

IN THE MATTER OF
PROVINCIAL DISTILLERIES, LTD., INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SEC. 3
OF TITLE I OF AN ACT OF CONGRESS APPROVED JUNE 16, 1933¹

Docket 2404. Complaint, May 22, 1935—Decision, June 8, 1937

Where a corporation engaged in rectifying and bottling, at its rectifying plant and under rectifier's permit, whiskies, gins, and other spirituous beverages, and in producing gin with still used therefor by redistillation of purchased alcohol, not produced by it, over juniper berries and other aromatics, and in selling its aforesaid various products to wholesalers and distributors in various States other than State of origin and in District of Columbia, in substantial competition with those engaged in manufacture by true distillation of whiskies, gins, and other spirituous beverages from mash, wort, or wash, and in sale thereof in trade and commerce among the various States and in the District of Columbia, and with those engaged in purchasing, rectifying, blending, and bottling such various beverages in rectifying plants and under rectifiers' permits, and in similarly selling same, and including among its said competitors those who, as manufacturers and distillers by original and continuous distillation of mash, wort, or wash through closed pipes and vessels until manufacture is complete, of whiskies, gins, and other spirituous beverages sold by them, truthfully use words "distillery," "distilleries," "distilling," 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 said products, and those who, engaged in purchasing, rectifying, blending, and bottling such various products in their respective rectifying plants and under their rectifiers' permits, do not use aforesaid words as above set forth—

Represented, through use of word "Distilleries" in its corporate name, printed on its stationery and catalogs and on the labels attached to the bottles in which it sold and shipped its said products, and in various other ways, to its customers, and furnished them with the means of representing to their vendees, both retailers and consuming public, that it was a distiller, and that the said whiskies, gins, cordials, brandies, and other alcoholic beverages contained in such bottles were by it made through process of distillation from mash, wort, or wash, notwithstanding fact it did not own, operate, or control any place or places where such beverages are made by process of original and continuous distillation from mash, wort, or wash, as long definitely understood from word "Distilleries" when used in connection with liquor industry and products thereof, by trade and ultimate purchasing public, as meaning place where spirituous liquors are made by original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until manufacture is complete, and was not a distiller, requirements of which, in the way of bond, plant, etc., are more exacting and extensive than in case of rectifier, and for the

¹ Count two of the complaint, under the National Industrial Recovery Act, dismissed.

purchase of the bottled liquors of which there is a preference on the part of a substantial portion of the purchasing public;

With effect of misleading and deceiving dealers and purchasing public into the beliefs that it was a distiller or distilling company in the ordinarily accepted sense thereof, and that the whiskies, gins, and other spirituous beverages sold by it were by it made or distilled from mash, wort, or wash by one continuous process, and of inducing dealers and purchasing public, acting in such beliefs, to buy the whiskies, gins, and other alcoholic beverages rectified and bottled by it, and with tendency to give it an unfair competitive advantage over those of its competitors who do not, through use of such terms in their trade or corporate names, represent the packages of alcoholic liquor offered to retailer, and in turn to consumer, as a distillery-bottled package, and thereby to divert trade to it from such competitors; to the substantial injury of competition in commerce:

Held, That such acts and practices were to the prejudice of the public and competitors and constituted unfair methods of competition.

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

Mr. PGad B. Morehouse and *Mr. DeWitt T. Puckett* for the Commission.

Mr. R. E. Joyce, of Washington, D. C., 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 Provincial Distilleries Ltd., Inc., a 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 in violation of the Act of Congress approved June 16, 1933, known as the "National Industrial Recovery 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:

Count 1

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under the laws of the State of New York, with its office and principal place of business in the city of Brooklyn in said State. It is now, and since October 1934 has been, engaged in the business of manufacturing and bottling whiskies, gins, and other spirituous beverages in a rectifying plant under a rectifier's permit 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 distributors, some located within the State of New York and some 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 since October 1934 has been, in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the manufacture by true distillation of whiskies, gins, and other spirituous beverages from mash, wort, or wash 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, and since October 1934 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 spirituous beverages in rectifying plants under rectifiers' permits 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. Upon the premises of respondent's place of business aforesaid, there is a still for use in the production of gins by a process of rectification whereby alcohol, purchased but not produced by respondent, is re-distilled over juniper berries and other aromatics. Such rectification of alcoholic spirits does not make or constitute respondent a distillery or a distiller, as defined by Section 3247 of the Revised Statutes regulating Internal Revenue, nor as commonly understood by the public and the liquor industry. For a long period of time the word "distillery" when used in connection with the liquor industry and with the products thereof has had and still has a definite significance and meaning to the minds of wholesalers and retailers in such industry and to the ultimate purchasing public, to wit, a place where such alcoholic liquors are manufactured by an original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof is complete, and a substantial portion of the purchasing public prefers to buy spirituous liquors bottled and prepared by the actual distillers and manufacturers thereof.

