

Syllabus

IN THE MATTER OF

JAMES R. KAYE, TRADING AS THE LO-WELL PENCIL
COMPANY AND THE LO-WELL COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4318. Complaint, Sept. 17, 1940—Decision, Nov. 29, 1940*

Where an individual engaged in sale of pencils, carbon paper, and other merchandise, to purchasers in other States, and in also giving or selling premiums to his customers as an inducement for purchasing his products, and including among such premiums, which varied from time to time, various types of merchandise, including, among other things, novelty merchandise, fountain pens, pencil sharpeners, cameras, and electric razors; in offering such different premiums at different periods of time and in engaging in the practice of representing falsely, to induce purchase of pencils and carbon paper or other merchandise sold and distributed by him, quality, material, construction, durability and other characteristics of the various premiums offered to purchasers of his regular merchandise—

- (a) Represented, as typical of false statements and representations disseminated by circulars and other printed matter distributed and circulated by him among prospective customers in various States and in the District of Columbia, that certain fountain pens given or sold by him as premiums had points or nibs made of or covered with substance known as "iridium" and were of high quality, and that certain of them had pen points made or covered with substance known as "durium," through such statements or representations as "Genuine Iridium Nibs," "Fine Quality," and "Durium Pointed," facts being points of said pens were not tipped or covered with, or made of, some special alloy or special substance of unusual quality, giving them special writing quality and durability, as implied through use, as aforesaid, of word "Durium," nor tipped or covered with "Iridium," there is no metal or substance known to science or industry as "Durium," and pens in question were not of fine quality but, on the contrary, of a very low, cheap grade; and
- (b) Made a practice, as further typical of his methods in connection with operation of his business, of placing in circulars above described pictorial representations purporting to illustrate cameras offered as premiums, facts being cameras sent by him to customers were not of grade and quality pictured in said circulars, but were of inferior grade and quality to, and different from, those illustrated therein, both from standpoint of materials used and workmanship; and

Where said individual, in conducting his said business and in offering pencils or one of his regular items of merchandise—

- (c) Made such representations, as further typical of his methods and practices in conducting his said business, in describing such items in circulars above set forth, as "100% first quality in every respect," "New," "Better," "Outwears ordinary pencils," and "New record-breaking price reduction," facts being his said pencils were not in any respect comparable to those of

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first quality or grade, selling generally at retail for 5 cents each, but were either second or third grade and of type which ordinarily sells at retail at price of 2½ cents each, his said products, represented as new and better than ordinary pencils, were not new in sense of being a different product from those which had been sold by him and others theretofore, and were no better than others of a similar grade, and would not outwear such other pencils, and his said product, represented as being sold at a new record-breaking price, was in fact being sold at a price higher than that of similar pencils theretofore sold by him;

With effect of misleading and deceiving members of purchasing public in the various States into the mistaken and erroneous belief that his said false, misleading, and deceptive statements and representations were true, and of inducing members of such public, because of said erroneous belief engendered as above set forth, to purchase substantial quantities of his said products, and with result of diverting unfairly trade to him from his competitors engaged in sale of similar products in commerce, and who do not misrepresent their products but advertise same truthfully and honestly:

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

Mr. L. E. Creel, Jr., for the Commission.

Mr. James W. Bevans, of New York City, for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that James R. Kaye, an individual trading as The Lo-Well Pencil Co. and The Lo-Well Co., hereinafter referred to as respondent, has violated the provisions of the said act, and it appearing to the 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 James R. Kaye is an individual trading as The Lo-Well Pencil Co. and The Lo-Well Co. with his principal place of business located in the city of New York in the State of New York. Respondent is now and for more than 1 year last past has been engaged in the business of selling pencils, carbon paper, and other merchandise in commerce among and between the various States of the United States. He causes, and has caused, said merchandise when sold to be shipped from his place of business in the State of New York to purchasers thereof located in States other than New York. In the course and conduct of his business respondent has been at all times herein referred to in competition with other individuals and with firms, partnerships, and corporations likewise engaged in the sale and distribution in commerce of similar products.

