

IN THE MATTER OF
MANHATTAN BREWING COMPANY¹

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

Docket 4572. Complaint, Aug. 20, 1941—Decision, Apr. 5, 1946

Where a corporation, engaged at Chicago in the brewing of ale and beer, including its "Canadian Ace Brand Beer" and "Canadian Ace Brand Ale," and for a time its "Old Wisconsin Lager Brand Beer," and in competitive interstate sale and distribution of its products to wholesalers and retailers, restaurants, taverns, and other purchasers—

(a) Featured the word "Canadian" or the words "Canadian Ace" in extensively

¹ The findings and order are published as modified by the following order of the Commission dated April 5, 1946, namely:

"This proceeding came on for hearing before the Federal Trade Commission on the complaint, answer of respondent, testimony and other evidence, report of the trial examiner, briefs in support of the complaint and in opposition thereto, and oral arguments of counsel. The Commission, after duly considering the matter and finding that the proceeding was in the public interest, made, entered, and served upon respondent and duly recorded and filed in the office of the Commission on September 7, 1943, its findings as to the facts, its conclusion drawn therefrom and its order to cease and desist.

"Subsequently thereto, and after the statutory time allowed for the filing of a petition for review of said proceeding had expired, the Commission, on the 27th day of March 1946, duly notified respondent to appear and show cause why this proceeding should not be reopened and the findings of facts and order to cease and desist be altered, modified, and set aside, in part, in the manner and terms therein set forth.

"Respondent, on the 1st day of April 1946, having filed a waiver of hearing and its consent to the entry of an order modifying the findings of facts and the order to cease and desist in the manner set forth in the order to show cause, and the Commission having duly considered the matter and being now fully advised in the premises, and being of the opinion that the public interest requires that said findings of facts and order to cease and desist be altered, modified, and set aside, in part.

"It is now ordered, That this proceeding be, and the same hereby is, reopened.

"It is further ordered, That the second sentence of the second paragraph of paragraph 7 of the said findings of fact be, and the same hereby is, set aside, and the following finding substituted in lieu thereof:

"The Commission is of the opinion, however, and finds that these legends as heretofore used are too inconspicuous and inadequate to adequately explain or qualify the word "Canadian," so as to prevent deception or confusion in the mind of a substantial portion of the public."

"It is hereby further ordered, That paragraph 1 of said order to cease and desist be, and the same hereby is, set aside, and the following order substituted in lieu thereof:

"Using any brand or trade name containing the word "Canadian" or any simulation thereof, to designate, describe, or refer to any beer or ale which is not brewed in Canada unless accompanied in immediate connection and conjunction therewith by suitable statements clearly, conspicuously, and adequately informing prospective purchasers and the public that such beer or ale is brewed in the United States of America; or otherwise representing directly or by implication, that beer or ale which is not brewed in Canada is brewed in that country."

"It is further ordered, That the said findings as to the facts and conclusion and order to cease and desist, modified as hereinbefore set forth, shall be as follows:"

[Here follow the modified findings, and modified order, as published herewith, followed by concurring opinion of Commissioner Mason, dissenting opinions of Chairman Ayres, concurred in by Commissioner Davis, and further dissenting opinion of Chairman Ayres, all as set forth herein.]

advertising said brand of beer and ale in point-of-sale advertising—supplied to retailer for display or distribution to the public, including menu covers and sheets, table display cards, place cards and coasters, paper table napkins, leaflets, booklets, and large show-window placards—and also, to a limited extent, in radio advertising and in a trade journal, and featured said words likewise in labels on bottles or other containers in which its said beer was packaged and sold;

The facts being, its said products were not, as thus represented, imported Canadian brewed, preferred by a substantial portion of the purchasing public over such products brewed in the United States, particularly so in those States nearest Canada, but, like its other products, were brewed in Chicago; and inconspicuous and inadequate legends used were incapable of explaining or qualifying word "Canadian" so as to prevent deception or confusion in the minds of the public; and

(b) Falsely represented, through use of word "Wisconsin" as a part of one of its aforesaid brand names, that its Chicago-made product was a Wisconsin-brewed beer, preferred by a substantial portion of the purchasing public over beers originating in other States; and

(c) Falsely represented for a time that it was a Royal Warrant holder enjoying the patronage of the British Royal family or some member thereof, and therefore entitled to display the British Royal coat of arms on its products, through use, in connection with sale of its said Canadian Ace Brand Beer and Ale, of a crest simulating said royal coat of arms, and through displaying same also on the labels of the bottles involved;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public in aforesaid respects, and with result of causing it to purchase substantial quantities of products in question as a result of said erroneous belief; whereby trade was diverted unfairly to it from its competitors, many of whom did not use aforesaid practices and methods:

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

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

Mr. DeWitt T. Puckett for the Commission.

McHale, Arthur, Myers & Patrick, of Indianapolis, Ind., 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 Manhattan Brewing Co., a corporation, 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, Manhattan Brewing Co., is a corporation,

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organized under the laws of the State of Illinois, is now and for several years last past has been engaged in the brewing and in the sale and distribution of beer and ale, with its brewery and principal office located at 3901 Emerald Avenue, Chicago, Ill.

In the course and conduct of its business as aforesaid, respondent causes and for several years last past has caused its said products, when sold, to be transported from its said place of business in Chicago, Ill., to the purchasers thereof located in various States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said products in commerce between and among the various States of the United States and in the District of Columbia.

The respondent is now, and at all times mentioned herein has been, in substantial competition with other corporations, and with partnerships and individuals engaged in the sale and distribution of beer and ale in commerce between and among the various States of the United States and in the District of Columbia. Among said competitors are many who do not use the acts, practices, and methods hereinafter alleged.