PAR. 3. In the course and conduct of its business as aforesaid, by the use of the word "Distilleries" in its corporate name printed on its stationery 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 the said whiskies, gins, and other spirituous beverages therein contained were by it manufactured through the process of distillation from mash, wort, or wash, 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 re-distillation 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 the public. Respondent does not own, operate or control any place or places where such alcoholic beverages are manufactured by a process of original and continuous distillation from mash, wort, or wash.

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 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, 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 and bottling whiskies, gins, and other spirituous beverages in rectifying plants under rectifiers' permits who do not use the words "distillery," "distilleries," "distilling," or "distillers" as a part of their corporate or trade names, nor on their stationery, advertising nor on the labels attached to the bottles in which they sell and ship their said products.

PAR. 5. The representation by respondent, as set forth in paragraph 3 hereof, is calculated to and has a capacity and tendency to and does mislead and deceive dealers and the purchasing public into the belief that the whiskies, gins, and other spirituous beverages sold by the respondent are manufactured and distilled by it from mash, wort, or wash by one continuous process and is calculated to and has the capacity and tendency to and does induce dealers and the purchasing public, acting in such belief, to purchase the whiskies, gins, and other spirituous beverages rectified and bottled by the respondent, thereby diverting trade to respondent from its competitors who do not by their corporate or trade name or in any

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other manner misrepresent that they are manufacturers by distillation from mash, wort, or wash of whiskies, gins or other spirituous beverages, 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.

Count 2

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under the laws of the State of New York, with its office and principal place of business in the city of Brooklyn in said State. It is now, and since October 1934 has been, engaged in the business of manufacturing and bottling whiskies, gins, and other spirituous beverages in a rectifying plant under a rectifier's permit 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 distributors, some located within the State of New York and some 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 since October 1934 has been, in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the manufacture by true distillation of whiskies, gins, and other spirituous beverages from mash, wort, or wash 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, and since October 1934 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 spirituous beverages in rectifying plants under rectifiers' permits and in the sale thereof in commerce between and among the various States of the United States and in the District of Columbia.

PARS. 2, 3, 4 and 5. As grounds for these paragraphs of this complaint, the Federal Trade Commission relies upon the matters and things set out in paragraphs 2, 3, 4, and 5 of count 1 of this complaint to the same extent as though the several allegations thereof were set out at length and in separate paragraphs herein, and the said paragraphs 2, 3, 4, and 5 of count 1 of this complaint are incorporated herein by reference and adopted as the allegations of paragraphs 2, 3, 4, and 5, respectively, of this count, and are hereby charged as fully and as completely as though the several averments of the said paragraphs of count 1 were separately set out and repeated verbatim.

PAR. 6. Under and pursuant to Title I of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 195 C. 90), the President of the United States, by Executive Order No. 6182, of June 26, 1933, as supplemented by Executive Order No. 6207, of July 21, 1933, and Executive Order No. 6345, of October 20, 1933, delegated to H. A. Wallace as Secretary of Agriculture certain of the powers vested in the President of the United States by the aforesaid act.

Under and pursuant to the delegation of such powers, the said Secretary of Agriculture pursuant to Section 3 (d) of the Act and Executive orders under the act, upon his own motion presented a Code of Fair Competition for the Distilled Spirits Rectifying Industry after due notice and opportunity for hearing in connection therewith had been afforded interested parties, including respondent, in accordance with Title I of the National Industrial Recovery Act and applicable regulations issued thereunder, to the President of the United States who approved the same on the 9th day of December, 1933, thereby constituting the said code a Code of Fair Competition within the meaning of the said National Industrial Recovery Act, for the regulation of the aforesaid industry.