PAR. 2. In the course and conduct of his business the respondent gives or sells premiums to his customers as an inducement for their purchasing his products. At different periods of time, in promoting the sale of his products, respondent offers as premiums in connection therewith various types of merchandise, including among other novelty merchandise, fountain pens, pencil sharpeners, cameras, and electric razors. Although respondent offers different premiums at different periods of time, he continues to use the same general method in connection with said offering and with respect to the other practices hereinafter described.

PAR. 3. In the course of the operation of his business and for the purpose of inducing the purchase of pencils and carbon paper or other merchandise which he sells and distributes, respondent has engaged in the practice of falsely representing the quality, material, construction, durability, and other characteristics of the various premiums he offers to purchasers of his regular merchandise. Such false statements and representations are disseminated by means of circulars and other printed matter distributed and circulated among prospective customers located in various States of the United States and in the District of Columbia.

Among and typical of respondent's false representations as to the quality and material of his said premiums are the following relating to fountain pens appearing in various advertisements disseminated as aforesaid:

Genuine Iridium Nibs

Fine Quality

Durium pointed

By means of the above representations and others similar thereto not specifically set out herein, the respondent represents that certain fountain pens given or sold by him as premiums have points or nibs made of or covered with the substance known as Iridium and are of high quality, and that certain of them have pen points made or covered with a substance known as "Durium."

In truth and in fact, said points of respondent's fountain pens are not tipped or covered with substances known as Iridium or Durium. Said fountain pens are not of fine quality, but on the contrary are of a very low, cheap grade. The use of the word "Durium" in the representations purporting to describe the points of certain of respondent's fountain pens, as hereinbefore set out, creates the impression or belief that said pen points are made of some special alloy or are tipped with some special substance of unusual quality, giving said points a special writing quality and durability. In truth

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and in fact, there is no metal or substance known to science or industry as "Durium."

PAR. 4. Further typical of respondent's methods in connection with the operation of his business is his practice of placing in the circulars hereinabove described pictorial representations purporting to illustrate cameras which are offered as premiums. The cameras which are, in fact, sent to customers by respondent are not of the grade and quality pictured in said circulars but are of inferior grade and quality to, and different from, those illustrated in the circulars, both from the standpoint of materials used and workmanship.

PAR. 5. Further typical of respondent's methods and practices in conducting his said business is his practice of falsely representing to prospective purchasers, in the circulars hereinabove described, the quality of one of his regular items of merchandise, namely, pencils. In describing said product, respondent has made the following representations:

100% first quality in every respect

New

Better

Outwears ordinary pencils

New record-breaking price reduction

In truth and in fact, respondent's pencils are not 100 percent first quality, being either second or third grade, and not in any respect comparable to pencils of first quality. Respondent's said pencils are of the type which ordinarily sells at retail at a price of 2½ cents each, while first grade pencils generally sell at retail for 5 cents each. Respondent's said pencils represented to be "new" and "better" than ordinary pencils are not new in the sense of their being a different product from those which had been sold by respondent and others before said representation was made; they are no better than others of a similar grade and will not outwear other pencils of similar grade. Respondent's further representation that certain of his said pencils are being sold at a new record-breaking price is likewise untrue, said pencils in fact being sold at a higher price than that of similar pencils theretofore sold by the respondent.

PAR. 6. The use by respondent of the aforesaid false, misleading and deceptive statements and representations has the tendency and capacity to and does mislead and deceive members of the purchasing public situated in various States of the United States into the mistaken and erroneous belief that such statements and representations are true. Because of said erroneous belief engendered as aforesaid,

members of the purchasing public have been induced to purchase substantial quantities of respondent's said products, As a further result of said false and misleading representations, trade has been unfairly diverted to the respondent from his competitors engaged in the sale of similar products in commerce between and among the various States of the United States and in the District of Columbia, and who do not misrepresent their products but advertise the same truthfully and honestly.

