

Syllabus

IN THE MATTER OF
COLONIAL DISTILLING AND DISTRIBUTING
CORPORATION

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

Docket 2470. Complaint, June 28, 1935—Decision, Aug. 27, 1936

Where a corporation engaged in purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages, and in making gin by re-distillation of purchased alcohol over juniper berries and other aromatics, and in selling its aforesaid products to wholesalers and retailers in various States and the District of Columbia, in substantial competition with (1) other corporations, individuals, and firms engaged in manufacture by distillation of whiskies, etc., and in sale thereof, and (2) other corporations, etc., engaged in purchasing, rectifying, etc., whiskies, gins, and other spirituous beverages dealt in by them, and in sale thereof as aforesaid, and which, respectively, as manufacturers and distillers from mash, wort, or wash, by process of original and continuous distillation, through continuous closed pipes and vessels until manufacture is complete, as long understood by word "Distilling," truthfully use said word or words "Distillery," "Distilleries," or "Distillers" as a part of their corporate or trade names and on their stationery and advertising and on the labels of the bottles in which they sell and ship their products, or as purchasers, rectifiers, etc., of the whiskies, etc., dealt in by them, do not use such various words as above set forth—

Represented through use of word "Distilling" in its corporate name, printed on its stationery and advertising and on labels attached to bottles in which it sold and shipped its said products, and otherwise, to its customers, and furnished same with means of representing to their retailer-vendees and consuming public, that it was a distiller and that the whiskies, etc., contained as aforesaid, were by it made through process of distillation from mash, wort, or wash, as above set forth, notwithstanding fact it neither owned, operated, nor controlled any place where whiskies and other beverages were made by process of distillation from mash, wort, or wash, and was not a distiller;

With effect of misleading and deceiving dealers and purchasing public in aforesaid respect and into belief that said whiskies, gins, and other spirituous beverages sold by it were made and distilled by it from mash, wort, or wash, as aforesaid, and of inducing dealers and purchasing public, in such beliefs, to buy such whiskies, etc., bottled and sold by it, and of thereby diverting trade to it from competitors who do not, through their corporate or trade names or in any other manner, misrepresent themselves as manufacturers by distillation of such products, as above set forth, and with capacity and tendency so to mislead and deceive and induce such purchases; to the substantial injury of substantial competition in commerce:

Complaint

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Held, That such acts and practices, under the conditions and circumstances set forth, were to the prejudice and injury of the public and competitors and constituted unfair methods of competition.

Before *Mr. John L. Hornor*, trial examiner.

Mr. PGad B. Morehouse for the Commission.

Mr. Alfred D. Van Buren, of New York City, for respondent.

COMPLAINT

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, having reason to believe that Colonial Distilling and Distributing Corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to the said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business 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 now, and for more than one year last past has been, engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages and in the sale thereof in constant course of trade and commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of its said business, it causes its said products when sold to be transported from its place of business aforesaid into and through various States of the United States to the purchasers thereof, consisting of wholesalers and retailers located in other States of the United States and the District of Columbia. In the course and conduct of its business as aforesaid, respondent is now, and for more than one year last past has been, in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the manufacture by distillation of whiskies, gins, and other spirituous beverages and in the sale thereof in trade and commerce between and among the various States of the United States and in the District of Columbia; and in the course and conduct of its business as aforesaid, respondent is now, and for more than one year last past has been, in substantial competition with other corporations, and with individuals, firms, and partnerships engaged in the business of purchasing, rectifying, blending,

and bottling whiskies, gins, and other spiritous beverages and in the sale thereof in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business as aforesaid, respondent has upon its said premises a still which it uses in the production of gin by a process of rectification, whereby alcohol purchased but not produced by respondent is redistilled over juniper berries and other aromatics. Such rectification of alcoholic spirits does not make or constitute respondent a distiller as defined by Section 3247 of the Revised Statutes regulating Internal Revenue, nor as commonly understood by the public or the liquor industry. For a long period of time the word "distilling" when used in connection with the liquor industry and the products thereof has had and still has a definite significance and meaning to the minds of the wholesalers and retailers in such industry and to the ultimate purchasing public, to wit, the manufacturing of such liquors by the process of original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof is completed; and a substantial portion of the purchasing public prefers to buy spirituous liquors prepared and bottled by distillers.