In his written report to the President, the said Secretary of Agriculture made, among others, the following findings with respect to the said Code in the following words, to wit:

That said Code will tend to effectuate the declared policy of Title I of the National Industrial Recovery Act as set forth in Section 1 of said Act in that the terms and provisions of such Code tend: (a) to remove obstructions to the free flow of foreign commerce, which tend to diminish the amount thereof; (b) to provide for the general welfare by promoting the organization of industry for the purposes of cooperative action among trade groups; (c) to eliminate unfair competitive practices; (d) to promote the fullest possible utilization of the present productive capacity of industries; (e) to avoid undue restriction of production (except as may be temporarily required); (f) to

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increase the consumption of industrial and agricultural products by increasing purchasing power; and (g) otherwise to rehabilitate industry.

By his approval of the said Code on December 9, 1933, the President of the United States, pursuant to the authority vested in him by Title I of the National Industrial Recovery Act aforesaid, made and issued his certain written Executive order, wherein he adopted and approved the report, recommendations and findings of the said Secretary of Agriculture, and ordered that the said Code of Fair Competition be, and the same thereby was approved, and by virtue of the National Industrial Recovery Act aforesaid, the following provision of Article V of said Code became and still is one of the standards of fair competition for the Distilled Spirits Rectifying Industry and is binding upon every member of said Industry and this respondent:

The following practices constitute unfair methods of competition and shall not be engaged in by any member of the industry:

SECTION 1. *False Advertising.*—To publish or disseminate in any manner any false advertisement of any rectified product. Any advertisement shall be deemed to be false if it is untrue in any particular, or if directly or by ambiguity, omission or inference it tends to create a misleading impression.

PAR. 7. The use by respondent of the word "Distilleries" in its corporate name, printed on its stationery and on the labels attached to the bottles in which it sells and ships such products and in various other ways, constitutes false advertising within the meaning of the aforesaid provision of said Article V and tends to and does create the misleading impression that respondent is engaged in the business of distilling whiskies, gins, and other spirituous beverages from mash, wort, or wash and that the whiskies, gins, and other spirituous beverages by it so sold and transported have been bottled by the original distillers thereof and have been produced by a true process of distillation from mash, wort, or wash, all contrary to the provisions of Section 1, Article V, of the Code aforesaid.

PAR. 8. The above alleged methods, acts and practices of the respondent are and have been in violation of the standard of fair competition for the Distilled Spirits Rectifying Industry of the United States. Such violation of such standard in the aforesaid transactions in interstate commerce and other transactions which affect interstate commerce in the manner set forth in paragraph 5 of count 1 hereof, are in violation of Section 3 of Title I of the National Industrial Recovery Act and they are unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act as amended.

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 May 22, 1935, issued and on May 23, 1935, served its complaint in this proceeding upon respondent Provincial Distilleries, Ltd., Inc., 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, testimony and other evidence in support of the allegations of the said complaint were introduced by PGad B. Morehouse and DeWitt T. Puckett, attorneys for the Commission, before John L. Hornor, an examiner of the Commission theretofore duly designated by it, and in opposition to the allegations of the complaint by R. E. Joyce, attorney for the respondent; and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and other evidence and brief in support of the complaint (no brief in opposition thereto having been filed and no oral argument having been made); and the Commission having duly considered the foregoing and being now 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 office and principal place of business at the city of Brooklyn in that State. It is now, and since October 1934, has been, engaged in the manufacturing and bottling of whiskies, gins, and other spirituous beverages in a rectifying plant under a rectifier's permit and in the sale thereof in the 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 distributors, located in various States of the United States other than the State of origin of said shipments, and in the District of Columbia. In the course and conduct of its business, as aforesaid, respondent is now, and since October 1934, has been in substantial competition with

other corporations and with individuals, partnerships, and firms engaged in the manufacture by true distillation of whiskies, gins, and other spirituous beverages from mash, wort, or wash, 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 and since October 1934, 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 spirituous beverages in rectifying plants under rectifiers' permits, and in the sale thereof in commerce between and among the various States of the United States and in the District of Columbia.

Respondent's corporation was organized in December 1933, with \$50,000 fully paid in capital which was later increased to \$200,000, which has since all been paid in. Its plant is located at No. 1027 Forest Street and occupies an entire city block. It is equipped with very large modern equipment. Respondent has its own artesian well and distills all of the water used in its manufacturing. It has a very large warehouse and large stocks of whiskey which it purchases from various distilleries. Up to January 11, 1935, 95% of respondent's business consisted of the rectification of whiskies, and respondent specialized in five brands, namely: Sunny Ridge Straight, Provincial Maryland Straight Rye, City Athletic Club Blended, Provincial Blended, Auld Petrie Blended Scotch Whiskey.