PAR. 7. The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act the Federal Trade Commission on September 17, 1940, issued, and on September 18, 1940, served its complaint in this proceeding upon respondent James R. Kaye charging him with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer the Commission by order entered herein granted respondent's motion for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of fact set forth in said complaint and waiving all intervening procedure and further hearing as to said facts, which substitute answer was duly filed in the office of the Commission. Thereafter this proceeding regularly came on for final hearing before the Commission on the said complaint and substitute answer and the Commission having duly considered the matter 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 James R. Kaye is an individual trading as The Lo-Well Pencil Co. and The Lo-Well Co., with his principal place of business located in the city of New York in the State of New York. Respondent is now and for more than 1 year last past has been engaged in the business of selling pencils, carbon paper, and other merchandise in commerce among and between the various

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States of the United States. He causes, and has caused, said merchandise, when sold, to be shipped from his place of business in the State of New York to purchasers thereof located in States other than New York. In the course and conduct of his business respondent has been at all times herein referred to in competition with other individuals and with firms, partnerships, and corporations likewise engaged in the sale and distribution of similar products in commerce among and between the several States of the United States.

PAR. 2. In the course and conduct of his business the respondent gives or sells premiums to his customers as an inducement for their purchasing his products. At different periods of time, in promoting the sale of his products, respondent offers as premiums in connection therewith various types of merchandise including, among other novelty merchandise, fountain pens, pencil sharpeners, cameras and electric razors. Although respondent offers different premiums at different periods of time, he continues to use the same general method in connection with said offering and with respect to the other practices hereinafter described.

PAR. 3. In the course of the operation of his business and for the purpose of inducing the purchase of pencils and carbon paper or other merchandise which he sells and distributes, respondent has engaged in the practice of falsely representing the quality, material, construction, durability and other characteristics of the various premiums he offers to purchasers of his regular merchandise. Such false statements and representations are disseminated by means of circulars and other printed matter distributed and circulated among prospective customers located in various States of the United States and in the District of Columbia.

Among and typical of respondent's false representations as to the quality and material of his said premiums are the following relating to fountain pens appearing in various advertisements disseminated as aforesaid:

Genuine Iridium Nibs

Fine Quality

Durium pointed

By means of the above representations and others similar thereto not specifically set out herein, the respondent represents that certain fountain pens given or sold by him as premiums have points or nibs made of or covered with the substance known as Iridium and are of high quality, and that certain of them have pen points made or covered with a substance known as "Durium."

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In truth and in fact, said points of respondent's fountain pens are not tipped or covered with substances known as Iridium or Durium. Said fountain pens are not of fine quality, but on the contrary are of a very low, cheap grade. The use of the word "Durium" in the representations purporting to describe the points of certain of respondent's fountain pens, as hereinbefore set out, creates the impression or belief that said pen points are made of some special alloy or are tipped with some special substance of unusual quality, giving said points a special writing quality and durability. In truth and in fact, there is no metal or substance known to science or industry as "Durium."

PAR. 4. Further typical of respondent's methods in connection with the operation of his business is his practice of placing in the circulars hereinabove described pictorial representations purporting to illustrate cameras which are offered as premiums. The cameras which are, in fact, sent to customers by respondent are not of the grade and quality pictured in said circulars but are of inferior grade and quality to, and different from, those illustrated in the circulars, both from the standpoint of materials used and workmanship.

PAR. 5. Further typical of respondents' methods and practices in conducting his said business is his practice of falsely representing to prospective purchasers, in the circulars hereinabove described, the quality of one of his regular items of merchandise, namely, pencils. In describing said product, respondent has made the following representations:

100% first quality in every respect

New

Better

Outwears ordinary pencils

New record-breaking price reduction.

In truth and in fact, respondent's pencils are not 100 percent first quality, being either second or third grade, and not in any respect comparable to pencils of first quality. Respondent's said pencils are of the type which ordinarily sells at retail at a price of $2\frac{1}{2}$ cents each, while first grade pencils generally sell at retail for 5 cents each. Respondent's said pencils represented to be "new" and "better" than ordinary pencils are not new in the sense of their being a different product from those which had been sold by respondent and others before said representation was made; they are no better than others of a similar grade and will not outwear other pencils of similar grade. Respondent's further representation that certain of his said

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pencils are being sold at a new record-breaking price is likewise untrue, said pencils in fact being sold at a higher price than that of similar pencils theretofore sold by the respondent.