PAR. 2. In the course and conduct of its business as aforesaid, the respondent has represented and now represents in newspaper advertising circulated among prospective purchasers of its said products, located in the various States of the United States, by means of labels attached to the containers in which its products are offered for sale and sold, by means of placards, napkins, menus, and in various other ways, that some of its beer and ale is imported from Canada and that other of its said products are brewed in the State of Wisconsin. Among and typical of the advertising statements and representations used and disseminated as aforesaid are the following:

In "The News," a newspaper published in Elmira, N. Y., the following advertisement appeared:

ELMIRA
HAS IT AT LAST!

Your Restaurant Has it!
Your Club and Cafe Serve It!
Your Hotel Has It!
Your Package Store Has It!
Your Home Should Have It!

CANADIAN
Ace Brand
ALE
Extra Pale

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(Picture of bottle showing label.)

Substantially the same advertisement appeared in the "Boston Daily Record," a newspaper published in the city of Boston, Mass., and substantially the same advertisement concerning respondent's "Canadian Ace Brand Beer" appeared in the "Beer Distributor," a trade publication circulated throughout the United States.

A placard used by respondent in advertising its "Canadian Ace Beer" contains the following:

The Symbol of the Finest Beer

CANADIAN ACE

Beer Brings You

An Outstanding Superiority in Drinking Enjoyment!

All the goodness of choice ingredients plus the skill of expert blending produced Canadian Ace Beer.

Enjoy the uniform, subtle smoothness and delicious flavor of a prime beverage "brewed to your taste"—

Convince yourself by trying a bottle today.

On the reverse side of the placard appears the following:

Get my Companion by Buying

CANADIAN

ACE BEER

The Good Companion for Beer Enjoyment

(Picture of beer bottle which shows in large letters "Canadian Ace Beer" and in small letters the word "Brand".)

On the main or large label affixed to the bottles in which one of respondent's beers is offered for sale and sold is the statement "Old Wisconsin Brand Lager Beer," the word "Brand" being in letters about half the size of the other words in the statement. The next label used on said bottle contains only the words "Old Wisconsin."

On the label attached to the bottle in which another of respondent's beers is offered for sale and sold appear the words "Canadian Beer." Diagonally across the bottom of said label appears the word "Imported" followed by the word "Hops" in much smaller and less conspicuous print. The same phraseology appears on the sticker around the neck of said bottle.

Affixed to the bottles in which other of respondent's products are offered for sale and sold appear the expressions "Canadian Ace Brand Ale" or "Canadian Ace Brand Beer." In every instance in which the

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word "Canadian" appears said word is featured by appearing in bolder type and in the most conspicuous place on the labels or advertising matter.

Table napkins and menus distributed by respondent bear some or all of the above expressions, pictures, and designs.

PAR. 3. Through the use of the aforesaid representations and others of similar import not specifically set out herein, the respondent represents and has represented, directly or by implication, that some of its aforesaid products are imported from the Dominion of Canada and that other of its said products are brewed in the State of Wisconsin. In truth and in fact, respondent's aforesaid products were not and are not imported from the Dominion of Canada or brewed in the State of Wisconsin.

PAR. 4. There is a marked preference on the part of a substantial portion of the purchasing public for beer and ale imported from the Dominion of Canada. There is likewise a marked preference on the part of a substantial portion of the purchasing public for beer and ale brewed in the State of Wisconsin. Such preference is based in part on a belief by said purchasing public that such beer and ale are superior in quality to beer and ale brewed elsewhere.

PAR. 5. A picture of a crest or coat of arms closely resembling the British royal coat of arms appears in some of respondent's advertising matter used in connection with the sale of its beer and ale as aforesaid.

There is a preference on the part of a portion of the purchasing public for merchandise bearing the British royal coat of arms. Such preference is based upon a belief that the manufacturer or distributor of such merchandise is a royal warrant holder and enjoys the patronage of the British royal family or a member thereof.

PAR. 6. The use by the respondent of the aforesaid words, legends, pictures, and designs, in connection with the sale of its said products, has the capacity and tendency to cause, and has caused, a substantial portion of the purchasing public erroneously to believe that some of respondent's said products are imported from the Dominion of Canada and that other of its said products are brewed in the State of Wisconsin. Furthermore, the use by respondent of the aforesaid coat of arms, in the manner set forth above, has the capacity and tendency to cause, and has caused, a substantial portion of the purchasing public erroneously to believe that said respondent is a royal warrant holder and entitled to use the British coat of arms. As a result of the aforesaid acts and practices, a substantial portion of the purchasing public has been misled and deceived and trade has been diverted unfairly to the respondent from its competitors with the result that substantial injury

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has been done and is being done by respondent to competition in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 7. The aforesaid acts and practices of the 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 within the intent and meaning of the Federal Trade Commission Act.

ORDER REOPENING THIS PROCEEDING AND ALTERING, MODIFYING, AND SETTING ASIDE, IN PART, THE FINDINGS OF FACT AND ORDER TO CEASE AND DESIST

This proceeding came on for hearing before the Federal Trade Commission on the complaint, answer of respondent, testimony and other evidence, report of the trial examiner, briefs in support of the complaint and in opposition thereto, and oral arguments of counsel. The Commission, after duly considering the matter and finding that the proceeding was in the public interest, made, entered, and served upon respondent and duly recorded and filed in the office of the Commission on September 7, 1943, its findings as to the facts, its conclusion drawn therefrom, and its order to cease and desist.

Subsequent thereto, and after the statutory time allowed for the filing of a petition for review of said proceeding had expired, the Commission, on the 27th day of March 1946, duly notified respondent to appear and show cause why this proceeding should not be reopened and the findings of facts and order to cease and desist be altered, modified, and set aside, in part, in the manner and terms therein set forth.