Respondent's production of "Auld Petrie Blended Scotch Whiskey" is under the supervision of a Mr. L. R. Chambers, an official of Southard & Company, Ltd., of London, England, who is chairman of respondent's board of directors, and under an agreement which provides that the said scotch whiskey is to be made under a formula supplied by Southard & Company, and that Mr. Chambers will visit the United States at least once a year to supervise the manufacture and production of this product.

PAR. 2. Upon the premises of respondent there is a still for use in the production of gins 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 distillery or a distiller, as defined by Section 3247 of the Revised Statutes regulating internal revenue. This gin still has a capacity of 2400 gallons, and there is also one registered 75-gallon still for cordials. There are upon said premises three storage tanks, each with a capacity of 2600 gallons, six storage tanks of 1100 gallons and three tanks of

1100 gallons each for bottling, in addition to six 50-gallon tanks for use in the manufacture of cordials. Up to January 11, 1935, no gin had been produced. Production of gin by the above described process began on the 15th day of March 1936, and during June, July, and August, 1936, respondent had produced approximately 6,858 proof gallons of gin, constituting approximately 81% of its total volume by gallons of spirits handled.

"Rectifying" in the distilled spirits rectifying industry means the mixing of whiskies of different ages or types or the mixing of other ingredients with whiskies, but reducing proof of whiskey by adding water is not rectifying. Rectifiers also blend whiskies with neutral spirits (grain alcohol).

Many distillers operate a separate establishment 600 feet or more away from their distillery, known as a rectifying plant, wherein they operate in the same manner as described above, for a rectifier—sometimes exclusively with spirits of their own distillation and sometimes with spirits purchased from other distillers or both. Some distilleries have a tax paid bottling room on the distillery bonded premises wherein their distilled spirits are bottled straight as they come from the still, or in a bonded warehouse after aging, or after reduction of proof. Any rectifying by a distiller, however, must be done in his rectifying plant under his rectifier's permit. On all bottled liquors, whether bottled at the distillery or at any rectifying plant, appear the words "bottled" or "blended" (as the case may be) "by the ----- Company." If the distilled spirits therein contained are bottled by a distiller either in his distillery or spirits of his own distillation bottled in his rectifying plant, the distiller may and does put "distilled and bottled by ----- Company." If, in the distiller's rectifying plant, other spirits have been blended or rectified, he puts on the bottle "blended and bottled by ----- Company."

Finally, blown in the bottom of each bottle is a symbol, consisting of a letter followed by a number, identifying the bottler, viz, a "D" for a distillery and "R" for a rectifier, the number following said letter corresponding with the distiller's or rectifier's permit. Thus "R-62" designates this respondent. A distiller who also operates a rectifying plant, having both kinds of permits, may use either symbol depending upon whether the liquor contained in the bottle was produced and bottled under his distiller's or his rectifier's permit. This number is placed on the bottle to identify the bottler. Subsequently to the issuance of the complaint herein, and, on the 6th day of February 1936, pursuant to proper application approved by the requisite governmental authorities, there was issued to respondent by the

Federal Alcohol Administration a basic distiller's permit, No. D-700, authorizing it to distill spirituous beverages from mash, wort or wash, but up to the present time respondent has not distilled any spirituous beverages and has not commenced operations under the aforesaid basic permit. Since the issuance of respondent's basic distiller's permit it can and may place the symbol "D-700" on the bottles in which it sells and ships its liquors, but it has not yet done so.

A distiller has a maximum bond of \$100,000, and is permitted to have untaxed liquors. The average bond of the rectifier is about \$5,000. A distiller must own the fee title to the premises upon which the business is conducted, or have consent from the owner waiving the owner's interest so that the government can have a first lien upon that property for taxes. A distillery is under constant general supervision by storekeeper gaugers who are always there. Absolute supervision is maintained over the bonded warehouse of a distillery and the rectifying plant; the premises are not locked, and general supervision is maintained over the bottling and rectification. The primary distinction is that one storekeeper gauger may take care of several rectifying plants, but at the distillery he is in constant supervision, primarily to supervise the tax payments. A rectifier is not permitted to store spirits in bond. A distiller produces spirits from grain, alcohol, molasses, and fruits, but a rectifier produces no distilled spirits whatever and must obtain them from the producer or from someone holding warehouse certificates. The requirements are considerably more detailed in the case of a distiller than in the case of a rectifier.

