ceeding be, and they hereby are, directed to exhibit the aforesaid motion picture film to counsel for respondent Libbey-Owens-Ford Glass Company.

Commissioner Tait not participating.

CONSOLIDATED FOODS CORPORATION

Docket 7000. Order and Opinions, Mar. 4, 1960

Interlocutory order upholding denial of motion to dismiss complaint at close of case in chief.

ON APPEAL FROM HEARING EXAMINER'S RULING

By KERN, *Commissioner:*

The complaint in this matter, issued December 18, 1957, charges the respondent with having violated Section 7 of the Clayton Act, as amended. At the conclusion of the case in chief, the respondent filed a motion seeking dismissal of the proceeding on the ground that the proof thus far adduced fails to establish a *prima facie* case. Briefs in support of and in opposition to the motion were filed, and on December 11, 1959, the hearing examiner entered an order denying the motion. The case is here on the respondent's interlocutory appeal from that order.

In his order denying the motion, the hearing examiner in pertinent part stated:

> The hearing examiner has given consideration to the motion of respondent, answer thereto, reply, and the record herein, and is of the opinion that dehydrated onion and dehydrated garlic comprise the lines of commerce involved in this proceeding and that there is reasonable, probative and substantial evidence in the record which, when considered in connection with reasonable inferences which may be drawn therefrom, would support an order in the absence of rebutting testimony.[1]
>
> *It is therefore ordered*, That motion of respondent to dismiss this proceeding be, and the same is hereby, dismissed.

The respondent concedes that the test applied by the hearing examiner in finding a *prima facie* case represents the established view of the Commission, but contends that the use of such test is not in conformity with the rule now followed by the Federal district courts in ruling on motions to dismiss actions tried by the court without a jury. It contends also that the hearing examiner has prematurely delineated the lines of commerce to be considered in the proceeding, thereby apparently precluding the respondent from proving as part of its case that the relevant market must include both raw and dehydrated onion and garlic.

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[1] *Vulcanized Rubber and Plastics Company*, D. 6222, 52 F.T.C. 533; *The Timken Roller Bearing Company*, D. 6504; *Scott Paper Company*, D. 6559.

As pointed out by the respondent, the standard applied in Commission proceedings in the disposition of motions to dismiss for failure of the evidence to establish a *prima facie* case was first articulated in 1955 in the matter of *Vulcanized Rubber and Plastics Company*, Docket 6222, 52 F.T.C. 533.

Like the motion here, the motion in that case was made at the conclusion of the case in chief and was based on the ground that a *prima facie* case had not been established. As in this case, also, the questions for determination were, first, whether, under the provisions of §3.20 of the Commission's Rules of Practice, the interlocutory appeal fell within that category of appeals which the Commission would consider on the merits, and, second, if so, whether the ruling appealed from was erroneous. The second question was never reached, and no decision was made thereon, for, as the opinion shows, the appeal was not one to be considered on the merits. And this was so, the Commission explained, because the ruling appealed from constituted only a determination that there was then in the record sufficient evidence to justify the requirement that the respondent proceed with its defense, which determination could have no material effect on the final decision of the case within the meaning of §3.20. The Commission, among other things, stated:

> It is also clear that for the Commission to entertain appeals of this nature would be but to encourage the submission of cases for decision piecemeal, with resulting unjustifiable delays; and that, in the opinion of the Commission, would not "better serve the interests of justice."

Thus, while the Commission in *Vulcanized Rubber* did express approval of a standard to be applied in determining whether a *prima facie* case has been established, the point decided was that under the applicable rules of practice an interlocutory appeal will be considered only if it is shown that the ruling appealed from will in some manner affect the final decision of the case or that for some other reason substantial rights of the parties are involved. This is still the Commission's policy. Under this policy it is incumbent on the party appealing from a ruling denying a motion to dismiss initially to show the existence of such circumstances. This has not been done in this case, and it follows that the ruling here, like the ruling in Vulcanized Rubber, is not subject to interlocutory appeal.

