

IN THE MATTER OF
JAMES S. KIRK & COMPANY

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 1110. Complaint, Jan. 9, 1924—Decision, Dec. 12, 1928

Where the words "Castile Soap" had long since come to mean a hard soap produced from oil or fat derived solely from olives, without the addition or admixture of any artificial perfume or substance as a filler or builder, to be so recognized in pharmacopelas in England and the United States, in dictionaries, in treatises on materia medica, and in other authorities, to be so known by physicians, druggists, soap manufacturers and dealers and a substantial part of the public, and as a very mild neutral soap, especially adapted for sensitive skins and universally recommended by authorities above and beyond all other soaps as a baby soap, to be synonymous in common usage with the term "olive oil" soap, and to denote the best known toilet soap in the world; and thereafter a corporation engaged in the manufacture of various soaps and soap products including toilet soaps, and in the sale thereof to wholesale and retail dealers in the various States and in foreign countries,

Designated, labeled, and stamped some 20 brands of its soap varying as to fatty composition from no olive oil to 90 per cent olive oil and with unknown proportions in a few cases (and sold by reason of less expensive ingredients at lower prices than castile soaps), with various combinations of the word "Castile" and/or olive oil, such as "Oreno Olive Oil Castile", "Oreno Genuine Olive Oil Castile", "Baby Bath Castile" (together with the words "Olive Oil Soap", "made with pure olive oil", and a picture of a mother bathing a baby), "Nursery Olive Oil Castile", "Lady Fair Castile", "Crown Castile", "White Hardwater Castile", "Coco Castile", "Coco Strip Castile", "Kirk's Olive—trade mark registered", etc., and advertised its said brands under the aforesaid and similar designations and descriptions, and as "real milled olive oil castile soap of the highest quality", etc., and the first two as "ideal for the nursery, hospital, and general toilet uses" by reason of their "purity" and not surpassed "by castile soaps manufactured in America or abroad", and the "Baby Bath Castile" as "Made especially for use in the nursery" and "A pure soap for tender skins", without disclosing at all in some cases and equally conspicuously in other cases, along with the aforesaid designations, etc., the absence of olive oil, or presence of other fatty ingredients, as the case might be;

With the tendency and capacity to deceive members of the public into believing the aforesaid soaps to be castile and olive oil soaps, composed entirely as to their fatty composition of fat derived from olives, and with the effect of deceiving physicians, pharmacists and other members of the public into purchasing and using the aforesaid soaps for the purpose, among others, of compounding medical prescriptions and in connection with the care of babies, in place of castile or olive oil soap, and of diverting business from

and otherwise injuring and prejudicing competitors making and selling soap manufactured as to its oil or fatty composition only of the oil or fat derived from olives and properly representing the same as castile soap and as olive oil soap, and with the tendency so to do:

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

Mr. Edward E. Reardon for the Commission.

Cutting, Moore & Sidley, of Chicago, Ill., and *Mr. Henry Ward Beer*, of New York City, for respondent.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, an Illinois corporation engaged in the manufacture of soaps and allied products and in the sale thereof to wholesale and retail dealers at points in the various States, and with principal place of business in Chicago, with naming product misleadingly, misbranding or mislabeling and advertising falsely or misleadingly in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent, as charged, for more than four years last past has named, branded, labeled, advertised, and sold as castile soap seven separate kinds of soap made by it containing no olive oil whatsoever (in addition to several brands containing various percentages of olive oil), to wit, "the 'Kirk's Cocoa Hard Winter Castile', the 'Bengal Castile', the 'Kirk's Cocoa Strip Castile', the 'Peerless Cocoa Castile', the 'Cocoa Castile', the 'Crown Castile' and the 'Floating Castile' brands of soap", with the capacity and tendency to mislead and deceive the trade and public into the erroneous belief that said soaps are genuine castile soap, i. e., soaps having olive oil exclusively as their oil ingredient, and to purchase its said soaps in such belief, and to cause the trade and public in the United States to purchase such soaps, less costly on account of the substantially cheaper oils and fats used by respondent as olive oil substitutes, as and for genuine castile soap in preference to the necessarily more costly genuine article, dealt in by its importing or manufacturing and selling competitors and long esteemed by reason of its olive oil content and otherwise, and its qualities, for infants, the sick, use in medicinal preparations and other purposes, by dealers in soap, the public, the medical profession and the drug trade, by whom it has

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long been and now is prescribed and recommended; all to the prejudice of the public and respondent's competitors.¹

Upon the foregoing complaint, the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress approved September 26, 1914 (38 Stat. 717), the Federal Trade Commission issued and served a complaint upon the respondent, James S. Kirk & Co., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act.

The respondent having filed its answer herein, hearings were had and evidence was thereupon introduced on behalf of the Commission and the respondent before an examiner of the Federal Trade Commission duly appointed.

Thereupon this proceeding came on for a final hearing on the briefs and oral argument, and the Commission having duly considered the record and being fully advised in the premises, makes this its findings as to the facts and conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, James S. Kirk & Co., is, and has been for more than ten years prior to the date of service of the complaint herein, a corporation duly organized under the laws of the State of Illinois, having at all said times its factory and principal place of business in the city of Chicago in said State.