A distiller must have a distillery, which must be a complete building, and a warehouse, a separate building; he must have the necessary weighing equipment, grain hopper, cooker, cooking equipment, mash tubs, fermenters, sufficient distilling equipment to take care of his continuous distillation until the spirits are run through the pipe lines into the receiving tanks; and at the warehouse he must have the weighing and testing instruments for checking and many other things. A rectifier is not required to have a separate building. A rectifying plant may consist of a room without a building. He needs no bonded warehouse. If one room, it would have to be divided into three separate rooms by wire mesh partitions. The regulations for the equipment of a rectifier are not so specific as those for a distiller.

Knowledge of these details is not widespread among the retail trade and is very limited among the general public. All whiskies, whether coming from a distillery or rectifier, are generally conceded to be "distilled" products.

It therefore is not possible to determine from the presence of the phrase "blended and bottled by" alone or the phrase "bottled by"

alone on the label whether the package was bottled by a rectifier who is a distiller, or by a rectifier who is not a distiller.

This respondent does not now and never has produced or manufactured distilled spirits of any kind from mash or raw materials, although its charter would authorize it so to do. Its rectifier's permit authorizes it to engage in the business of rectifying and blending, and is conditioned upon compliance by respondent with all applicable regulations made pursuant to law, which are or may hereafter be in force.

The rectification of alcoholic spirits by this respondent as aforesaid in the production of its gin, does not make or constitute it a distiller or a distilling company as defined by Sec. 3247 of the Revised Statutes of the United States regulating Internal Revenue.

PAR. 3. The testimony of those having long experience in both the distilled spirits rectifying industry and the distilling industry, established, and the Commission finds that the foregoing rectification of alcoholic spirits by redistillation over juniper berries and other aromatics in the production of gin does not make or constitute this respondent a distilling company in the sense commonly understood by the liquor industry or by the general public. A large number of witnesses who were lay-members of the purchasing public, 22 in number, with few exceptions testified to the effect that from such terms as "distilling" or "distillery" or "distillers" used in the trade or corporate name of a concern handling alcoholic beverages, they understood such concern to be engaged in the initial distilling process of producing spirituous or alcoholic beverages from fermented grain or mash, and that they had a preference for a distillery-bottled package over one bottled by a rectifier.

The Commission finds that for a long period of time the word "distillery" when used in connection with the liquor industry and with the products thereof has had and still has a definite significance and meaning to the minds of wholesalers and retailers in such industry and to the ultimate purchasing public, to wit, the place where spirituous liquors are manufactured by an original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof is complete, and a substantial portion of the purchasing public prefers to buy spirituous liquors bottled and prepared by the distillers.

PAR. 4. In the course and conduct of its business as aforesaid, by the use of the word "distilleries" in its corporate name, printed on its stationery, catalogs 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 it is a distiller and that the said whiskies, gins, cordials, brandies, and other alcoholic beverages therein contained were by it manufactured through the process of distillation from mash, wort, or wash, when, as a matter of fact, respondent is not a distiller in the sense in which such term 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 spirituous beverages are manufactured by a process of original and continuous distillation from mash, wort, or wash, and therefore cannot truthfully designate itself as "Provincial Distillers."

PAR. 5. There are, among the competitors of respondent, engaged in the sale of spirituous beverages as mentioned in Paragraph One hereof corporations, firms, partnerships, and individuals who manufacture or distill from mash, wort, or wash, whiskies, gins, and other spirituous beverages sold by them and who truthfully use the word "distillery," "distilleries," "distillers," or "distilling" as a part of their corporate or trade names and on their stationery, 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, and bottling whiskies, gins, and other spirituous beverages in rectifying plants under rectifiers' permits who do not use the words "distillery," "distilleries," "distilling," or "distillers" as a part of their corporate or trade name, nor on their stationery, advertising, nor on the labels attached to the bottles in which they sell and ship their said products.

PAR. 6. The record discloses two instances where wholesale customers of respondent purchased liquors from respondent while they were under the impression from the name of respondent that respondent had a distillery in the sense above used, and one of them, a Mr. I. J. Rosbeck of Coughlin & Company testified that the use by respondent of such term in its name had a very definite influence upon the small business which that company had done with the respondent.