PAR. 3. In the course and conduct of its business as aforesaid, by the use of the word "Distilling" in its corporate name, printed on its stationery and advertising, and on the labels attached to the bottles in which it sells and ships its said products, and in various other ways, respondent represents to its customers and furnishes them with the means of representing to their vendees, both retailers and the ultimate consuming public, that respondent is a distiller and that the whiskies, gins, and other spirituous beverages therein contained were by it manufactured through the process of distillation from mash, wort, or wash, as aforesaid, when, as a matter of fact, respondent is not a distiller, does not distill the said whiskies, gins, and other spirituous beverages by it so bottled, labeled, sold, and transported, and merely by the use of a still operated by it as aforesaid in the rectification of alcoholic spirits by redistillation over juniper berries and other aromatics does not distill the whiskies, gins, and other spirituous beverages by it so bottled, labeled, sold, and transported in the sense in which the word distilled is commonly accepted and understood by those engaged in the liquor trade and by the public. Respondent does not own, operate, or control any place or places where such beverages are manufactured by the process of distillation from mash, wort, or wash.

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PAR. 4. There are among the competitors of respondent engaged in the sale of spirituous beverages, as mentioned in paragraph 1 hereof, corporations, firms, partnerships, and individuals who manufacture and distill from mash, wort, or wash, as aforesaid, whiskies, gins, and other spirituous beverages sold by them and who truthfully use the words "distillery," "distilleries," "distillers," or "distilling," as a part of their corporate or trade names and on their stationery and advertising, and on the labels of the bottles in which they sell and ship such products. There are also among such competitors, corporations, firms, partnerships, and individuals engaged in the business of purchasing, rectifying, blending, bottling, and selling whiskies, gins, and other spirituous beverages who do not use the words "distillery," "distilleries," "distilling," or "distillers" as a part of their corporate or trade names, nor on their stationery or advertising, nor on the labels attached to the bottles in which they sell and ship their said products.

PAR. 5. Representation by respondent, as set forth in paragraph 3 hereof, is calculated to and has the capacity and tendency to and does mislead and deceive dealers and the purchasing public into the beliefs that respondent is a distiller and that the whiskies, gins, and other spirituous beverages sold by the respondent are manufactured and distilled by it from mash, wort, or wash, as aforesaid, and is calculated to and has the capacity and tendency to and does induce dealers and the purchasing public in such beliefs, to purchase the whiskies, gins, and other spirituous beverages bottled and sold by the respondent, thereby diverting trade to respondent from its competitors who do not by their corporate or trade names or in any other manner misrepresent that they are manufacturers by distillation from mash, wort, or wash, of such products, and thereby respondent does substantial injury to substantial competition in interstate commerce.

PAR. 6. The acts and things above alleged to have been done and the false representations alleged to have been made by respondent are to the prejudice of the public and the competitors of respondent and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the

Federal Trade Commission on June 28, 1935, issued, and on June 29, 1935, served its complaint in this proceeding upon respondent, Colonial Distilling and Distributing Corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer thereto, respondent applied for permission to withdraw its said answer and file in lieu thereof a substituted answer waiving hearings on the charges set forth in the complaint in this proceeding, stating that it does not contest the said proceeding and that it admits all of the material allegations of the complaint to be true, and that the Commission might, without further evidence or other intervening procedure, make, issue, and serve upon the respondent findings as to the facts and an order to cease and desist from the violations charged in the said complaint; and the Commission having duly considered the same and being fully advised in the premises, finds that this proceeding is in the interest of the public and makes this, its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business 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. For more than one year prior to January 1, 1935, it was engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages and in the sale thereof in constant course of trade and commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of its said business, it caused its said products when sold to be transported from its place of business as aforesaid into and through various States of the United States to the purchasers thereof, consisting of wholesalers and retailers located in other States of the United States and the District of Columbia. In the course and conduct of its business as aforesaid, respondent was in substantial competition with other corporations and with individuals, partnerships, and firms, engaged in the manufacture by distillation of whiskies, gins, and other spirituous beverages and in the sale thereof in trade and commerce between and among the various States of the United States and in the District of Columbia; and in the course and conduct of its business as aforesaid; respondent was in substantial competition with other corporations, and with individuals, firms, and partnerships engaged in the business of purchasing, rectifying, blending, and bottling