PAR. 2. The respondent is and has been since March 28, 1906, engaged in the manufacture of various soaps and soap products, including toilet soaps, and during said times has been and still is engaged in the sale of its said soap and soap products, including toilet soaps, to various individuals, firms, and corporations, wholesale and retail dealers therein, located in the District of Columbia and in

¹ Allegations of the complaint more particularly relating to the history and standing of genuine castile soap, as set forth therein, follow:

"Genuine castile soap, so named from Castile, a geographical division of Spain, the place of its first manufacture, is a hard soap the oil ingredient of which always has been and now is olive oil to the exclusion of all other oils and fats. Said soap has for many years been distributed in commerce, and has been in general use by the public throughout the United States. Because of the qualities of olive oil as a soap material and for other reasons said soap has long been and now is considered by manufacturers of and dealers in soap, and by the public generally, as an excellent soap, free from substances harmful to the human skin or delicate fabrics, of undoubted excellence and possessing desirable qualities not contained in other soaps. By the medical profession and the drug trade said soap has long been and now is considered and held to have the qualities requisite and desirable for the cleansing, bathing of infants, and of sick or ailing persons, and for use in medicinal preparations, and said soap has long been and now is prescribed and recommended by said profession and said trade for said purposes."

various States of the United States of America, other than in the State of Illinois, and in foreign countries and has caused, and still causes, its said soaps and soap products including the soaps specifically mentioned in paragraphs 15 and 16 hereof when so sold by it to be transported, in commerce, from its said factory and place of business in the city of Chicago, Ill., to, into, and through said other States and the District of Columbia and to foreign countries to the said individuals, firms, and corporations, wholesale and retail dealers therein, to whom the same were sold by respondent.

PAR. 3. During the times above mentioned and referred to, other individuals, firms, and corporations, located in the various States of the United States and in foreign countries, have been engaged in the manufacture and in the sale of various soaps and soap products, including toilet soaps, which they have sold and still sell to individuals, firms, and corporations, wholesale and retail dealers therein, located in the various States of the United States and in the District of Columbia and in foreign countries. The respondent during the aforesaid times was, and still is, in competition in commerce in the sale of its said soaps and soap products, including toilet soaps, with said other individuals, firms, and corporations.

PAR. 4. From the end of the twelfth century to the early part of the nineteenth century soap was made in various localities in southern Europe of olive oil, alone, as to its fatty composition and such soap was known to commerce in many instances by the name of the city or place of its production.

The names of several of these cities or localities came into common usage to designate or describe the soap produced in those places and these names became synonymous terms, as they referred in each case to soap made of olive oil.

At some time prior to the year 1622 the term, "Castile soap", was used in England to designate a soap composed of olive oil and made in that part of the kingdom of Spain known as Castile, and the term, "Castile soap", then came into common usage in England in association with an olive oil soap, as shown in various publications such as, amongst others, language dictionaries, pharmacopeias, and medical treatises. The term, "Castile soap", has remained ever since in current public use.

PAR. 5. Castile soap is a hard soap produced from oil or fat which is derived solely from olives and without the addition or mixture of any artificial perfume, or any substance as a filler or builder. It derives its odor solely from the olive oil constituent in its composition.

Castile soap is produced by the saponification of olive oil by the use of an alkaline salt. Caustic soda (sodium hydroxide) is the saponifying agent most commonly used in modern times in conjunction with olive oil to produce Castile soap.

PAR. 6. The term "Castile soap", was first used in association with soap made of olive oil in Castile, Spain. The term became in common usage synonymous with the term, "olive oil soap", and the terms, "Castile soap", and "olive oil soap", are and have always been synonymous terms. For more than forty years the term, "Castile soap", has been used and is still used in the United States to designate and describe soap made of olive oil, to the exclusion of other oil or fat, regardless of the place where the soap was produced.

PAR. 7. The term "Castile soap" and "olive oil soap", used either alone or conjunctively to designate or describe a soap, imply and mean to a substantial part of the public in the United States that the soap referred to is made of oil or fat derived from olives and from no other source.

PAR. 8. The term "Castile soap" has been used synonymously with the term "Sapo" in Pharmacopeias in England and in the United States for approximately 150 years and it is so used at the present time in the Pharmacopeia of the United States to indicate or to refer to the official soap of the Pharmacopeia and the said term "Castile soap" is and has been synonymous with the term "Sapo Durus" in the Pharmacopeia of the British Empire.

The earliest Pharmacopeia published in the United States was the Pharmacopeia of the Massachusetts Medical Society, published in the year 1808 at Boston. It was based on the Pharmacopeia of Edinburgh College, Scotland, and under the title, "Sapo", was listed the following:

Soap, prepared with oil of olives and soda, called Castile soap.

Intermittently in the Pharmacopeias of the British Empire such as the Edinburgh, London, and Dublin Pharmacopeias, as well as in the Pharmacopeias published in the United States, the synonym, "Castile soap", for the official hard soap, "Sapo" or "Sapo Durus", has been omitted through inadvertence or otherwise, but, during the time the synonym "Castile soap" has been so omitted, semi-official publications called, Dispensatories, etc., have been published by learned authors and based upon the Pharmacopeias and these semi-official publications have usually referred to the official hard soap of the Pharmacopeias as Castile soap.

