

IN THE MATTER OF
ARMOUR AND COMPANY ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

Docket 6409. Complaint, Aug. 30, 1955—Decision, Mar. 30, 1956

Order dismissing, for lack of jurisdiction, complaint charging packing companies with violating the Oleomargarine amendment to the Federal Trade Commission Act by suggesting in advertising that their Cloverbloom "99" Margarine was butter, contained butter, or was produced the same as butter.

Mr. Morton Nesmith for the Commission.

Mr. Henry O. Kavina, of Chicago, Ill., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On August 30, 1955, the Federal Trade Commission issued its complaint in this proceeding, alleging that certain advertisements of Respondents' Cloverbloom "99" Oleomargarine were misleading in material respects and constituted false advertisements as such term is defined in Section 15 (a) (2) of the Federal Trade Commission Act, in that such advertisements deceptively suggest that Respondents' oleomargarine is a dairy product. The language of the complaint follows rather closely the amendment to the Federal Trade Commission Act of July 1, 1950, commonly known as the Oleomargarine Act.

On September 30, 1955, Respondents filed an answer to the above charges, contending in Part I thereof that each Respondent was, at all times mentioned in the complaint, a packer within the meaning of the Packers and Stockyards Act of 1921 (7 U.S.C.A. Sec. 181, and particularly Secs. 182, 183 and 191). Based upon such affirmative pleading, Respondents contend that the Federal Trade Commission is without jurisdiction over them.

In order to resolve the jurisdictional issue thus raised in Part I of Respondents' answer, counsel supporting the complaint and counsel for the Respondents entered into a stipulation as to the facts plead by Respondents, wherein it was agreed that the ultimate facts plead in Part I of Respondents' answer might be taken as fully proved. In view of this stipulation, establishing that Respondents are packers within the meaning of the Packers and Stockyards Act, the issue for present determination is whether the Federal Trade Commission has jurisdiction over the Respondents insofar as their advertisements of oleomargarine are concerned.

The complaint herein recognizes that the Commission's authority in this proceeding arises from " * * * the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, * * *." Section 5 (a) (6) of that Act sets forth the Commission's authority as follows:

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except * * * persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

From the above empowering provision of the Federal Trade Commission Act, it is clear that certain legal authority is thereby vested in the Commission, and equally clear that certain legal authority is withheld therefrom. This provision of the Commission's organic Act clearly and in unambiguous words excludes from the Commission's jurisdiction " * * * persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921 * * *," excluding certain narrow exceptions not relevant to this proceeding.

Consistent with the above exception and preceding it in point of time, the Packers and Stockyards Act, 1921, provided that the Federal Trade Commission should have no "power and jurisdiction" over the matters included in that Act. Section 406 (b) of that Act provides as follows:

On and after the enactment of this Act, and so long as it remains in effect, the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this Act is made subject to the jurisdiction of the Secretary, except in cases in which, before the enactment of this Act, complaint has been served under section 5 of the Act entitled "An Act to create a Federal Trade Commission, to define its power and duties * * * " * * * and except when the Secretary of Agriculture, in the exercise of his duties hereunder, shall request of the said Federal Trade Commission that it make investigations and report in any case. (August 15, 1921, Chap. 64, Sec. 406, 42 Stat. 169; 7 U.S. Code, Sec. 227.)

Thereafter, in 1938, when the Wheeler-Lea Amendment added Sections 12, 13, 14, and 15 to the Federal Trade Commission Act, expanding the Commission's powers and responsibilities to include the advertising of foods, drugs, devices and cosmetics, Section 5 of the Federal Trade Commission Act was amended to its present form, excluding packers and stockyards from the Commission's jurisdiction.

In considering this exclusion, the Court, in *United Corporation v. F.T.C.*, 110 F. 2d 473 (4th CCA, 1940), stated that:

It was doubtless because plenary power over the unfair trade practices of packers had been vested in the Secretary of Agriculture by the Packers and Stockyards Act and the Meat Inspection Act, that Congress withheld jurisdic-

tion over packers from the Federal Trade Commission. Only confusion could result from an overlapping jurisdiction, as this case well illustrates.

