of appeals for the enforcement of it, and if the party complained of desires a review of the order he may make an application such as this.

In either case the commission "shall certify and file with the application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission." Upon the filing of such application and transcript and upon notice the court shall "have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree affirming, modifying or setting aside the order of the commission. The findings of the commission as to facts, if supported by testimony, shall be conclusive."

On December 16, 1922, the respondent issued its complaint against the petitioner charging him with unfair methods of competition in commerce. In substance it charged that the Baltimore Process Company, a corporation engaged in the manufacture and sale of non-alcoholic beverages in Baltimore, Maryland, owned certain patents for the manufacture of such beverages and granted licenses to others to manufacture and sell the same; that the petitioner was granted letters patent for a process for manufacturing such beverages and had granted licenses to others to manufacture and sell them and that such manufacturers and licensees sold and transported their products to persons in states other than the states in which they were manufactured; that the petitioner and his licensees were in direct competi-

tion with the Baltimore Process Company and its licensees; that on June 13, 1921, and September 19, 1921, petitioner caused a letter of warning to be sent to licensees of the Baltimore Process Company advising them that the process they were using under licenses granted to them by said Baltimore Process Company was an infringement of patents owned by him, and that unless they discontinued the use of said process legal steps would be taken to compel them to do so; that the sending of such letters was calculated to bring and had the capacity and tendency to bring the patented process of the Baltimore Process Company under suspicion, and tended to intimidate and coerce the licensees of the Baltimore Process Company to discontinue the use of its process and to use the process patented by the petitioner; and that such acts and things done by petitioner were all to the prejudice of the public and of petitioner's competitors and constitute unfair methods of competition in commerce within the intent and meaning of the act.

On February 2, 1923, respondent issued an amended complaint identical with the complaint first filed with the addition of paragraph 6, which is as follows:

The letters of warning and threats to sue by respondent as set out in paragraph 4 of this complaint charged that the preparations manufactured and sold by the persons holding licenses from the Baltimore Process Company were infringements of patents held by the said respondent, such threats not being made in good faith intending to bring such suits, but for the purpose of injuring said competitors and of intimidating them, their agents, customers and prospective customers, and causing them to cease to operate under the licenses issued to them by the said Baltimore Process Company.

To this complaint the petitioner filed an answer much more lengthy than necessary and pleading a considerable portion of his evidence. In his answer he denied that the letters of warning and threats to sue by petitioner as set out in the amended complaint were not made in good faith by him, denied that the threats were made for the purpose of injuring the competitors of the Baltimore Process Company, and averred that, on the contrary, said communications were sent out by him in good faith and with the intention to start suit against any infringer or infringers where proper proof could be obtained to establish infringement.

Thereupon, on March 12, 1923, it was ordered that the hearings of the proof of the charges of the amended complaint in said proceedings be had and the evidence heard upon the issues made by the amended complaint and the petitioner's answer thereto. The evidence was heard, reduced to writing and filed as required and on December 19, 1923, the respondent made its findings as to the facts. The facts were found to be substantially as averred in the amended complaint, except that no finding was made upon the issue presented by the averments of paragraph 6 and petitioner's denial thereof. No finding was made upon the question of the good or bad faith of petitioner; no finding that the letters were sent without the intention to sue. Nevertheless the order was made to cease and desist "from threatening by letters or otherwise to institute suits * * * without in good faith intending to institute such suit or suits, and in fact following up such threat or threats with suit or suits brought within a reasonable time."

The provisions of Section 5 above referred to make it clear that, in proceedings by and before the commission and upon applications

here to enforce or review its orders, the settled rules of procedure should be followed. There should be a sufficient complaint issued and served and the facts found by the commission should furnish a sufficient basis for its orders. The Supreme Court has decided the first of these propositions. In *Federal Trade Commission v. Gratz*, 253 U. S. 421, on page 427 the court said:

When proceeding under Sec. 5, it is essential, first, that having reason to believe a person, partnership, or corporation has used an unfair method of competition in commerce, the commission shall conclude a proceeding "in respect thereof would be to the interest of the public;" next, that it formulate and serve a complaint stating the charges "in that respect" and give opportunity to the accused to show why an order should not issue directing him to "cease and desist from the violation of the law so charged in said complaint." If after a hearing the commission shall deem "the method of competition in question is prohibited by this Act," it shall issue an order requiring the accused "to cease and desist from using such method of competition."