A publication entitled "The Extra Pharmacopeia", published in London, 17th edition, 1921, as well as the publication entitled "The British Pharmaceutical Codex", published by the Pharmaceutical

Press, London, 1923, refer to the "Sapo Durus" or hard soap of the British Pharmacopeia as Castile soap made with sodium hydroxide and olive oil.

During the entire history of the Pharmacopeias of the British Empire and of the United States the composition of the official hard soap has been of olive oil and soda and it has been known by the public of the United States, including physicians and druggists and by manufacturers of and wholesale and retail dealers in soap as Castile soap during all said time.

• The earliest Pharmacopeias of the United States and Great Britain recognized as the official hard soap for Pharmacopeial or medical use the Castile soap contemporaneously in general commercial use and the later Pharmacopeias, including the current Pharmacopeias of the United States and the Pharmacopeia of the British Empire specify the same soap, of the same composition, as the official soap for such uses and purposes, only adding in connection therewith certain specifications or tests, obviously to the end that the soap for such special uses or purposes shall be under the control of a uniform standard.

PAR. 9. Castile soap is and has been for centuries the best known toilet soap in the world.

The composition of Castile soap, as an olive oil soap, is and has been known to a substantial number of the public in North America and in the United States since before the time the Government of the United States was established.

Dictionaries of the English language, including those published in the earliest times in England and in the United States, down to and including the present time have defined and described Castile soap and its composition, generally, as a superior kind of refined soap of olive oil and soda, originally made in Castile, Spain.

Members of the public in the United States have resorted to and consulted, and still consult such dictionaries and have accepted and still accept the above definition of Castile soap and its composition.

In medical dictionaries and treatises on materia medica, in chemical dictionaries, dictionaries of terms used in architecture, among others, as well as in textbooks on pharmacology and therapeutics, the term "Castile soap" has been practically unanimously defined as meaning a soap made of olive oil and soda.

PAR. 10. Some of the component elements of various oils or fats are not found in other oils or fats, and even when some of the component elements of certain oils or fats are present in other oils or fats they are found in widely differing proportions and the use of various oils or fats in the manufacture of soap results in the pro-

duction of soaps not only differing structurally from each other but of soaps having different qualities and attributes.

PAR. 11. Olive oil is and always has been an important article in the economy of the food and wealth of many nations. For centuries past, even to Biblical times olive oil has been considered and still continues to be considered by the public and by soap manufacturers one of the principal sources of the oil or fatty substances for the manufacture of soap with qualities preeminent in a toilet soap, in a soap for medicinal use and for various uses in the arts and sciences.

This oil forms a very mild, neutral soap, specially adapted for sensitive skins, such as those of very young children, and on this account and on account of the known history of the oil and its reputation, as above stated, both the oil and the soap made from it are universally recommended in the writings of authorities on infant hygiene to be used beginning with the very first bath given newly-born infants immediately after birth.

PAR. 12. Castile soap has always been known and continues to be known, above and beyond all other soaps, as a baby soap to members of the general public, including physicians, nurses, pharmacists, and druggists, and those connected with the departments of municipal and State governments and the Federal Government in charge of the hygiene of maternity and infant care, including authors of literature circulated in enormous quantities by such departments among the mothers and prospective mothers of children throughout the various States, and writers, generally, on the subject of infant care.

During a recent period of approximately 5 years, only, over 100,600,000 copies of booklets entitled "The Child", "The Baby and You"; "Mother's Manual"; "Infant Care", and others similarly entitled, have been distributed throughout the United States recommending the use of Castile soap, and the authors and writers of these booklets have known and understood at all times that Castile soap was a definite and distinct soap made of no other oil or fat than olive oil.

PAR. 13. Soaps branded or labeled "Castile soap" having on the soap or the wrappers of the soap the word "Baby", and sometimes the picture of a baby in a bath basin or tray, as a part of the name or description of the soap, or some word or words suggesting a baby, such as "Nursery Olive Oil Castile", "Stork Castile", and "Tiny Tot Castile", are and have been made and sold throughout the United States by the respondent and other manufacturers.

The respondent and other manufacturers and dealers, generally, have represented such soaps, on the wrappers or on the soap itself

and in advertisements in newspapers and elsewhere to be made of olive oil, often by the use of the phrase "olive oil soap".

PAR. 14. Soaps that have been sold as Castile soap to purchasers among the public for use or consumption, including those sold as Baby Castile soap, have been displayed for sale to the public by manufacturers, including respondent, and by wholesale and retail dealers, and sold, in plain bars of various sizes and in small cakes, both as unwrapped soaps, and as wrapped soaps inclosed in paper or foil wrappers and in nearly all instances in the sale of Castile soap where any statement or indication of the composition of the soap has been made or displayed, beyond what is conveyed in the word "Castile", the ingredient indicated or referred to has been olive oil.