Despite the unambiguity of the statutes quoted and the clarity of the above statement, counsel supporting the complaint contends that the Oleomargarine Amendment to Section 15 of the Federal Trade Commission Act, enacted March 16, 1950, effective July 1, 1950, gives exclusive jurisdiction to the Commission over advertisements of oleomargarine. This amendment is as follows:

SEC. 15. (a) (2) In the case of oleomargarine or margarine an advertisement shall be deemed misleading in a material respect if in such advertisement representations are made or suggested by statement, word, grade designation, design, device, symbol, sound, or any combination thereof, that such oleomargarine or margarine is a dairy product, except that nothing contained herein shall prevent a truthful, accurate, and full statement in any such advertisement of all the ingredients contained in such oleomargarine or margarine.

Based upon the above contentions, he asserts that the Oleomargarine Amendment, which establishes a standard for determining when an advertisement of oleomargarine shall be deemed misleading in a material respect, impliedly repeals that part of Section 406 (b) of the Packers and Stockyards Act which excludes packers from the jurisdiction of the Federal Trade Commission. This contention of implied repeal is based upon the theory that the sections of the Acts cited are repugnant each to the other. The same reasoning would require the conclusion that the Oleomargarine Amendment of 1950 impliedly repeals Section 5 (a) (6) of the Federal Trade Commission Act, which defines the Commission's powers and excludes therefrom jurisdiction over packers. In support of this theory of implied repeal by repugnancy, counsel quotes from the decision in *U. S. v. Tynen*, 11 Wall 88, wherein the court stated that if two legislative acts

are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.

It is true that repeals by implication are not favored, but where the same subject matter is covered by two acts which cannot be harmonized with a view to giving effect to provisions of each, to the extent of the repugnancy between them the later act will prevail, particularly in cases where it is apparent that the later act was intended as a substitute for the earlier one. *Gibson v. U. S.*, 194 U. S. 182, 192.

It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute, which might otherwise prove controlling. *Kepner v. U. S.*, 195 U. S. 100, 125 (1904).

We recognize as correct in theory the court's statement that although implied repeals are not favored, an earlier statute on one subject may be impliedly repealed by a later statute on the same subject. The real question which arises in the instant proceeding, therefore, is whether the Oleomargarine Amendment is on the same subject as the earlier statutes on jurisdiction. A careful review of reports on the extensive Congressional debates and the Committee reports leading to the passage of the Oleomargarine Amendment fails, however, to reveal any reference to the jurisdiction of the Federal Trade Commission or that of the Secretary of Agriculture. In fact, all the reports are altogether silent on the question of the power of either to issue complaints.

Since the allegedly repealing Oleomargarine Amendment deals with the subject of a standard for determining what is a false advertisement of oleomargarine, and since the earlier statutes in question deal with the relative power and jurisdiction of the Federal Trade Commission and the Secretary of Agriculture, it appears clear that these statutes are on unrelated subjects. Furthermore, this conclusion is corroborated by the absence from the Congressional Record of any indication that Congress intended by the Oleomargarine Amendment to repeal, or in any way change, the existing jurisdictional power of either the Secretary of Agriculture or the Federal Trade Commission. Consequently, since the statutes in question are on unrelated subjects, there can be no repugnancy between them, and counsel's theory of repeal by repugnancy must fail.

Counsel supporting the complaint, in effect, further contends that a repugnancy exists between the Oleomargarine Amendment to the Federal Trade Commission Act, Sec. 15 (a) (2) on the one hand, and Section 5 (a) (6) of the same Act and Section 406 (b) of the Packers and Stockyards Act, 1921, on the other, resulting in an implied repeal of the earlier statutes because of the difference in the regulation of oleomargarine advertising which would otherwise result. Specifically, he contends that although the Packers and Stockyards Act authorizes the Secretary of Agriculture to prohibit any packer from engaging in any unfair, unjust, discriminatory or deceptive practice or device in commerce (7 U.S.C.A. § 192 (a)), that Act does not make unlawful the false advertisement of oleomargarine to the same extent as does the Oleomargarine Amendment of the Federal Trade Commission Act.