PAR. 6. The use by respondent of the aforesaid false, misleading, and deceptive statements and representations has the tendency and capacity to and does mislead and deceive members of the purchasing public situated in various States of the United States into the mistaken and erroneous belief that such statements and representations are true. Because of said erroneous belief engendered as aforesaid, members of the purchasing public have been induced to purchase substantial quantities of respondent's said products. As a further result of said false and misleading representations, trade has been unfairly diverted to the respondent from his competitors engaged in the sale of similar products in commerce between and among the various States of the United States and in the District of Columbia, and who do not misrepresent their products but advertise the same truthfully and honestly.

CONCLUSION

The aforesaid acts and practices of respondent as herein found are all to the prejudice and injury of the public and of respondent's competitors, and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer of respondent, in which answer respondent admits all the material allegations of fact set forth in said complaint and states that he waives all intervening procedure and further hearing as to said facts, and the Commission having made its findings as to the facts and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent James R. Kaye, individually and trading as The Lo-Well Pencil Co. and The Lo-Well Co., his representatives, agents, and employees, directly or through any corporate or other device in connection with the offering for sale, sale and distribution of pencils, carbon paper and various types of premiums in commerce as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from representing in any manner or by any means:

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1. That pencils are of first quality unless such pencils are in fact of the kind and quality usually sold at retail as and known as 5-cent pencils.

2. That a line of pencils is new unless there are features about such pencils which distinguish them from pencils which have theretofore been sold by respondent.

3. That a line of pencils is "better" unless such pencils are of a higher quality than those which have theretofore been sold by respondent.

4. That respondent's pencils will outwear ordinary pencils unless such pencils possess wearing qualities greater than those of pencils usually sold at retail as 5-cent pencils.

5. That pencils are being sold at reduced prices unless in fact such pencils are being offered for sale at a price lower than the prices at which they are usually and customarily sold by respondent.

6. That the quality, grade, or material of his products or of the various premiums offered by him are superior to or different from the actual quality, grade, or material of such products or premiums.

It is further ordered, That the respondent shall, within 60 days after service upon him of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which he has complied with this order.

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IN THE MATTER OF

H. STANLEY JONES, H. EDWIN JONES AND MAURICE C. BERKELEY, DOING BUSINESS AS HOWARD E. JONES & CO., KING FOODS COMPANY, BALTIMORE SALES SERVICE COMPANY, BALTIMORE MACARONI COMPANY, AND OCONO COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. (C) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT OF CONGRESS APPROVED JUNE 19, 1936

Docket 4215. Complaint, Aug. 2, 1940—Decision, Nov. 30, 1940

Where three individuals engaged as partners and under various trade names, in business of acting as brokers in sale of food products, and particularly canned fruits and vegetables, and also engaged in buying and selling such products for their own account, and in buying, selling, and distributing, in the course of their said businesses, such food products in commerce among the various States, and in causing products purchased by them for their own account to be shipped and transported to them from sellers' various places of business, including, in case of many, those located and doing business in other States, and in causing products sold for their own account to be shipped and transported to their customers located and doing business, in case of many, also in other States—

Received, in course and conduct of their aforesaid business of buying food products for their own account, as above set forth, and trading under various firm names and styles, from numerous sellers, brokerage fees or allowances or discounts in lieu thereof on many of their said own account purchases:

Held, That said individuals, in receiving and accepting brokerage fees or allowances or discounts in lieu thereof from sellers upon their purchases of commodities as above set forth, violated provisions of section 2 (c) of Clayton Act, as amended by the Robinson-Patman Act.

Mr. S. G. Churchill, for the Commission.

Allers & Cochran, of Baltimore, Md., for respondents.

COMPLAINT

Pursuant to the provisions of an act of Congress, approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act (U. S. C., title 15, sec. 13), as amended by an act of Congress, approved June 19, 1936, commonly known as the Robinson-Patman Act, the Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof and hereinafter more particularly designated and described, since June 19, 1936, have been and are now violating