PAR. 15. Among the soaps referred to in paragraph 2 hereof that respondent is and has been making and selling in commerce are the following brands that respondent is and has been making and selling as Castile soap: 1. Oreno Olive Oil Castile. This soap was first made and sold by respondent on or before January, 1918, and its manufacture and sale by respondent has been continuous from that time to the present time. It is and has been sold in long 4-pound bars, unwrapped, and on the bars is stamped in four different places along its length, the words "Oreno Olive Oil Castile" surrounded by the representation of a wreath. This soap is illustrated in the latest catalogue of its toilet soaps, printed, published, and in use by purchasers and by the respondent since January, 1918. The only description of the soap or its composition contained in the catalogue is the statement under the illustration of the soap, "Oreno Olive Oil Castile. Made in Chicago, U. S. A., from Genuine Olive Oil."

This soap as to its fatty composition is made of tallow, cocoanut oil and olive oil, the percentages of which are unknown.

2. Oreno Genuine Olive Oil Castile. A wrapped soap, first made and sold by respondent in 1908, the manufacture and sale of which by the respondent has been continuous from that time to the present time.

From the time this soap was first made and sold until 1923, there was stamped on the soap the following: "No. 158—Oreno Genuine Olive Oil Castile—Kirk".

Since 1923 there has been stamped on this soap, in addition to the above, the following:

Contains 90 per cent olive oil and 10 per cent choice selected coconut oil.—James S. Kirk & Co., Chicago, Ill., U. S. A.

This soap is made as to its fatty composition of 90 per cent olive oil and 10 per cent coconut oil.

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In respondent's said catalogue only the two soaps above mentioned are illustrated on a certain page under the following statement: "The purity of these soaps makes them ideal for the nursery, hospital, and general toilet uses. No Castile soaps manufactured abroad or in America can surpass those illustrated on this page."

3. Baby Bath Castile. A wrapped soap packed in a display box. On the wrapper of the soap just above the representation of a baby in a tray are the words "Baby Bath Castile," and underneath the representation of the baby on the lower edge of each cake of soap is the phrase "Olive Oil Soap". In the respondent's said catalogue this soap is illustrated in its display box. On the inside of the raised cover of the display box is a printed label, on which the name "Baby Bath Castile" is printed in large type. Immediately under that the phrase "Olive Oil Soap" is printed in large type and in letters of a different color. Underneath these words there is the picture of a mother washing a baby in a small tub.

In addition to the above, the statement is made in the said catalogue as follows:

Made especially for use in the nursery. A pure soap for tender skins.

There was no further statement of the composition of this soap on its wrappers or in the said catalogue.

On a box-end label of the soap there was the further statement as follows:

Made with pure olive oil. A neutral soap soothing to the skin.

Respondent's Baby Bath Castile Soap has been and is composed, as to its fatty composition, substantially of 55 per cent of tallow, 10 per cent of coconut oil, and 35 per cent of olive oil.

Respondent began making and selling this soap in 1915 and the manufacture and sale of the soap with the above representations has been continuous until February, 1926. Since February, 1926, in connection with the sale of this soap there has been printed on one of the vertical sides of the wrapped soap the following words in small type, "Contains Olive Oil, Cocoa Oil, and Refined Tallow".

4. Olive Oil Castile. An unwrapped soap, first made and sold by respondent on or before January, 1918, and its manufacture and sale by respondent has been continuous from that time to the present time.

The words "Olive Oil Castile" were stamped on the soap.

In the above-mentioned catalogue of the respondent an illustration of the soap is shown stamped as above. Above the representation of the soap in the catalogue is the statement, "Large White Cakes of Milled Olive Oil Soap" and below it is the statement,

"No. 580—Olive Oil Castile, White Milled, 12 cakes in box unwrapped".

This soap as to its fatty composition contains 80 per cent of tallow, 10 per cent of coconut oil and 10 per cent of olive oil.

5. Nursery Olive Oil Castile. A wrapped soap first made during or before 1919 by respondent for distribution to the public by one of its customers. The representations regarding this soap, were stamped on the soap and printed on its wrappers, and were as follows: "Nursery Olive Oil Castile made in U.S.A. United Drug Co., Boston, U. S. A."

The manufacture and sale of this soap by respondent and its distribution as above stated has been continuous from the above mentioned time to the present time.

The fatty composition of this soap contains 90 per cent of olive oil and 10 per cent of coconut oil.

6. Field's Olive Oil Castile. A wrapped soap, first made by respondent and sold by it at some time unstated prior to May 5, 1927, to a large retail dealer for distribution to the public. It is still being made and sold by respondent and said dealer. The above name of this soap is printed on its wrappers.

The soap is made partly of olive oil and partly of some other oil or oils or fats. The percentages of olive oil and of the other oil or oils or fats, or their names, used in making the soap were not disclosed by respondent to the said retail dealer and are unknown, as well as the name or names of the other oils or fats that were used besides olive oil.

7. Glendora Castile Soap. An unwrapped soap, on the bars of which are stamped, only, "Glendora 90 per cent Olive Oil".

It was first made and sold as Castile soap by respondent in 1925, and its manufacture and sale by respondent has been continuous from that time to the present time. This soap was made by respondent for use and distribution by a corporation operating a chain of retail drug stores.