Counsel for the Respondents refers to the above contention as a "ghost of repugnancy," and one that would arise only from a "fantastic interpretation" of the Oleomargarine Amendment by the Federal Trade Commission.

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We observe that Senate Report No. 309 (81st Cong., 1st Sess., Cal. 288) states that the Federal law regulating oleomargarine is “* * * designed to provide a minimum of protection to consumers of butter and colored oleomargarine and to insure honesty, fair dealing and an absence of all *deception* in the competitive sale of such products.” Likewise, Section 202 of the Packers and Stockyards Act authorizes the Secretary of Agriculture to prohibit any “unfair, unjustly discriminatory or *deceptive practice* or device in commerce.” [Underscoring supplied.] Comparison of the respective authority thus granted clearly indicates that the Secretary of Agriculture is empowered to enforce honesty and fair dealing by all packers, including those who may be advertising oleomargarine. It is obvious, therefore, that both the Federal Trade Commission Act and the Packers and Stockyards Act condemn the deceptive advertising of oleomargarine. Consequently, for a repugnancy to arise between these two acts, it would be necessary for the Federal Trade Commission and the Secretary of Agriculture to postulate two separate and different concepts of deceptive practice. “It must not be; * * * ’Twill be recorded for a precedent, and many an error, by the same example, will rush into the state; it cannot be.”

In view of the facts established in this proceeding and the legal principles applicable thereto, there appears to be no repugnancy between Sections 12 (a) (2) and 5 (a) (6) of the Federal Trade Commission Act, nor between the Federal Trade Commission Act and the Packers and Stockyards Act, by reason of the Oleomargarine Act. It is concluded, therefore, that the jurisdictional provisions of both the Federal Trade Commission Act and the Packers and Stockyards Act remain unchanged and in force, and that the Federal Trade Commission, with the exceptions above mentioned, which are here irrelevant, has no jurisdiction over packers and, consequently, no jurisdiction over the Respondents herein. Accordingly,

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

By SECREST, Commissioner:

The sole question presented by this appeal is whether the Commission has jurisdiction to issue its complaint against a “packer” in its advertising of an oleomargarine product.

A complaint was issued by the Commission on August 30, 1955, charging the respondents with false and deceptive advertising of their Cloverbloom 99 Oleomargarine. Respondents filed an answer to this charge contending in Part One thereof that respondents

were "packers" within the intent and meaning of the Packers and Stockyards Act of 1921 and hence not subject to the jurisdiction of the Federal Trade Commission. Since this issue, if resolved in favor of the respondents, would control in the disposition of the case it was stipulated between counsel that the jurisdictional issue would be submitted to the hearing examiner on briefs before proceeding further with the litigation. The hearing examiner, on December 8, 1955, dismissed the complaint. Presented here for our consideration is counsel supporting the complaint's appeal from such dismissal.

In contending that the examiner erred in dismissing the complaint, counsel supporting the complaint alleges, inter alia, that while respondents are admittedly "packers" within the meaning and definition of the Packers and Stockyards Act of 1921, the manufacturing and marketing of oleomargarine constitutes a business "disassociated therefrom, not related thereto and not subject to the jurisdiction of" the Department of Agriculture. Counsel contends that the Oleomargarine Amendment to the Federal Trade Commission Act impliedly repealed the Packers and Stockyards Act of 1921 insofar as it related to the advertising of oleomargarine and vested complete jurisdiction over the advertising for such substances in the Federal Trade Commission. In support of this proposition counsel cites the "well settled principle" of statutory construction that "specific terms covering the given subject matter will prevail over general language of the same or another statute, which might otherwise prove controlling" (Citing *Kepner vs. United States*, 195 U.S. 100, 125 [1904]). Also relied upon by counsel is the proposition that where two laws are clearly repugnant to each other and both cannot be carried into effect, * * * the later of the two laws will prevail. (*Posades v. National City Bank*, 296 U.S. 497).¹