Respondent, on the 1st day of April 1946, having filed a waiver of hearing and its consent to the entry of an order modifying the findings of facts and the order to cease and desist in the manner set forth in the order to show cause, and the Commission having duly considered the matter and being now fully advised in the premises, and being of the opinion that the public interest requires that said findings of facts and order to cease and desist be altered, modified, and set aside, in part,

It is now ordered, That this proceeding be, and the same hereby is, reopened.

It is further ordered, That the second sentence of the second paragraph of paragraph 7 of the said findings of fact be, and the same hereby is, set aside, and the following finding substituted in lieu thereof:

The Commission is of the opinion, however, and finds that these legends as heretofore used are too inconspicuous and inadequate to adequately explain or qualify the word "Canadian," so as to prevent deception or confusion in the mind of a substantial portion of the public.

It is hereby further ordered, That paragraph 1 of said order to cease and desist be, and the same hereby is, set aside, and the following order substituted in lieu thereof:

Using any brand or trade name containing the word "Canadian" or any simulation thereof, to designate, describe, or refer to any beer or ale which is not brewed in Canada unless accompanied in immediate connection and conjunction therewith by suitable statements clearly, conspicuously, and adequately informing prospective purchasers and the public that such beer or ale is brewed in the United States of America; or otherwise representing directly or by implication, that beer or ale which is not brewed in Canada is brewed in that country.

It is further ordered, That the said findings as to the facts and conclusion and order to cease and desist, modified as hereinbefore set forth, shall be as follows:

REPORT, MODIFIED FINDINGS AS TO THE FACTS, AND ORDER

PARAGRAPH 1. The respondent, Manhattan Brewing Co., is a corporation organized under the laws of the State of Illinois, with its principal office and place of business located at 3901 Emerald Avenue, Chicago, Ill. Respondent is now and for a number of years last past has been engaged in the brewing of beer and ale, and in the sale and distribution of such products to wholesale and retail dealers, restaurants, taverns, and other purchasers.

PAR. 2. In the course and conduct of its business, respondent causes and has caused its products, when sold, to be transported from its place of business in the State of Illinois to purchasers thereof located in various other States of the United States. Respondent maintains and has maintained a course of trade in its products in commerce among and between various States of the United States.

PAR. 3. Respondent is and at all times mentioned herein has been in substantial competition with other corporations and with partnerships and individuals engaged in the sale and distribution of beer and ale in commerce among and between various States of the United States.

PAR. 4. Among the various brands of beer and ale brewed and sold by respondent is a beer designated by respondent as "Canadian Ace

Brand Beer" and an ale designated by respondent as "Canadian Ace Brand Ale." The beer was placed on the market in 1939 and the ale in the early part of 1941. Respondent formerly sold another brand of beer designated by it as "Old Wisconsin Lager Brand Beer." This beer was placed on the market in September 1939, but was discontinued in the spring of 1941.

PAR. 5. Respondent advertises its Canadian Ace Brand beer and ale extensively, most of the advertising being what is known as point-of-sale advertising, that is, advertising supplied to the retail seller for display or distribution to the public. The various advertising media used include menu covers and sheets, table display cards, place cards and coasters, paper table napkins, leaflets, booklets, and large show window placards. Radio advertising has also been employed to a limited extent, and at least one advertisement was inserted in a trade journal having general circulation among beer distributors. In all of this advertising the word "Canadian" or the words "Canadian Ace" have been featured. These words are also featured in the labels on the bottles or other containers in which the beer is packaged and sold.

PAR. 6. The Commission finds that the use by respondent of the word "Canadian" as a part of the brand or trade name for these products constitutes a representation that the products are of Canadian origin; that is, that they are brewed in the Dominion of Canada and imported into the United States. Not only does this conclusion necessarily result from a consideration of the word itself, but it is supported also by the testimony of a number of witnesses at the hearings, including both persons in the trade and members of the purchasing public. Neither the beer nor the ale is in fact brewed in Canada, both being brewed by respondent at its place of business in Chicago along with various other products. The evidence further shows, and the Commission finds, that there is a preference on the part of a substantial portion of the purchasing public for beer and ale which is brewed in Canada over that brewed in the United States, this preference being found particularly in those States of the United States which lie nearest the Dominion of Canada.

PAR. 7. Early in 1940 respondent began placing on its labels the words "Made in the U. S. A.," these words appearing at the lower right-hand corner of the label and being imprinted in white on a red background. In the lower left-hand corner of the label there appear in small type the words "Brewed and Bottled by Manhattan Brewing Co., Chicago, Illinois." Also in some of its advertising material respondent has inserted certain expressions such as "Made in

the U. S. A.," and "An American beer in the best Canadian tradition." Some of the advertising also carries a picture of the bottle showing the current label.

It is urged by respondent that the use of these words on the labels and in the advertising, particularly the use on the labels of the words "Made in the U. S. A.," is sufficient to correct any erroneous impression which might otherwise be conveyed through the use of the word "Canadian," and that in consequence, there is no deception of the public. The Commission is of the opinion, however, and finds that these legends as heretofore used are too inconspicuous and inadequate to adequately explain or qualify the word "Canadian," so as to prevent deception or confusion in the mind of a substantial portion of the public.

PAR. 8. The Commission finds further that the former use by respondent of the word "Wisconsin" as a part of the brand name for one of its products constituted a representation that the beer so designated was brewed in the State of Wisconsin. This beer was not in fact brewed in Wisconsin, but was brewed by respondent at its place of business in Chicago. There is a preference on the part of a substantial portion of the purchasing public for beer which is brewed in Wisconsin over that having its origin in other States of the United States.

PAR. 9. In connection with the sale of its Canadian Ace Brand beer and ale, respondent has also made use of a crest simulating the British royal coat of arms, such crest being displayed both in certain of respondent's advertising material and in the labels of the bottles. The use of this crest constituted a representation that respondent was a royal warrant holder, enjoying the patronage of the British royal family or some member thereof, and was therefore entitled to display the British royal coat of arms on its products. Respondent has not at any time been a royal warrant holder and was not authorized to make use of such crest. There is a preference on the part of a substantial portion of the purchasing public for merchandise bearing the British royal coat of arms. In 1942 respondent made material changes in the crest, with the result that the similarity between the crest and the British royal coat of arms was eliminated.