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whiskies, gins, and other spirituous beverages and in the sale thereof in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business as aforesaid, respondent had upon its said premises a still which it used in the production of gin by a process of rectification, whereby alcohol purchased but not produced by respondent was redistilled over juniper berries and other aromatics. Such rectification of alcoholic spirits does not make or constitute respondent a distiller as defined by Section 3247 of the Revised Statutes regulating Internal Revenue, nor as commonly understood by the public or the liquor industry. For a long period of time the word "distilling" when used in connection with the liquor industry and the products thereof has had and still has a definite significance and meaning to the minds of the wholesalers and retailers in such industry and to the ultimate purchasing public, to wit: the manufacturing of such liquors by the process of original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof is completed; and a substantial portion of the purchasing public prefers to buy spirituous liquors prepared and bottled by distillers.

PAR. 3. In the course and conduct of its business as aforesaid, by the use of the word "Distilling" in its corporate name, printed on its stationery and advertising, and on the labels attached to the bottles in which it sold and shipped its said products, and in various other ways, respondent represented to its customers and furnished them with the means of representing to their vendees, both retailers and the ultimate consuming public, that respondent was a distiller and that the whiskies, gins, and other spirituous beverages therein contained were by it manufactured through the process of distillation from mash, wort, or wash, as aforesaid, when, as a matter of fact, respondent was not a distiller, does not now and never did distill the said whiskies, gins, and other spirituous beverages by it so bottled, labeled, sold, and transported, and merely by the use of a still operated by it as aforesaid in the rectification of alcoholic spirits by redistillation over juniper berries and other aromatics did not distill the whiskies, gins and other spirituous beverages by it so bottled, labeled, sold and transported in the sense in which the word "distilled" is commonly accepted and understood by those engaged in the liquor trade and by the public. Respondent does not now and never did own, operate, or control any place or places where such beverages were manufactured by the process of distillation from mash, wort, or wash.

PAR. 4. There were among the competitors of respondent engaged in the sale of spirituous beverages, as mentioned in paragraph 1 hereof, corporations, firms, partnerships, and individuals who manufactured and distilled from mash, wort, or wash, as aforesaid, whiskies, gins, and other spirituous beverages sold by them and who truthfully used the words "distillery," "distilleries," "distillers," or "distilling" as a part of their corporate or trade names and on their stationery and advertising, and on the labels of the bottles in which they sold and shipped such products. There were also among such competitors, corporations, firms, partnerships, and individuals engaged in the business of purchasing, rectifying, blending, bottling, and selling whiskies, gins, and other spirituous beverages who did not use the words "distillery," "distilleries," "distilling," or "distillers," as a part of their corporate or trade names, nor on their stationery or advertising, nor on the labels attached to the bottles in which they sold and shipped their said products.

PAR. 5. Representation by respondent, as set forth in paragraph 3 hereof, was calculated to and had the capacity and tendency to and did mislead and deceive dealers and the purchasing public into the beliefs that respondent was a distiller and that the whiskies, gins, and other spirituous beverages sold by the respondent were manufactured and distilled by it from mash, wort, or wash, as aforesaid, and was calculated to and had the capacity and tendency to and did induce dealers and the purchasing public in such beliefs, to purchase the whiskies, gins, and other spirituous beverages bottled and sold by the respondent, thereby diverting trade to respondent from its competitors who did not by their corporate or trade names or in any other manner misrepresent that they were manufacturers by distillation from mash, wort, or wash, of such products, and thereby respondent did substantial injury to substantial competition in interstate commerce.

The records of the Commissioner of Internal Revenue show no interstate shipments to have been made by this respondent since January 1, 1935. It appears that all the assets of respondent were seized by the Collector of Internal Revenue on August 1, 1935, and later sold on September 13, 1935, to satisfy unpaid taxes, and since that time this concern has not engaged in business. Its corporate charter, however, is still existent and the Commission has no assurance that in the absence of a prohibitive order this respondent may not at some future time renew the violations of law herein charged and admitted to be true by respondent.

PAR. 6. Because of existing regulations, and regulations proposed under the Federal Alcohol Administration Act approved August 29,

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1935 (49 Stat. 977), and which regulations are presently expected to become effective as of August 15, 1936, providing that rectifiers who redistill purchased alcohol over juniper berries and other aromatics may label such resulting product "distilled gin," and requiring that the labels state who distilled it, the Commission has excepted gins produced by respondent by redistillation of alcohol over juniper berries and other aromatics from the prohibitions of its order.