The obvious answer to these contentions is that there can be no repugnancy if the one law is not on the same subject as the second law. The Packers and Stockyards Act conferred jurisdiction in the Secretary of Agriculture over the activities of a wide segment of American Industry, while the Oleomargarine Amendment amounted to no more than a definition of terms under the Federal Trade Commission Act. The later specific enactment not being on the same subject could and did not alter the jurisdiction already vested in the Secretary of Agriculture, nor did this Amendment disturb

¹ This rule is more explicitly stated in counsel's brief as "Where two legislative acts are repugnant to, or in conflict with each other the one last passed, being the latest expression of the legislative will, although it contains no repealing clause, govern, control or prevail so as to supersede and impliedly repeal the earlier act to the extent of the repugnancy." (82 CJS 489 and the cases cited therein.)

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or alter the "packers" exemption set forth under Section 5 (a) (6) of the Federal Trade Commission Act.

Counsel supporting the complaint contends that when respondents entered the field of the manufacture and distribution of oleomargarine, they entered into a new field of business disassociated from and not related to the packing industry and so as to this business are not subject to the jurisdiction of the Secretary of Agriculture. Counsel earnestly maintains that under this proceeding, respondents are not being proceeded against as "packers" but as manufacturers and distributors of oleomargarine.

In treating this and the related contentions of counsel supporting the complaint, we must delve into the legislative hearings in an attempt to determine what Congress intended in enacting the Packers and Stockyards Act of 1921. Since the House version of the Bill was ultimately adopted, with some modification, the following expression of views by sponsors of the legislation in the House is of interest in determining Congressional intent with respect to the various activities which the packer may be engaged in, yet which are not directly in the packing field:

Congressman Haugen (Chairman, House Committee on Agriculture):

* * * the farm bureau suggested that the definition of the term "packer" be so amended as to confine packers to those manufacturing or preparing meats or meat products for sale or shipment in commerce. While recognizing the justice of the complaint that the definition in the original Haugen bill might be construed to include independent tanneries, fertilizer plants, and other industries using by-products of the packing industry, the Committee at once perceived that the adoption of the suggestions of the American Farm Bureau Federation would be to leave outside of all regulation such industries *when conducted as subsidiaries of the packing industry*. It therefore amended the Haugen bill in such manner as to relieve from regulation these outside industries only when having no affiliation with a packer, *but subjecting the packer to complete regulation, no matter what line of business he goes into*. (61 Cong. Rec. 4781.) [Emphasis supplied.]

* * * * *

Congressman Anderson:

We did not undertake to prohibit the packers from engaging in any related or unrelated lines, but we did undertake to say that if the *packers* engaged in these other lines *or if the stockholders in the packing companies* owned stock in other lines, then the products of the business so owned or controlled while in commerce should be subject to exactly the same regulations as we imposed upon the *packers*. (61 Cong. Rec. 1888.) [Emphasis supplied.]

* * * * *

Further light on this question may be gained from the following excerpts from the committee hearings and report:

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Congressman Anderson:

The definition of the term "packer" is found in section 201 on page 3 of the bill, and is an attempt to reach, in some way, the problems that have arisen in connection with the *so-called unrelated business of the packers*.

The hearings before the committee, I think, demonstrated a disposition on the part of the *large packers to extend their activities into many lines* which were not directly connected with them and, through subsidiaries and interlocking directorates and joint-stock ownership or community of stock ownership, to control a very widely diverging class of articles. * * *

We undertake to say that *if a person engaged in the packing business—and when I say person, of course, I include corporations—undertakes to extend its control over other commodities, through the ownership of stock or otherwise, that the products of the company over which it has extended its sphere of influence shall be subject to the same regulation as the products of the packers themselves.*

"I think that is a perfectly legal provision. I think it is a perfectly sound principle, that we shall not only regulate the packers and the products which they themselves produce, but that we shall regulate in commerce the products of companies *which are within their sphere of influence, either through community of stock ownership or otherwise, or direct stock ownership.* (Hearing before Committee on Agriculture on H.R. 14 etc., 67th Cong., 1st Sess., p. 17.) [Emphasis supplied.]