The Commission finds that the representations by respondent, as set forth in paragraph 4 hereof, have the capacity and tendency to and do mislead and deceive dealers and the purchasing public into the beliefs that respondent is a distiller or distilling company in the ordinarily accepted sense of those terms, and that the whiskies, gins, and other spirituous beverages sold by respondent are manufactured

or distilled by it from mash, wort, or wash by one continuous process and have the capacity and tendency to and do induce dealers and the purchasing public acting in such beliefs, to purchase the whiskies, gins, and other alcoholic beverages rectified and bottled by the respondent. The Commission finds that the whole situation in this industry is such that the foregoing representations have a distinct tendency to give respondent what amounts to unfair competitive advantage over those of its competitors who do not, by the use of such terms in their trade or corporate names, represent that the package of alcoholic liquor offered to the retailer and in turn to the consumer, is a distillery bottled package and this in turn tends to divert trade to respondent from such competitors and thereby respondent does substantial injury to competition in interstate commerce.

PAR. 7. Because of existing regulations promulgated under the Federal Alcohol Administration Act approved August 29, 1935 (49 Stat. 977), 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.

PAR. 8. The Commission's complaint in this case was issued prior to the decision of the United States Supreme Court in the case of *A. L. A. Schechter Poultry Corporation, et al. vs. United States* (295 U. S. 495), and contained two counts. Count one specifically charged a violation of the Federal Trade Commission Act, and count two charged that the practices of respondent, as hereinbefore set out, were unfair methods within the meaning of the Federal Trade Commission Act because they were in violation of Section 3 of Title I of the National Industrial Recovery Act, which was invalidated by the aforesaid decision. For that reason the Commission is dismissing the complaint as to count two thereof.

CONCLUSION

The aforesaid acts and practices of the respondent Provincial Distilleries, Ltd., Inc., are to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition in commerce, within the intent and meaning of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

Order

25 F. T. C.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testimony and other evidence taken before John L. Hornor, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, brief filed herein by PGad B. Morehouse and DeWitt T. Puckett, counsel for the Commission (no brief having been filed on behalf of respondent, and no oral argument having been made), 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 ordered, That the respondent, Provincial Distilleries, Ltd., Inc., its officers, representatives, agents, and employees, in connection with the offering for sale or sale and distribution by it in interstate commerce or in the District of Columbia of whiskies, gins, or 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 word "distilleries" 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 other spirituous beverages; or (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 complaint be, and the same hereby is dismissed as to count 2 thereof.

It is further ordered, That the said respondent within 60 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.

Syllabus

IN THE MATTER OF
MENASHA WOODEN WARE CORPORATION ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914

Docket 2650. Complaint, Dec. 10, 1935—Decision, June 8, 1937

Where five corporations and an individual engaged in the manufacture and sale of more than ninety percent of the total volume of new butter tubs sold in interstate commerce in the United States, and, prior to acts and practices hereinafter set forth, in active competition with one another in sale of said products in commerce among the several States—

- (a) Entered into a combination and conspiracy to restrict, restrain and suppress competition in interstate sale of said products by fixing and maintaining, pursuant to agreements and understandings, expressed or implied, uniform prices, terms, and discounts at which said tubs were to be sold to creameries and other customers located throughout the several States, and to enforce and maintain said fixed prices, terms, and discounts by exchanging, through their council, information as to prices, etc., at which they were selling and offering their said products; and in pursuance of said combination, etc., and incident thereto, and as a means of carrying out the same
- (1) Jointly or cooperatively fixed, adopted, and quoted uniform prices, terms, and discounts at which such tubs were to be sold, as above set forth, throughout the States, and thus enforced and maintained said fixed prices, etc., by exchanging information through said council as to prices, etc., at which they were selling and offering to sell butter tubs, as hereinabove stated;
- (2) Jointly or cooperatively exchanged with each other, directly or through the medium of their said council, future sales price information, including future prices in advance of the actual adoption, quotation or effective date thereof, and reports as to sales of butter tubs, together with prices, discounts, and terms at which sold or offered in interstate commerce;
- (3) Jointly or cooperatively adopted special lists of preferred customers to whom extra discounts on butter tubs were to be allowed, and thus exchanged with one another, directly or through their said council, future sales price information as aforesaid, including lists of preferred customers, jobbers or brokers; and
- (4) Jointly or cooperatively discriminated against a cooperative association which served some 400 to 450 customer creamery members and some 800 to 1,000 non members by purchase and sale in large quantities of various items of equipment and supplies used by creameries, did an annual business of about \$1,500,000, published a catalog listing 1,200 items, including butter tubs, and performed the usual services rendered by jobbers and which, except as below noted, received usual jobber's commissions on all items handled by it, by withholding therefrom the usual and customary jobber's discount on sales of butter tubs made by it; and