The fatty composition of Glendora Castile Soap is and has been 90 per cent of olive oil and 10 per cent of other oil or oils or fats, the names and percentages of which were not disclosed by respondent to the said retail distributor and are unknown.

8. Harmony Olive Oil Castile. A wrapped soap on which was printed the above name of the soap. This soap was first made by respondent during or before 1919, and its manufacture and sale by respondent has been continuous from that time to the present time. It is composed as to its fatty composition 60 per cent of tallow, 10 per cent of coconut oil, and 30 per cent of olive oil.

9. Lady Fair Castile. A wrapped soap. The name only was printed on the wrapper.

This soap was first made by respondent for a manufacturing and wholesale druggist distributor for distribution to the public by it through a large chain of retail drug stores during or before 1919, and its manufacture and said sale by respondent has been continuous from that time to the present time. It is and has been composed as to its fatty ingredients of 88 per cent tallow, 10 per cent of coconut oil, and 2 per cent of olive oil.

10. Wash Rag Castile. A soap wrapped with a wash rag with a paper label around the wash rag on which only the words "Olive Oil Castile" were printed. In respondent's 1918 catalogue, above mentioned, above the illustration of this soap, is printed: "This is a real milled olive oil castile soap of the highest quality." Underneath the illustration is printed: "No. 425 Olive Oil, Wash Rag Castile."

This respondent's soap, as to its fatty composition, was composed of 60 per cent tallow, 10 per cent coconut oil, and 30 per cent olive oil. The manufacture and sale of this soap by respondent has been continuous from or before January, 1918, to the present time.

11. Wash Rag Castile. A soap wrapped in a wash rag with a paper label around the wash rag on which only the words "Crown Castile Soap—Strictly Pure" were printed.

In respondent's said catalogue alongside the illustration of the soap is printed: "No. 307—Wash Rag Castile, 12 in box."

This soap was first made in 1900. Its manufacture and sale by respondent has been continuous from that time to the present time. Since December, 1926, a box-end label was used on the box in which this soap was packed on which was printed: "Crown—Wash Rag Castile—made from Pure Cocoa oil and Refined Tallow," and on the label around the Soap was printed "Kirk's Crown Castile Soap—Strictly Pure—Made from Pure Cocoa Oil and Refined Tallow."

This soap as to its fatty composition was composed of coconut oil and tallow, the percentages of which in the composition of the soap were not stated and are unknown.

12. Crown Castile. An unwrapped soap, first made and sold in 1900, and its manufacture and sale by respondent has been continuous from that time to the present time. On each cake of the soap the words "Crown Castile" are shown in respondent's said catalogue, stamped and surrounded by the illustration of a wreath.

In respondent's said catalogue alongside the illustration of this soap, packed in a box, is printed: "No. 100—Crown Castile, white or mottled."

This soap was composed as to its fatty composition of coconut oil and tallow the percentages of which are not stated and are unknown.

13. White Hardwater Castile. An unwrapped soap, first made and sold during or before January, 1918, and its manufacture and sale has been continuous from that time to the present time. This soap is illustrated in respondent's said 1918 catalogue on page 48. The illustration of the soap in the catalogue shows the words "White Hardwater Castile" only, on the cake of soap.

In the index to the said catalogue is the following:

Coconut Oil Soaps----- Page 46-48

This soap was made as to its fatty composition 100 per cent of coconut oil.

14. White Castile. An unwrapped soap first made and sold during or before January, 1918, and its manufacture and sale by respondent has been continuous from that time to the present time. This soap was illustrated in respondent's said 1918 catalogue on page 48. The illustration of the soap in the catalogue shows the words "White Castile" only on the cake of soap.

In the index to the said catalogue is the following:

Coconut Oil----- Page 46-48

This soap was made as to its fatty composition partly of tallow and partly of coconut oil. The percentages of coconut oil and tallow were not stated and are unknown.

15. King White Genuine Cocoa Hardwater Castile. An unwrapped soap, first made and sold during or before January, 1918, and its manufacture and sale by respondent has been continuous from that time to the present time. This soap is illustrated in respondent's said 1918 catalogue on page 48. The illustration of the soap in the catalogue shows the words "King White Genuine Cocoa Hardwater Castile" only on the cake of soap.

In the index to the said catalogue is the following:

Coconut Oil Soaps----- Pages 46-48

This soap was made as to its fatty composition 100 per cent of coconut oil.

16. Queen Pink Genuine Cocoa Hardwater Castile. An unwrapped soap, first made and sold during or before January, 1918, and its manufacture and sale by respondent has been continuous

from that time to the present time. This soap is illustrated in respondent's said 1918 catalogue on page 48. The illustration of the soap in the catalogue shows the words "Queen Pink Genuine Cocoa Hardwater Castile" only on the cake of soap.

In the index to the said catalogue is the following:

Coconut Oil Soaps----- Pages 46-48

This soap was made as to its fatty composition 100 per cent of coconut oil.