In order to bring within the terms of the bill the packers thus defined, whatever the ramifications of his business and whatever the form of corporate organization adopted, and at the same time to avoid interference with businesses having no packer affiliations, it is provided that a person engaged in the business of manufacturing or preparing, for sale or shipment in interstate or foreign commerce, live-stock products or of marketing such products in such commerce, shall be considered a packer if such person has an interest in a packing business as above defined, or if a packer has any interest in his business, or if a common control amounting to 20% exists in each business. In this manner an independent tannery would not be a packer, *but if a packer sets up a tannery business as a separate corporation, it would be controlled.* (From the unanimous Report from the Committee on Agriculture, H.R. Report No. 77, 67th Congress, 1st Session.) [Emphasis supplied.]

That it was the intention of Congress to cover the activities of this particular respondent, Armour & Company, and of this particular product, oleomargarine, is also evidenced by the hearings. Congressman Voigt, an exponent of Packing legislation, stated that:

While there is a large number of meat packers in this country doing an interstate business, it is understood that this legislation is aimed at the so-called Big Five packers—Swift & Co., *Armour & Co.*, Morris & Co., Wilson & Co., and Cudahy Packing Co. There can be no question that these five concerns and their predecessors in interest for many years have had and now have a complete monopoly of the meat packing business * * *. (61st Cong. Rec. 1853.)

In recent years the packers have gone extensively into related and non-related lines of business. They handle a considerable proportion of the interstate trade in poultry, eggs, milk, butter, and cheese. It is said that they handle two-thirds of all cheese produced in Wisconsin.

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They own large plants in South America and are interested in many foreign companies. *They are heavily interested in plants producing cottonseed oil, used in the manufacture of oleomargarine.* In 1916 Swift & Co., sold 50,000,000 pounds of butter; in 1917 Armour sold \$17,000,000 worth of canned goods. *The Armour Grain Co., operates over 90 country elevators, and in 1917 handled 75,000,000 bushels, or 25 percent of all grain receipts at Chicago.* The packers are very largely interested in tanneries, manufacture of fertilizers, and wool. They own in whole or in part substantially all of the leading stockyards of the country; they own over 90 percent of all refrigerator and other cars owned by interstate slaughterers; they own or control over a thousand branch houses; they are interested in dozens of banks. Up to 1920, when the injunction was issued against them, hereafter referred to, they dealt to a large extent in fish and wholesale groceries. They are interested in hundreds of subsidiary corporations which in the eyes of the public appear to be competitors. The Federal Trade Commission finds that—

"the power of the Big Five in the United States has been and is being unfairly and illegally used to manipulate live-stock markets; restrict interstate and international supplies of foods; control the prices of dressed meats and other foods; defraud both the producers of food and consumers; crush effective competition; secure special privileges from railroads, stockyard companies, and municipalities; and profiteer." (61st Cong. Rec. 1864.) [Emphasis supplied.]

While it is apparent from the above that the primary source of Congressional concern was the practices in the packing industry, the debates nevertheless indicate that there was brought to the attention of Congress the fact that these industrial giants had extended their sway into many diversified fields of endeavor and the resultant legislation was framed in language broad enough to encompass these activities. Also, it is of considerable significance that the report of this Commission played an important part in the passage of the Packers and Stockyards Act of 1921 and that the language of the Act, as finally adopted, closely parallels not only Section 5 of the Commission's organic Act, but also provisions of the Clayton Act of 1914, as well. That it was the intention of Congress to remove the activities of packers from the jurisdiction of the Commission is shown by the following excerpts from the Committee reports:

The Bill further coordinated the duties of the Secretary of Agriculture so that it prevents overlapping of authority and duplication of jurisdiction of other departments of government having regulatory powers *which previously existed.* It provides for ample court review for any of the orders or regulations of the Secretary of Agriculture, so as to protect the industry from any mistakes of judgment or unwarranted use of the power thus delegated. (From the unanimous Report of the Committee on Agriculture—H. R. Report No. 77, 67th Congress, 1st session.) [Emphasis supplied.]