PAR. 10. The Commission finds further that the use by respondent of the word "Canadian" and the word "Wisconsin" in designating and describing its products, and the use of the crest simulating the British royal coat of arms, as herein set forth, has or has had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to the origin of such products and

with respect to respondent's business identity and status, and the tendency and capacity to cause such portion of the public to purchase substantial quantities of respondent's products as a result of the erroneous and mistaken belief so engendered. In consequence thereof, substantial trade has been diverted unfairly to the respondent from its competitors, among whom are many who do not use the practices and methods herein described.

CONCLUSION

The acts and practices of the respondent as herein found are all 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 the Federal Trade Commission Act.

MODIFIED ORDER TO CEASE AND DESIST

It is ordered, That the respondent, Manhattan Brewing Co., a corporation and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of respondent's beer and ale in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using any brand or trade name, containing the word "Canadian" or any simulation thereof, to designate, describe, or refer to any beer or ale which is not brewed in Canada unless accompanied in immediate connection and conjunction therewith by suitable statements clearly, conspicuously, and adequately informing prospective purchasers and the public that such beer or ale is brewed in the United States of America; or otherwise representing directly or by implication, that beer or ale which is not brewed in Canada is brewed in that country.

2. Using any brand or trade name containing the word "Wisconsin," or any simulation thereof, to designate, describe, or refer to any beer which is not brewed in the State of Wisconsin; or otherwise representing, directly or by implication, that beer which is not brewed in Wisconsin is brewed in that State.

3. Representing, directly or by implication, that beer or ale brewed in the United States is imported from any foreign country.

4. Using any pictorial representation which simulates in appearance the British royal coat of arms.

It is further ordered, That the respondent shall, within 60 days after service upon it of this modified order, file with the Commission

a report in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioners Ferguson, Freer, and Mason voting in the affirmative, and Commissioners Ayres and Davis voting in the negative and dissenting to all the foregoing action.

An opinion by Commissioner Mason and a dissenting opinion by Commissioner Ayres, concurred in by Commissioner Davis, are attached.

OPINION OF COMMISSIONER LOWELL B. MASON

This is the opinion of Lowell B. Mason, a Federal Trade Commissioner, concurring in the judgment of Commissioners Ferguson and Freer.

This case comes up on a motion entered by me on February 26, 1946, for the Commission to amend the findings and order heretofore entered on the 7th of September 1943.

Businessmen are entitled to know why Commissioners decide cases the way they do. Therefore, I shall write or concur in opinion, particularly when judgments involve any new or changed views of the Commission. This is not a break in precedent. The Commissioners broke the precedent established by the courts of the land for generations when from 1914 to 1920 they did not accompany their judgments with reasoned opinions.

As Lord Chancellor Parker said two centuries ago: "Let all people be at liberty to know what I found my judgment upon; that so, when I have given it in any cause, others may be at liberty to judge of me."

Also, I shall try to write my opinions in plain English devoid of legal jargon. There will be no citations of cases. Citations are cryptic. They give a learned appearance to decisions, but lawyers seldom look them up, and businessmen don't know how.

The Federal Trade Commission is the "Businessman's Court." Therefore, this opinion, like all others, should be so clear that it will not be necessary for a businessman to refer to the judgment of other courts, in other cases, to find out my reasoning in this.

To begin with:

This is a case about a beer-bottle label.

A brewery wants to continue selling a beer they call "Canadian Ace." The Federal Trade Commission said (of course, neither the FTC nor the brewery can talk—I am just cutting away the legal foliage to get at the trunk of the matter): "You can't do that to the

public, because people might get fooled about where the beer came from."

Well, that made sense.

The brewery admitted the FTC was right. So they said, "We will make changes in the picturization and phrasing of the label and add a big red 'Made in U. S. A.' if the Commission will let us keep our brand name."

Why did they want to hang on to that name? Because the brewery had been selling beer under that name since 1939; because the brewery had been told by the Alcohol Tax Unit (another branch of the Government) that their label was O. K.; because the brewery had spent three quarters of a million dollars advertising the name and building up public acceptance of the trade-mark—naturally they hated to throw all that money and effort out of the window just because another branch of the Government in 1943 decided their label was not all right.

"And besides," said the brewery, "nobody ever has been fooled," which, if true, made their side of the argument sound very reasonable.

But the Federal Trade Commission still claimed somebody might be fooled and that even with the "Made in U. S. A.," the label "had the capacity" to deceive. So the Commission replied, "Anyway, that's all we have to prove to get an order against you," which is undoubtedly the truth, because, you see, Congress passed a law which the courts say gives the Commission the right to stop an advertisement that has the "tendency" to mislead. You get the difference—ads that deceived someone and ads that tend to deceive someone?

Here's an example which shows the difference.

Few wives give their husbands black eyes, but many upon odd occasions may "tend" in that direction. The police department doesn't arrest many women for blacking their husbands' eyes, but if the police were required under the law to use no discretion but arrest every woman who had that tendency or that capacity, we would close down the shops, cripple manufacturing and almost completely destroy family life. So here: Just how far shall the FTC go in searching out and preventing false "tendencies" and "capacities" in advertising?

Certainly it is better to lock the barn before the horse is stolen and, of course, that's why Congress gave the FTC the power to stop wrongs before they actually happened. This all makes for a very virtuous business world—at least, on the statute books. But there are so many advertisements in this world, and each "has the capacity and tendency" to do different things to different people!