17. Carlo Hardwater Castile. An unwrapped soap first made during or before January, 1918, and its manufacture and sale by the respondent has been continuous from that time to the present time. This soap is illustrated in respondent's said 1918 catalogue on page 47. The illustration of the soap in the catalogue shows the words "Carlo Hardwater Castile" only on the cake of soap.

In the index to the said catalogue is the following:

Coconut Oil Soaps----- Pages 46-48

This soap was made as to its fatty composition 100 per cent of coconut oil.

18. Bengal Castile. An unwrapped soap, first made in 1890. The soap is shown illustrated in the respondent's said 1918 catalogue. It had the words "Bengal Castile" only stamped on one side of the soap and on the reverse side "J. S. Kirk & Co., Chicago."

Box labels for use on boxes containing this soap were used for a long unstated period on which were printed: "Made from Pure Cochinchina Coco Oil." It was made as to its fatty composition 100 per cent of coconut oil.

The manufacture of this soap was discontinued in 1925.

19. Coco Castile. An unwrapped soap. First made and sold by respondent in 1905. This soap is illustrated in respondent's said 1918 catalogue with the words, only, "Coco Castile" on the cake of soap.

After February, 1926, there was stamped on the reverse side of the soap the additional words "Made only from selected coconut oil," with the name and address of respondent. This soap as to its fatty composition was composed 100 per cent of coconut oil. The manufacture of this soap was discontinued some time in 1926.

20. Peerless Cocoa Castile. An unwrapped soap first made and sold by respondent in 1905. This soap is illustrated in respondent's said 1918 catalogue on page 48. The illustration of the soap in the catalogue shows the words, only, "Peerless Cocoa Castile, Jas. S. Kirk & Co." stamped on the soap.

This soap was made, as to its fatty composition 100 per cent of coconut oil. The manufacture and sale of this soap was discontinued in 1920.

21. Kirk's Cocoa Strip Castile. An unwrapped long bar of soap. This soap is shown illustrated in respondent's said catalogue, marked off in four equal sections, with the above name stamped across it, one word of the name appearing on each successive section.

The above was the inscription on this soap until February, 1926, since when there have been also stamped on the soap on the reverse side of each section the words "Made only from selected cocoanut oil—Jas. S. Kirk & Co., Chicago, Ill., U. S. A."

This soap is made as to its fatty composition 100 per cent of coconut oil. It was first made in 1908, and its manufacture and sale by respondent has been continuous from that time to the present time.

22. Kirk's Floating Castile. An unwrapped soap, first made and sold by respondent in 1918, on which only the above name was stamped on the cake of soap until February, 1926, since when to the present time in addition to the words "Floating Castile" there are also stamped in smaller letters, "Made from Coconut Oil and refined tallow—Jas. S. Kirk & Co., Chicago, U. S. A."

This soap is composed as to its fatty composition of tallow and coconut oil, the percentages of which were not stated and are unknown.

PAR 16. Among the soaps referred to in paragraph 2 hereof that respondent is and has been making and selling in commerce, the respondent made, sold, and causes to be sold since on or about January, 1918, a wrapped toilet soap, on the wrappers of which as shown in an illustration of the soap in respondent's said 1918 catalogue are only the words "Kirk Olive—trade-mark registered."

This soap contains 60 per cent of tallow, 10 per cent of coconut oil, 15 per cent of palm oil, and 15 per cent of olive oil.

PAR. 17. Olive oil is and has been more costly to use as an ingredient entering into the fatty composition of Castile soap than tallow or coconut oil of which, or of combinations of which, the soaps of respondent mentioned in paragraph 15 hereof, were and are partly or wholly made.

PAR. 18. The word "Cocoa" which has been and is being used by respondent as part of the brand name or description of some of its soaps which respondent sold and is selling as Castile soap describes or indicates an ingredient known as cocoa or chocolate.

PAR. 19. The use by respondent of the word "Castile" either alone or in association with the word "olive", or the words "olive oil", or "olive oil soap", or with any other word or words in the name or

Conclusion

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description of soaps made partly or wholly of oil or fat other than derived from olives, and selling or causing the same to be sold by respondent, as set forth herein, has the tendency and capacity to deceive members of the public into the belief that such soaps, as to their fatty composition, were and are made, respectively, of oil or fat derived only from olives and that such soaps were and are, respectively, Castile soap.

PAR. 20. The use by respondent of the phrase "olive oil soap" in labeling, branding, or otherwise describing soap not made, as to its fatty composition, wholly of oil or fat derived from olives, and offering such soap for sale and selling or causing the same to be sold has the tendency and capacity to deceive members of the public into the belief that such soap is made from oil or fat derived from olives and from no other source.

PAR. 21. The use by respondent, either alone or together, of the word "olive" or the words "olive oil" in labeling, branding, or otherwise describing soap made partly of oil or fat derived from olives and partly of other oil or fat and offering such soap for sale and selling or causing the same to be sold as herein set forth without stating, immediately in conjunction with, or in association with, said word or words, and in a manner equally conspicuous with and similar in all respects to that in which said word or words are used, the name or names of the other oils or fats in the composition of the soap or that such soap is not made wholly of oil or fat derived from olives has the tendency and capacity to deceive members of the public into the belief that such soap was and is composed, as to its fatty composition, exclusively of oil or fat derived from olives.