The House Bill took away from the Federal Trade Commission its power and jurisdiction in regard to any matter which by the Act is made subject to the jurisdiction of the Secretary of Agriculture, except where complaint has been

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served before the passage of the Act. The Senate amendment, while retaining the provisions of the House Bill, continues in force the powers of the Commission, *but only so far as relating to making investigations and reports, and permits these powers to be exercised only on request of the Secretary of Agriculture.* (Rep. No. 324, 67th Cong., 1st Session, House of Representatives. [Emphasis supplied.]

As found by the hearing examiner, the complaint issued herein recognized that the Commission's authority in this proceeding arises from " * * * the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, * * *." Section 5 (a) 6 of that Act sets forth the Commission's authority as follows:

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except * * * persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in Section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

From the above enabling provision in the Federal Trade Commission Act, it is clear that certain legal authority is vested in the Commission, and equally clear that certain legal authority is withheld therefrom. This provision of the Commission's organic Act clearly and in unambiguous words excluded from the Commission's jurisdiction " * * * persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921 * * *," except with reference to certain narrow exceptions not relevant to this proceeding.

Consistent with the above exception and preceding it in point of time, Section 406 (b) of the Packers and Stockyards Act provided that:

On and after the enactment of this Act, and so long as it remains in effect, the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this Act is made subject to the jurisdiction of the Secretary, except in cases in which, before the enactment of this Act, complaint has been served under section 5 of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties * * * " * * * and except when the Secretary of Agriculture, in the exercise of his duties hereunder, shall request of the said Federal Trade Commission that it make investigations and report in any case. (August 15, 1921, Chap. 64, Sec. 406, 42 Stat. 169; 7 U.S. Code, Sec. 227.)

Thereafter, in 1938, when the Wheeler-Lea Amendment added Sections 12, 13, 14, and 15 to the Federal Trade Commission Act, expanding the Commission's powers and responsibilities to include the advertising of foods, drugs, devices and cosmetics, Section 5 of the Federal Trade Commission Act was amended to its present form, excluding packers and stockyards from the Commission's jurisdic-

tion. The Oleomargarine Act, which amended Section 15 of the Wheeler-Lea Act states that:

In the case of oleomargarine or margarine an advertisement shall be deemed misleading in a material respect if in such advertisement representations are made or suggested by statement, word, grade designation, design, device, symbol, sound, or any combination thereof, that such oleomargarine or margarine is a dairy product, except that nothing contained herein shall prevent a truthful, accurate, and full statement in any such advertisement of all the ingredients contained in such oleomargarine or margarine.

However, in passing this amendment, Congress left undisturbed the exemption given to "packers" under Section 5 (a) (6) of the Federal Trade Commission Act, nor is there any evidence in the hearings on the Bill to indicate a contrary intention.

As indicated in our Drew opinion on May 5, 1955,² the oleomargarine-butter controversy, which culminated in the Oleomargarine Act of 1950, had been waged in the halls and chambers of Congress for the better part of a century. The Act of August 2, 1886, for example, defined "butter" and "oleomargarine" and imposed upon the latter discriminatory excise taxes as well as labeling and packaging requirements. It was clear from the beginning that this exercise of the taxing power was not designed to raise revenue but to achieve certain regulatory effects in the field of competition between oleomargarine and butter.³

The difference in tax treatment between yellow and white oleomargarine was first inserted in the law by the Act of May 9, 1902 (32 Stat. 193), which Act imposed a 10¢ per pound tax on oleomargarine which was artificially colored to look like butter. This action was amplified and embellished by the Act of May 4, 1931.

The 1950 bill as it passed the House and as it was reported to the Senate, continued to regulate oleomargarine under the Federal Food, Drug and Cosmetic Act, but provided for the repeal of all Federal taxation on oleomargarine. The Senate Committee in reporting the bill attempted to forestall some of the arguments of the Senators from the dairy states by pointing out that the Federal Trade Commission already had jurisdiction, under existing law, to prevent misrepresentation of oleomargarine as butter; also to prohibit the advertising practices which were in any way deceptive or which might confuse oleomargarine with butter. These arguments failed to satisfy the opposition that confusion might, in any event, result and therefore during the course of the floor debate an amendment was offered to the Federal Trade Commission Act. This amendment, Section 15 (a) (2), in effect made it a per se

² Docket 6126.