Take for instance the beer label in this case. If I were a competitor and saw a bottle of beer with the label "Canadian Ace," I might "tend" to write the FTC complaining that the label was fraudulent.

If I were a thirsty tramp and saw the label, I would have the "tending" to beg, borrow, or steal a bottle. This of itself is bad and should be stopped, but, fortunately, the FTC lacks jurisdiction here.

A teetotaler would say the label "tended" to make him disgusted.

And so on down the roll call of humanity; each person feeling different—some joyful—some mad—and some indifferent.

Congress has given us the power out of all this welter of emotions to seek out and stop all advertising that has the tendency and capacity to deceive.

We are no moral Gargantuas, and consequently this feast of authority has at times been bad for the Commission's digestion. With the leavening of moderation lacking, we might stuff ourselves on the indigestible parsing, phrasing and syntax of too much advertising language while many vital questions of fair dealing in business remain untasted on the table.

The present question is not whether the Commission has the power to ban advertising which may "tend" to deceive; that question was answered by Congress and affirmed by the courts.

The question is, shall we extend that power to words in themselves regardless of qualification or explanation, as was done by the ancient Hebrews when it was unlawful even to pronounce the sacred Tetragrammaton? Congress gave great power to the Commission, but we must remember Congress also gives the power to search your home!

A police officer may obtain (under certain legal restrictions) the right to break into a man's castle to arrest him. But this power by its overwhelming scope presupposes a restraint, which hedges about its use all the protection against unwarranted interference with life, liberty, and property. The authority to break into the home of a man to arrest him does not give carte blanche to smash the piano or tear up the rugs.

We, too, should observe this restraint. There should be no relaxing of caution just because the Commission deals with intangibles instead of pianos. Those intangible things called "good will" and "name acceptance" are the commodities whose legality we pass upon here. We, too, must go only so far in dealing with them as to prevent or remedy a wrong, and no further.

An unbridled, intemperate wielding of this power to prohibit the

use of words makes us grasp at much while we secure little. This case is a good example. The order heretofore entered banned the words "Canadian Ace" regardless of how they were explained or qualified. In my opinion, this type of authoritarian decree is not just.

Injustice always has plenty of precedent to maintain its position.

Take for instance all this stuff about prohibiting words. It is not as new as you might think. In the Biblical time of "Josephus," the Tetragrammaton, a Greek compound which designated the divine name composed of the four Hebrew letters JHVH, was not allowed to even be pronounced. It was considered too sacred for utterance.

A bill was introduced in Congress in 1806 to incorporate a national academy to police our language. Thomas Jefferson refused the Presidency of this organization saying, "Judicious neology can alone give strength and copiousness to language and enable it to be the vehicle of new ideas."

Which I take to mean: Jefferson thought we ought to be allowed to make up fresh words and apply new meanings to old words if we expected our language to progress. Daniel Webster also rebelled against the effort to police English from above. Today Polynesian tribes place taboos on certain words, especially proper names. And in this country, there are words which are not uttered in the presence of ladies. But these prohibitions are dictated by custom and are enforced by good taste, rather than by civil penalties. On the other hand, if we were to let the order in this case stand, the brewery would be subject to a penalty of \$5,000 for each violation in its use of the words "Canadian Ace, Made in U. S. A."

What is there in these four words and three initials so fraught with evil as to warrant such action?

It is obvious that this case is important to all businessmen, not just to beer labelers. While you are not concerned with the personal welfare of a brewer who ran afoul of the Federal Trade Commission, you are concerned with the judgments of a quasijudicial body whose decisions, proclaimed to be in the public interest, may next fall on your head.

All restraints, whether warranted or unwarranted, are taken by Government in the name of protecting the public. The line between actual protection of the people and just plain "busybodiness" has generally been made plain to the courts by examining the impact of an injury to the public welfare, such as an injury to competition or the fraud upon a customer. These things can be seen as it were with the naked eye, but since the Federal Trade Commission has been endowed by Congress with the power to protect the public from

things which have the "capacity" and "tendency" to injure, the line between beneficial restraints and puritanical meddling has become hazy.

Congress gave us this power to anticipate wrong before it had the opportunity to injure. This is a praiseworthy end. No one can complain if we get the first punch in ahead of sin, provided, of course, we punch sin and not something else. This desire to get the draw on sin has been carried to ridiculous heights in the Orient.

During the last great war the Japanese Emperor prohibited, under severe penalty, any person from thinking thoughts against the Emperor. This edict, if properly enforced, could anticipate traitorous conduct before it broke out in overt acts against the Son of Heaven. This law (from the Nipponese standpoint) had a praiseworthy end but General MacArthur, with the homely logic of an American, revoked the imperial edict against evil thinking. To us, it is futile to pass laws to police thoughts and impressions.

In the instant case we are not concerned with "evil thoughts" but with "false impressions." To be more specific, the question before the bar (and I use this word in its judicial sense) is what impression does one get when looking at an ad or a bottle of beer—not just any but one which carries a certain legend designating it as "Canadian Ace" and proclaiming its birthplace with a red label "Made in U. S. A."

At the trial a great amount of testimony was given by people but no one said the beer was bad although some competitors expressed the opinion theirs was better. No one testified he was cheated into buying beer different from that which he thought he was getting, but these practical questions were not at issue. The case hung on questions of this type: "State what impression you get from that (the label in question) as to the origin, the place of manufacture, or the place of production described there."

Let us look at the testimony in this case. The Government, to fortify its contention that the label was misleading, called witnesses to tell what impressions they got when glancing at the labeled bottle.

Both the Government and defense attorneys lay great stress on their public witnesses. (A public witness is a person you pull off the street or get from the telephone book. They come to court and tell what impression they got from a sign, a label, or an advertisement. Theoretically, they are not generally supposed to know what it is all about until they are on the stand—to believe this would test the credulity of any man.) The witnesses were honest enough. They thought they were giving "impressions," but for the most part it was predilections

they were revealing. An amusing instance is shown in the case of one witness. His first predeliction to help the Government was overcome by his desire to help a friend when he later discovered he knew the opposing side.