PAR. 22. Relying upon the representations of respondent in the labeling, branding, and description of its soaps sold and caused to be sold by respondent as and for Castile soap and olive oil soap, as set forth above, and because respondent is and has been enabled to offer for sale and has offered and sold its said soaps at a lower price by reason of their composition than the prices at which respondent's competitors can offer and sell and have offered and sold Castile soap, members of the public, including physicians, pharmacists, druggists, and others have been deceived into purchasing and using respondent's said soaps instead of and in place of Castile soap or olive oil soap, among other purposes for use in the compounding of medical prescriptions and for use in connection with the care of babies.

PAR. 23. There are among the competitors of respondent referred to herein many who make and sell soap made, as to its oil or fatty composition, only of oil or fat derived from olives and who properly represent their said soap as Castile soap and as olive oil soap,

and respondent's acts and practices as above set forth tend to and do divert business from such competitors and otherwise injure and prejudice them.

CONCLUSION

The practices of the respondent under the conditions and circumstances set forth in the foregoing findings are to the prejudice of the public and of respondent's competitors, and are unfair methods of competition in commerce and constitute a violation of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes".

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and upon the answer of the respondent filed herein, 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 above named, James S. Kirk & Co., its agents, representatives, and employees, do cease and desist:

1. From the use of the word "Castile" and the words or phrase "Olive Oil Soap" either alone or in conjunction or in association with any other word or words, which are the name of, or are descriptive or suggestive of, an oil or fat, in labeling, branding, or otherwise describing soap offered for sale or sold in commerce, the oil or fatty composition of which is not wholly derived from olives.

2. From the use of the word "Olive" or any representation indicating an olive oil source, either alone or in conjunction or in association with any other word or words, as the name of, or as descriptive of, soap, in labeling, branding, or otherwise describing soap offered for sale or sold in commerce, the oil or fatty composition of which is not wholly derived from olives:

Provided, that, when the oil or fatty composition of a soap is composed of two or more oils or fats, and the oil or fat from olives is included therein in such proportion that the soap so composed is, in its detergent or other qualities, substantially affected or qualified by the ingredient derived from olives, the word "Olive" or any representation indicating an olive oil source shall not be used in labeling, branding, or otherwise describing such soap—

Unless the name or names of each and every other oil or fat ingredient therein is used in each and every instance immediately in conjunction or association with the word "Olive" or with said representation indicating an olive oil source, and in a manner equally conspicuous with and similar in all respects to that in which the word "Olive" or said representation is so used; or,

Unless the word "Olive" or said representation indicating an olive oil source is immediately accompanied by some other word or words, letter or letters, displayed in type equally conspicuous with the word "Olive", or said representation, and in a manner clearly to indicate that the soap is not made wholly from oil or fat derived from olives, or that will otherwise indicate clearly that the soap is composed in part of oil or fat other than that derived from olives.

It is further ordered, That the respondent, James S. Kirk & Co., shall within 60 days after the service on it of this order file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which it has complied with the above order to cease and desist.

Dissent by Commissioner Humphrey

I can not agree that the facts in this case warrant the issuance of an order. In my judgment there is no evidence to sustain the contention that castile soap in the United States means soap made exclusively of olive oil. I agree with the trial examiner, who ought to have a better understanding of this case and especially of the evidence, than anyone else. He says:

For 70 years in the United States it has been the ordinary, usual, and general custom of all manufacturers of soap to use in the castile soap made and sold by them oils or fats other than olive oil, and there *is no evidence whatever* that there has been a soap called "Castile" made in the United States for toilet and general household purposes which was made exclusively of olive oil as its fat or oil ingredient. There have been throughout the whole of this period castile soaps made from coconut oil exclusively—tallow and coconut oil—tallow, coconut oil, and olive oil—coconut oil and olive oil—and various admixtures of these oils or fats. (See Note 4.) (T. E. Rec. pp. 18, 19.) (*Italics supplied.*)

The definitions quoted from the Pharmacopeia and encyclopedias, which define castile soap as indicating a pure olive oil product, refer to it only as a medicine and not as a soap in the general acceptance of that word.

Take again, the statement in the findings of fact to the effect that—

Dictionaries of the English language, including those published in the earliest times in England and in the United States, down to and including the

present time have defined and described Castile soap and its composition, generally, as a superior kind of refined soap of olive oil and soda, originally made in Castile, Spain.

This is not a fact, and I am perplexed to understand how the majority ever made this finding. Webster's New International Dictionary, which is universally regarded as high authority, if not of the highest, in the courts of the United States, gives the following definition:

Castile soap: A kind of fine, hard, white, or mottled soap, made from olive oil, sometimes with added coconut oil, also any soap imitating it.

An examination of the dictionaries and encyclopedias will show the error of this finding. The Bureau of Standards has decided that Castile soap does not mean soap made exclusively of olive oil, and so has the Treasury Department on several occasions; and so has the Customs Court of Appeals.