³ Senate Report 309, Cong. Rec., Jan. 4, 1950, p. 44.

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violation of the Federal Trade Commission Act to represent or suggest that oleomargarine is a dairy product.⁴ It did not amend Section 5 of the Federal Trade Commission Act so as to disturb or alter the traditional exceptions or exemptions from the Commission's jurisdiction; nor can we glean from the debates any Congressional intention to change or eliminate these exemptions.

It is our conclusion, from a consideration of the legislative history, and from the lack of ambiguity in the provisions of the statutes, that both the Commission and the Secretary of Agriculture are charged with responsibility for proscribing deceptive practices in their respective fields. It is our further conclusion, from the above comparison of the respective authority granted by Congress to the Commission and the Department of Agriculture, that the Secretary of Agriculture is empowered to enforce honesty and fair dealing by respondent, Armour & Company, in its advertising of oleomargarine.⁵ We believe that the hearing examiner correctly held that the Oleomargarine Act did not disturb the jurisdictional provisions of either the Federal Trade Commission Act or the Packers and Stockyards Act, and therefore that the Commission has no jurisdiction over respondents herein in their advertising of oleomargarine.

Accordingly, the appeal of counsel supporting the complaint is denied and the complaint is dismissed.

ORDER DENYING APPEAL FROM INITIAL DECISION
AND DISMISSING COMPLAINT

This matter having come before the Commission upon the appeal of counsel supporting the complaint from the initial decision of the hearing examiner dismissing the complaint herein, and the Commission having heard the appeal on briefs of counsel; and

The Commission having determined, for the reasons set forth in the accompanying opinion, that the appeal of counsel supporting the complaint should be denied and that the complaint should be dismissed:

It is ordered, therefore, That the appeal of counsel in support of the complaint be, and it hereby is, denied.

It is further ordered, That the complaint herein be, and it hereby is, dismissed.

⁴ Docket 6228, *Reddi-Spred Corp.*, 3rd Cir., Dec. 22, 1955.

⁵ Section 402 of the Packers and Stockyards Act provides for enforcement by stating that "the provisions (including penalties) of Section 6, 8, 9 and 10 of the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914, are made applicable to the jurisdiction, powers and duties of the Secretary in enforcing provisions of this Act and to any person subject to the provisions of the Act whether or not a corporation."

IN THE MATTER OF
MILLARD, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

Docket 6427. Complaint, Oct. 17, 1955—Decision, Mar. 30, 1956

Order vacating and setting aside—for the reason that respondents were out of business and had no intention of resuming—initial decision prohibiting false advertising in connection with the sale of hair and scalp preparations and a “new” method of treatment for baldness or thinning hair for use by persons in their homes.

Mr. Morton Nesmith for the Commission.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The respondents in this proceeding are charged with violating the Federal Trade Commission Act by the dissemination of false and deceptive advertising pertaining to a suggested course of treatment and the use of certain medical and cosmetic preparations sold by them to induce hair growth and prevent baldness. The complaint was issued October 17, 1955, mailed October 20, 1955, and served on respondents October 24, 1955. No answer was filed by respondents and no appearance was made by any of them at the initial hearing held January 10, 1956. They are, therefore, in default. Under the rules of the Commission and in accordance with the Notice, which is attached to and part of the complaint duly served upon respondents, the hearing examiner is authorized to and does find the facts to be as alleged in the complaint. All the transactions at the hearing, including the submission by counsel supporting the complaint of a proposed cease and desist order, were duly recorded and the transcript thereof filed in the office of the Commission. No request for the submission of proposed findings and conclusions has been received, and the proceeding before the hearing examiner has been closed.

Upon this record, the following findings of fact are made:

1. Respondent Millard, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, having its office and principal place of business located at 2511 East 75th Street, Chicago, Illinois.

Individual respondents, E. V. Safranski and Eugene J. Dooley, are president and secretary-treasurer, respectively, of the corporate respondent, Millard, Inc. These individual respondents formulate,