Most public witnesses are disposed to stay out of trouble with Uncle Sam. When a Federal officer orders a citizen to appear in court, it's a great relief to discover Uncle Sam only wants you as a public witness instead of as a private defendant. This relief, coupled with pride in helping Uncle Sam, does funny things to people. It expands their virtue out of all proportion. They become parties to a game and they are out to have their side win, especially if their side is the all-powerful Uncle Sam.

As for the defendant's public witnesses, a lawyer never combs the country for witnesses against his own client. Through the years I have become convinced public witness testimony on "impressions" is not worth a "continental."

To record an impression of an advertisement through the media of subpoena—courthouse—judge—Government attorney—defense attorney and court reporter, is like recording the impression of a butterfly's carcass on a 10-ton trip hammer. Why all the fuss about public witnesses anyway? It were as though neither side could trust the Federal Trade Commissioners to look at the label in question with their own eyes. I don't need insurance agents, housewives, or even brewmasters, to tell whether a beer label has the tendency to deceive. There is nothing esoteric or secret about a beer label. Both the brewer's exhibit 13 and the label offered by it in its request for modification of the order tell me the brand is Manhattan Canadian Ace. They tell me that the beer was made in U. S. A. For decoration there is a bird looking like an American eagle with the legs and the lower half of its body cut off. Beneath the bird is something that looks like a fireman's badge, surrounded by stalks of wheat. When I put on my glasses, I discover how much beer is in the bottle and am informed that the Internal Revenue tax has been paid. There is a printer's union label and the brewing company's address. All of this information is more than I would care to have about a bottle of beer and is certainly more than a great majority of purchasers would.

It is hard to tell exactly what this label does to me. The infinity of different impressions I receive when reading this beer label are too subtle to be reported. It depends on what o'clock it is when I look at it; it depends on whether I am hungry, thirsty, sleepy, cross, or happy. Every time I stare at it I get a different emotion but so far I have not had the feeling that I was "being put upon." This might

be because I have seen the word Canada applied so often to soft drinks and bacon made in this country that I never think of it as designating a place of manufacture. Perhaps most people's reactions are the same as mine. In all events, though millions of dollars' worth of this beer have been sold under the brand name "Canadian Ace," there was not a single instance of a purchaser testifying at the trial that he had been deceived or defrauded by the label.

Therefore, it is my opinion that the record in this case does not warrant the destruction of the brand or trade name containing the word "Canadian" when accompanied in immediate conjunction with suitable statements which clearly and conspicuously inform prospective buyers that respondent's products are brewed in the U. S. A. nor does the record warrant a finding destroying a label similar in import and characteristics to those above-mentioned. The record does not sustain the findings and conclusions heretofore entered. Consequently, it is in the public interest that the findings and order be modified so as to allow the use of the word "Canadian" qualified in a manner which will adequately protect the buying public, as above delineated.

DISSENT BY COMMISSIONER AYRES

The Commission found that the use by respondent of the word "Canadian" as a part of the brand or trade name for its beer and ale constituted representation that the products were of Canadian origin, that is, that they were brewed in the Dominion of Canada and imported into the United States; that early in 1940 respondent began placing on its labels the words "Made in the U. S. A.," and the words "Brewed and Bottled by Manhattan Brewing Co., Chicago, Illinois"; and that the qualifying statements were inconsistent with and contradictory of, the word "Canadian" and were incapable of explaining or qualifying the word "Canadian" so as to prevent deception or confusion in the mind of a substantial portion of the public. The findings were fully supported by evidence. In its order to cease and desist the Commission prohibited the respondent from:

1. Using any brand or trade name containing the word "Canadian," or any simulation thereof, to designate, describe, or refer to any beer or ale which is not brewed in Canada; or otherwise representing, directly or by implication, that beer or ale which is not brewed in Canada is brewed in that country.

The majority of the Commission has now modified the findings as to the facts and order to cease and desist so as to permit the word

"Canadian" to be qualified or contradicted by statements asserting domestic origin.

Many years ago there were instances in which the Commission permitted contradiction of false geographical designations. The present and undoubtedly the proper line of demarcation which has been established by the Commission, however, is shown by its decisions in recent years. For example, published reports of the Commission's proceedings since January 1, 1943 (vol. 36 and 37, and the page proofs of vol. 38), contain 11 orders and 19 stipulations which are in point. In these decisions the Commission permitted respondents to use explanatory statements showing that their domestic products are made in part of foreign ingredients or are of a foreign type, but no explanation was permitted to correct or contradict deceptive geographical wording which was untrue as to the entire product. The right of the Commission to prohibit an untrue statement and its refusal to permit a contradictory qualification have been repeatedly affirmed by the various circuit courts of appeal.

As early as 1928 the Commission refused to permit a respondent selling toilet and bath soaps manufactured in this country to qualify the designation "English Tub Soap" with the words "Made in U. S. A."; and the Commission's order was affirmed in a per curiam decision in 1929 (*F. T. C. v. James J. Bradley*, CCA-2, 31 F. (2d) 569).

In the case of *F. T. C. v. Army and Navy Trading Company*, CCADC. 88 F. (2d) 776, 780 (1937), the court stated:

"But the phrase 'Army and Navy' in the name 'Army and Navy Trading Company' makes the single representation that at least the major portion of the merchandise offered for sale is in some sense Army and Navy Goods. This single representation being untrue, it cannot be qualified; it can only be contradicted."