CONCLUSION

The aforesaid acts and practices of the said respondent, under the conditions and circumstances hereinbefore described, were to the prejudice of the public and respondent's competitors, and were unfair methods of competition in interstate commerce, constituting a violation 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

The respondent herein having filed its answer to the complaint in this proceeding and having subsequently filed with this Commission its application that it be permitted to withdraw its said answer and file in lieu thereof, as a substituted answer, the draft of answer annexed to the said application; and the Commission having duly considered the same.

It is hereby ordered, That the said application be and the same is hereby granted; that the said answer be and the same is hereby withdrawn, and that the said substituted answer be and the same is hereby filed in lieu of the answer so withdrawn.

And the said respondent, in and by its said substituted answer, having waived hearings on the charges set forth in the complaint in this proceeding, and having stated in its said substituted answer that it does not contest the said proceeding and that it admits all of the material allegations of the complaint to be true, and that the Commission may, without further evidence or other intervening procedure, make, issue, and serve upon the respondent findings as to the facts and an order to cease and desist from the violations of law charged in the complaint; and the Commission having made its findings as to the facts and its conclusion that said 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 hereby further ordered, That the respondent, Colonial Distilling and Distributing Corporation, its agents, salesmen, and employees, in connection with the offering for sale or sale by it in interstate commerce of whiskies, gins, and other spirituous beverages, except gins produced by it through a process of rectification whereby alcohol purchased but not produced by respondent is redistilled over juniper berries and other aromatics, do cease and desist from:

Representing, through the use of the work "Distilling" in its corporate name, on its stationery, advertising or on the labels attached to the bottles in which it sells and ships said products, or in any other way by word or words of like import, (a) that it is a distiller of whiskies, gins, or any other spirituous beverages; (b) that the said whiskies, gins, or other spirituous beverages were by it manufactured through the process of distillation; or (c) that it owns, operates, or controls a place or places where any such products are by it manufactured by a process of original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof is completed, unless and until respondent shall actually own, operate or control such a place or places.

It is further ordered, That the said respondent, within 30 days from and after the date of the service upon it of this order, shall file with the Commission a report or reports in writing setting forth in detail the manner and form in which it is complying and has complied with the order to cease and desist hereinabove set forth.

IN THE MATTER OF
FOSTER-MILBURN COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914

Docket 2711. Complaint, Feb. 3, 1936—Decision, Aug. 27, 1936¹

Where a corporation engaged in manufacture and sale of an extensively advertised medicinal, kidney preparation, under designation "Doan's Pills"; in advertising said medicine—

- (a) Represented that having trouble with too frequent bladder passages, with scanty amount causing burning and discomfort, meant that the 15 miles of kidney tubes needed washing out and that such passage might be a danger signal and mean loss of vitality, through statements contained in advertising headed "WASH OUT 15 MILES OF KIDNEY TUBES, Win back pep—vigor—vitality"; and
- (b) Represented that if kidney did not empty three pints every day and get rid of four pounds of waste matter body would take up such poison and cause serious trouble and "may knock you out and lay you up for many months", and that its said preparation would give quick relief and wash out said 15 miles of tubes;

Facts being that backaches, leg pains, and various symptoms described in its said advertisements might not be produced by failure of kidney to excrete a definite volume of urine, but be traced to causes other than diseases of kidney, and statement as to daily excretion was decidedly exaggerated and said tubes cannot be washed out, and medicine at most may cause stimulation of activities thereof, with result that they will be flushed, and claim that said preparation will enable patient to win back pep, vigor, and vitality was likewise exaggerated, since while regular functions of kidney may increase person's well being it will not bring about such conditions in sense understood from said words by average person in everyday life;

With effect of misleading and deceiving purchasing public into belief that said preparation had curative properties as claimed, and was a remedy for or gave relief in diseases and ailments named, without qualification or limitation, and with tendency and capacity so to do, and induce members of public to purchase and use such preparation because of erroneous belief engendered as above set forth, and to divert trade to it from competitors, among whom there are those who in no wise misrepresent therapeutic results of their competing products, and with effect of so diverting, to substantial injury of competitors and that of the public:

Held, That such acts and practices, under the conditions and circumstances set forth, were all to the injury and prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Robert S. Hall*, trial examiner.

Mr. William L. Pencke for the Commission.

Denning & Cross, of Washington, D. C., for respondent.

¹ Order published as modified as of Sept. 5, 1936.