If we are to adopt the rule announced in the Philippine mahogany cases (*Indiana Quartered Oak*²) that "*any evidence*" is sufficient to sustain an order, the American business man has no security against an unprincipled or prejudiced competitor. In my opinion there is no substantial, competent evidence in this case sufficient to sustain the findings, for, as the trial examiner points out, for more than 70 years the public has understood Castile soap to mean just what Webster's dictionary says it means.

Again I call attention to the findings of "fact", Nos. 19, 20, and 21, in which a finding is made to the effect that the practices of the respondent have a "tendency and capacity to deceive" the public. In my judgment that is not a finding of fact but a question for the court.

This case is a contest between the foreign and the domestic manufacturer. This ruling of the Commission, if sustained, will be a great blow to domestic industry and a great help to foreign industry.

I want to register my protest at the way in which this case was conducted. About a thousand witnesses from all walks of life were permitted to testify as to whether the use of the word "Castile" when applied to a soap not made exclusively of olive oil, had the tendency to deceive the public. I do not believe that such evidence was competent under any circumstances. I do not believe men and women from all classes can qualify as "experts on deception." Even admitted that they could, this piling up of cumulative evidence is an inexcusable outrage on the public. If this was competent testimony, there certainly could be a sufficient number of people

² *Indiana Quartered Oak Co. v. Federal Trade Commission*, 26 Fed. (2d) 340.

found in Washington City of average intelligence who know what the words "Castile soap" mean, without going elsewhere. The attorneys and the trial examiner traveled throughout the country for the purpose of taking the testimony of such witnesses. About 700 such were subpoenaed to testify at Spokane. What justification can there be for such performances? This action shows an ignorance and a disregard of the public interest that is deplorable. I hope that if this case is appealed, the court may find it advisable in the public interest to place its disapproval upon this so-called "expert testimony". This class of testimony has caused the Federal Trade Commission to waste hundreds of thousands of dollars.

Statement by Chairman Myers

I have voted for an order in this case because I believe the record shows that the public has a well-defined conception of Castile soap as a superior soap for surgical use and for bathing infants and that this conception is based on medical advice and pharmacopœia definitions all to the effect that it is a pure olive-oil soap.

Either this is the test of Castile soap, or there is none, since respondent's contention that Castile soap means merely a "pure" soap is too broad to permit of identification. There is a popular brand of soap advertised to be 99.94 per cent pure, and if it measures up to this claim it would be a Castile soap under respondent's theory, although I am sure it does not conform to anyone's notion of Castile soap.

There is no issue in the Commission concerning the manner in which the proof was taken in this case, so far as I am aware. It is hard to say which is the greater offender, the Commission or the respondent, in the amount of unnecessary proof taken. The strictures of the dissenting member are directed to a course pursued at a time when the trial staff was not under its present competent direction. It should be noted that the dissenting commissioner voted against the present chief counsel who has done so much to remedy the conditions of which complaint is now made.

Syllabus

IN THE MATTER OF
BERNARD-HEWITT & COMPANY

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 1543. Complaint, Oct. 30, 1928—Decision, Dec. 17, 1928

Where a corporation engaged in the sale by mail of sundry articles of merchandise direct to the consumer; in its catalogues describing such articles, and the prices thereof,

- (a) Represented as silk articles and materials containing no silk (material derived from the cocoon of the silkworm), but of less value than silk, though resembling the same in general appearance, applying such designations as "Silk", "Art Silk", "New Silk", "Silkoline", "Tussah Silk", "Silk Faille Poplin", "Pongee", "Cotton Pongee", "French Rayon Art. Silk Lace Net Dress with Mercerized Pongee Slip", etc., to such articles as rayon hosiery, cotton coverings of comforters, suits and dress materials composed only partly of silk, and cotton fabrics and cotton and rayon dresses, and designating or describing rayon and cotton hats as of "Genuine Silk Bengaline", and "Silk Sport", and dresses made of rayon and cotton, and of material other than silk as "Beautiful satin party dress", "Misses sparkling party dresses", and "Rayon Art. Silk Dress", and Neutrisilk, "Fashioned from figured Neutrisilk, a beautiful new material which has the lustre and wearing qualities of genuine silk", respectively;
- (b) Represented garments composed of wool, cotton, and silk as "All Wool", "Wool" and "Wool Tweed" and sweaters composed entirely of cotton as "Wool Mixed Silpon Sweaters", "Part Wool";
- (c) Represented shoes composed of materials other than alligator leather as "Alligator Dress Oxford", "Fine Grade Tan Alligator Leather with Blond Trimming"; and
- (d) Represented watches composed of materials other than silver and of less value, though resembling silver in general appearance, as "Silverline" and "Nickle Silverline";

With the effect of misleading many of the consuming public into purchasing merchandise from it relying on the truth of such representations and with the capacity and tendency so to do, and with the effect of diverting business from and otherwise injuring and prejudicing competitors conducting their businesses without in anywise misrepresenting to purchasers and prospective purchasers the nature, character and value of the merchandise offered and sold by them, and with the tendency so to do:

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

Mr. William T. Kelley for the Commission.