In the case of *H. N. Heusner & Son v. F. T. C.*, CCA-3, 106 F. (2d) 596 (1939), the question involved was the right of the Commission to prohibit the use of the word "Havana" to designate or describe cigars made of tobacco not of Cuban origin and the refusal of the Commission to permit any qualifying statement. The respondent asked that the order of the Commission be modified to permit retention of the word "Havana" with a qualifying statement that the cigars were made in the United States only of United States tobacco. In rejecting this, the court stated:

"The difficulty of petitioner's position lies in the fact that the implication of the word 'Havana' is totally false. The purchaser can be guided by either label or legend, but not by both * * *. We

doubt if petitioner would accede to a true qualification—"Fake Havana Smokers."

See also *El Moro Cigar Co. v. F. T. C.*, CCA-4, 107 F. (2d) 429 (1939), and *F. T. C. v. Edwin Cigar Co., Inc.*, and *F. T. C. v. James B. Hall, Jr., Inc.*, CCA-2, 67 F. (2d) 993 (1933), involving similar misuse of "Havana."

In 1939 the United States Circuit Court of Appeals for the Third Circuit reversed its own position and took away from Bayuk Cigars, Inc., permission which had been granted in 1930 to qualify a false geographical designation (*Bayuk Cigars, Inc. v. F. T. C.*, F. T. C. Stat. Dec. 1939-1943, p. 131). Other court decisions are in point, including *F. T. C. v. Walker's New River Mining Co.*, 79 F. (2d) 457, *Herzfeld, et al. v. F. T. C.*, 140 F. (2d) 207, and *Masland Dura-leather Co., et al. v. F. T. C.*, 34 F. (2d) 733.

From a careful study of the Commission's decisions and of the judicial authorities on the question of the qualification or contradiction of names or terms of geographical significance, I believe that we have, after much trial and some error, formulated a clear, concise, and understandable policy on this unfair trade practice in accordance with prevailing law on the subject. I am most reluctant to see the force and value of that policy impaired by the action which the majority of the Commission has here taken.

This case has been repeatedly before the Commission and its individual merits require no further discussion. The complaint was issued in August 1941, and the findings and present order to cease and desist were issued on September 7, 1943. On October 27, 1943, respondent petitioned the circuit court to review the Commission's order, and on January 16, 1946, pursuant to stipulation of the parties, the court dismissed respondent's petition for review.

The present action results from one of a series of previously unsuccessful formal efforts by respondent to obtain the modification. During the proceedings before the Commission the contentions of the parties were fully developed in all phases by evidence and complete briefs and arguments which were ably presented and carefully considered. The record shows that under the full force of these previous adversary contentions the Commission repeatedly, unanimously, and consistently, adhered to the position represented by the order which the majority has now modified. Respondent waived its right to judicial review on the merits when on its own initiative its petition before the court was dismissed. The order to cease and desist became final. The findings as to the facts and order were published in the

United States Federal Register and in volume 37, page 376 of FTC decisions.

After an order has become final "the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require" (sec. 5-b, FTC Act. *American Drug Corp v. F. T. C.*, C. C. A. 8, June 8, 1945, is in point).

On January 28, 1946, respondent requested the Commission to reconsider its order, and on the Commission's own motion to modify it. As a basis for this request respondent claimed that its use of the "Canadian" labels since May 1942 has fully informed the purchasing public that its products are not of Canadian origin, and "That by reason of such facts, conditions have so changed that the interests of justice and the public interest require a modification of the order." In effect, it is thus claimed that while the prohibited labels were under attack, respondent accomplished through their use what the Commission found, from contemporaneous evidence could not be accomplished. Such claim does not even provide a prima facie basis for believing that it has any merit. Beyond this, nothing is offered by respondent to persuade us that conditions of fact or of law have so changed as to require the proposed modification or that the public interest requires it.

After the elaborate proceedings which resulted in the original order, the majority now simply accept and endorse without any additional evidence what respondent has done contrary to our findings and order. The inconsistency of the majority action becomes even more apparent when it is considered that the modified order still contains a flat prohibition against the use of the word "Wisconsin" for beer or ale not brewed in that State while permitting qualification of "Canadian." There has been nothing to show that conditions of fact or of law have so changed as to warrant, or that the public interest requires the modification which has been ordered. Such modification is contrary to the previous findings as to the facts and no additional evidence has been adduced to justify it. The record which supported the previous findings is still the same.

It is my opinion that there are no considerations of fact, of law, or in the public interest which warrant the modification and I respectfully dissent from the majority action in this case.

Commissioner Davis concurs in the foregoing dissent of Chairman Ayers.

FURTHER STATEMENT OF DISSENT BY COMMISSIONER AYERS

Much confusion has resulted among lawyers, businessmen, and other members of the public from the impression that my dissent in this case was addressed to the opinion of Commissioner Mason. Questions have been raised as to why certain parts of that opinion went unchallenged and as to the significance of my silence on those points. Fairness and a respect for the opinions of those who may be concerned compel me to submit this additional statement in an effort to clarify some of this confusion and misunderstanding.

I dissented only to the action of the majority. My dissent was not addressed to the opinion of Commissioner Mason. I was denied the privilege of seeing that opinion until I had filed my dissent, and I had no knowledge as to what his opinion contained.

This case is about considerably more than a beer-bottle label. It is about a false geographical designation for beer and ale which is used not only on labels, but also in connection with the products wherever and however they are advertised and sold. There is much advertising of the beer and ale at point of sale, radio advertising has been employed to a limited extent, and other advertising media have been and may be employed. A substantial quantity of the beer and ale is sold in restaurants and at bars where the purchaser has no opportunity to examine the label and does not have the benefit of any qualifications, contradictory or otherwise. It is ridiculous to suggest that the qualification or contradiction can accompany the "Canadian" trade name whenever and wherever it is used.