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

So also the thing which may be prohibited is the method of competition specified in the finding of facts. "The findings as to the facts" must be sufficient to furnish the basis for the order to desist. If the facts found are not sufficient to furnish a basis for the order it was improvidently issued and should be annulled by the court.

Apparently recognizing the necessity of a sufficient complaint the respondent served the amended complaint upon the petitioner. This amended complaint, as we have seen, differed from the original only in charging that the threats to sue were made in bad faith without the intention to carry the threats into execution. As stated above, the respondent made no finding whatever upon this question. It is well settled that a finding of facts in order to sustain a plaintiff's cause of action must contain all the facts necessary to a recovery, and the failure to find any material fact charged is equivalent to finding against the plaintiff and for the defendant as to that fact. The findings of the respondent are not sufficient to sustain the order complained of.

But aside from these considerations we think the respondent was right in failing to find bad faith on the part of petitioner and in effect finding that he was acting in good faith. In weighing evidence upon this question the presumption is in favor of good faith. The party charging bad faith must prove it by evidence sufficient to overcome the presumption of good faith. Viewed thus we think the evidence falls short of establishing the charge of bad faith. Not many letters threatening suit were sent. There was no circularization of the trade as in many cases. The letters were written and sent by the attorneys of petitioner, attorneys of good standing in their profession who, upon being informed by petitioner as to his claims, in good faith advised him that his patents were valid, that the persons to whom letters were sent were infringing them, and they further advised delay in bringing suits. Two suits were actually brought against parties to whom letters were sent. True, these suits were not filed until after the proceedings by the respondent

were begun, but this fact is not, in the light of the circumstances, and the presumptions that run with human conduct, sufficient to establish bad faith.

It is also urged by petitioner that this proceeding is not "to the interest of the public" and that the record does not show any unfair method in "commerce." One member of the commission dissented from the order upon the first of these grounds, and we think much may be said in support of both of them, but in view of our holding upon the other questions presented it is not necessary to pass upon these.

The order of the commission was improvidently issued and it should be and is set aside and annulled.

**FEDERAL TRADE COMMISSION v. HAMMOND, SNYDER
& COMPANY.**

SAME v. BALTIMORE GRAIN COMPANY.

SAME v. H. C. JONES COMPANY, INC.

(Supreme Court of the United States. March 16, 1925.)*

Nos. 48, 49, 50.

Judgment of the lower court in *Federal Trade Commission v. Baltimore Grain Co., et al.*, 284 Fed. 886, denying the Commission's petitions for writs of mandamus to compel defendant grain companies to permit the Commission to inspect their books, records, correspondence, etc., relating to or bearing upon their interstate business, in connection with an investigation initiated upon the Commission's own motion, and in pursuance, as alleged, of a resolution of the Senate, affirmed.

Per Curiam. Judgment affirmed, upon the authority of *Federal Trade Commission v. American Tobacco Company*, 264 U. S. 298.

* 267 U. S. 586, 45 Sup. Ct. Rep. 461.

APPENDIX III.

RULES OF PRACTICE BEFORE THE COMMISSION.

I. SESSIONS.

The principal office of the Commission at Washington, Principal office.
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 Commission may exercise power elsewhere.
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.

Sessions of the Commission for hearing contested pro- Hearings as ordered.
ceedings will be held as ordered by the Commission.

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

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

II. COMPLAINTS.

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

Such application shall be in writing, signed by or in Form of appli- cation.
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 appli-
cant and of the party complained of.

The Commission shall investigate the matters com- Commission to investigate.
plained 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 Issuance and service of com- plaint.
serve upon the party complained of a complaint stating

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 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.

Deposition to be forwarded.

And filed. Copy to defendant or his attorney.

Size of paper, etc.

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

Notice.

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

Limitations as to time.

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

XIV. DOCUMENTARY EVIDENCE.

Relevant and material matter only to be filed.

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

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

XV. BRIEFS.

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

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

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

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

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

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

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

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

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

XVI. ADDRESS OF THE COMMISSION.

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