The Federal Trade Commission is indeed a "Businessman's Court," and it is entrusted with the obligation of protecting the honest businessman from the unfair practices of those who would gain competitive advantage by false and misleading means. Respondent's beer and ale are not of Canadian origin and are not even of Canadian type, and we have seen no reasonable excuse for the adoption of the misleading name except the competitive advantages which it offers. That the use of the word "Canadian" in connection with these products is of value to respondent cannot be doubted, and the Commission found that substantial trade has been diverted unfairly to respondent from its competitors.

Many of the basic rules of fair competition, and particularly those which apply to the instant case, developed before the Federal Trade Commission was created and did not grow out of a feast of authority which my colleague fears has at times been bad for the Commission's digestion. In a decision in 1910, a United States Circuit Court of

Appeals, in a case involving litigation between competitive sellers of similar products, used the following significant language:

"It is so easy for the honest businessman, who wishes to sell his goods upon their merits, to select from the entire material universe, which is before him, symbols, marks, and coverings which by no possibility can cause confusion between his goods and those of competitors, that the courts look with suspicion upon one who, in dressing his goods for the market, approaches so near to his successful rival that the public may fail to distinguish between them" (*Florence Mfg. Co. v. J. C. Dowd & Co.*, 178 Fed. 73, 75).

The opinion supporting the modification does much to emphasize that the beer and ale were not proved to be bad, and that no witness was produced who had been deceived or defrauded by the label. The wrong here lies not in the quality of the beer, but in its being sold for what it is not. The Supreme Court of the United States said in *F. T. C. v. Algoma Lumber Co.*, 291 U. S. 67:

"The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. * * * In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance. Nor is the prejudice only to the consumer. Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightly named, are diverted to others whose methods are less scrupulous."

My colleague analyzes the infinity of different impressions which he receives when reading the beer label in question and concludes that he did not have the feeling that he was "being put upon." I have never considered that the label or the advertising in question would deceive the members of this Commission. We are, or so the courts have told us, a body of experts.

"The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking, and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions" (*Florence v. Dowd, supra*).

Commissioner Mason's suggestion that "citations are cryptic" is truly amazing. When they are unfavorable, they are annoying, but certainly not "cryptic." They serve as the guides, the signposts in the gradual development of an understandable system of law. Judicial and quasijudicial bodies recognize that decisions of the courts must be accepted as an indication of the manner in which subsequent cases involving similar issues will be decided. This is the basic distinction

between government by law and government by men. The line of consistent authority for the action which the Commission originally took in this matter has now been disregarded. What had become clear has now been confused. The businessman who has been guided by a clear line of decisions must grope again in uncertainty. Does this case establish a new policy, or does it stand alone? Will future cases involving similar issues be based on this decision, on previous decisions of the courts, or "on what o'clock it is"? May businessmen now use "Scotch" to designate domestic whiskey, "British" to describe American shoes, "Sheffield" for American silver, and a multitude of similar false representations as to origin provided only that they satisfy the Commission by adding "Made in U. S. A."? Businessmen would no doubt like to know, and I wish that I could tell them.

The opinion supporting the modification states that the brewery had been told by the Alcohol Tax Unit "that their label was O. K." There should be no misunderstanding on this point. Respondent has indeed advised the Commission in various ways that its Canadian label had the approval of the Alcohol Tax Unit. In his reply to respondent's request for modification, counsel for the Commission referred to newly discovered information which provided reason to believe that the Alcohol Tax Unit disapproves of respondent's use of the word "Canadian" on its domestic products even with the qualifications now approved by the majority of this Commission. In a letter of September 30, 1943, the Alcohol Tax Unit advised respondent's counsel that—

"A material concession was given your client when the Bureau withheld action on this label, at your request, pending the termination of the Federal Trade Commission's case, particularly when it is recalled that the Bureau considered the label definitely in violation of its requirements."

As recently as February 7, 1946, the same agency advised the Assistant Chief Counsel of the Commission:

"It is the Bureau's opinion that the label is still objectionable * * *."

Despite these considerations, the Commission, by majority action canceled a scheduled hearing and issued its order of modification, thus depriving its own counsel of an opportunity to be heard on this point.

This case presents no "unbridled, intemperate wielding" of power. It presents simply an instance in which the Commission acted in the public interest to terminate a type of misrepresentation fully recognized by its own and by judicial decisions. I strongly feel that this quasijudicial body should recognize that its decisions and decisions of the courts must be accepted as an indication of the manner in which subsequent cases involving similar issues will be decided.

Complaint

IN THE MATTER OF

BERNARD SINGERMAN TRADING AS PIXACOL COMPANY

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

Docket 5329. Complaint, June 4, 1945—Decision, Apr. 15, 1946

Where an individual engaged in the interstate sale and distribution of a medicinal preparation designated "Pixacol"—

- (a) Falsely represented through statement in newspaper advertisements "Pixacol had brought results to psoriasis sufferers when everything else has failed," that said product constituted an effective treatment or cure for psoriasis; when in fact its only value in treatment of said ailment was limited to the removal of scales and crusts created thereby; and
- (b) Failed to reveal in its said advertisements facts material in the light of such representation and with respect to the consequences which might result from the use of the preparation under prescribed or usual conditions in that the preparation contained substances which were irritating to the skin and particularly irritating to the mucous membranes and eyes, by reason whereof care should be exercised in applying it to the skin and its use discontinued if irritation resulted, and it should not be allowed to come in contact with the eyes or any mucous membrane;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such representations were true, and that use of said preparation would produce no harmful results, and thereby to induce the purchase of substantial quantities thereof:

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

Before *Mr. Randolph Preston*, trial examiner.

Mr. Jesse D. Kash for the Commission.

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 Bernard Singerman, an individual, trading as Pixacol Co., hereinafter referred to as respondent, has violated the provisions of said act, and it appearing to the Commission that 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 Bernard Singerman is an individual, trading as Pixacol Co., with his office and principal place of business located at Cleveland, Ohio. Respondent's mailing address is box 3583.