In view of the foregoing, it is not necessary to dwell at length on the respondent's contention that a hearing examiner, when confronted with a motion to dismiss a Commission proceeding for failure of proof at the close of the case in chief, should in all instances weigh the evidence, including all possible inferences, both pro and con, with the same finality as would be required in an

ultimate decision on the merits. We do note, however, that this is not the first time this suggestion has been made. Moreover, it may be that the test applied by the Commission is not well understood, and for the benefit of all concerned we shall briefly explain it.

In attacking the Commission's test, the respondent, assuming apparently that this is the basis and reason for it, quotes from the opinion in *Vulcanized Rubber* as follows:

> A hearing examiner in ruling on a motion to dismiss for failure of proof, made at the close of the case in chief, like a Federal district court in ruling on a similar motion in a non-jury trial, views the evidence and inferences reasonably to be drawn therefrom in the light most favorable to the complaint.

And this, it says, is not a correct statement of the rule now followed in the Federal district courts. The Commission is aware of the fact that the courts of appeals in a number of circuits in recent years have not so stated the test. One of the leading cases on the point is *Allred* v. *Sasser*, 170 F. 2d 233 (7th Cir. 1948), in which the court said:

> The trial court was the trier of the facts, and in considering the evidence was not bound to view it in a light most favorable to the plaintiff, with all attendant favorable presumptions, but was bound to take an unbiased view of all the evidence, direct and circumstantial, and accord it such weight as he believed it entitled to receive. (170 F. 2d at 235.)

Substantially, the same test has been stated by the Courts of Appeals for the Second, Fifth and Sixth Circuits.[2]

It is to be noted, however, that all these cases have involved appeals from judgments on *the merits against the plaintiffs*, resulting in final disposition of the cases. And under Rule 41(b) of the Rules of Civil Procedure (as amended, effective March 19, 1948), the requirement in such a situation is that the district court as trier of the facts *shall make findings as provided in Rule 52(b)*. This, also, is the procedure in the same circumstances in a Commission proceeding. (See §§3.8(e) and 3.21 of the Commission's Rules of Practice, under which if a motion to dismiss a complaint is granted with the result that a proceeding is terminated, the hearing examiner must make and file an initial decision containing a statement of findings and conclusions upon all the material issues of fact, law or discretion, based upon a consideration of the whole record, and an appropriate order.) Rule 41(b) further provides, however, that in an action tried by the court without a jury the court when presented with a motion to dismiss on the ground that the plaintiff has shown no right to relief may *decline to render any judg-*

[2] See *Huber* v. *American President Lines*, 240 F. 2d 778 (2d Cir. 1957); *Benton* v. *Blair*, 228 F. 2d 55 (5th Cir. 1956); *Bach* v. *Friden Calculating Machine Co., Inc.*, 148 F. 2d 407 (6th Cir. 1945).

ment until the close of all the evidence, and if that course is followed there is no requirement for the court to make any findings at all.

The Commission, on the other hand, has no rule authorizing its hearing examiners to withhold decision on a motion to dismiss a complaint. Presumably, if it did have, the motion could be denied solely as a matter of sound discretion and the question of weighing the evidence, as such, would not arise. The Commission feels, however, that if at the conclusion of the evidence in support of the complaint it appears reasonably certain that the respondent has not violated the law, the complaint against it should be immediately dismissed. In all other cases, the public interest requires the development of a full record on the basis of which all questions of law, fact and discretion may be considered and decided in the light of all the circumstances. Thus, the disposition of a motion to dismiss may involve a single step, that of denial because of the presence of sufficient evidence to justify the requirement that the respondent present its defense, or two, a determination that such evidence is not present and, in addition, a detailed consideration of the record, including all inferences to be drawn therefrom, and the preparation of an appropriate initial decision. A respondent filing a motion to dismiss a Commission proceeding is not only not prejudiced by an application of the Commission's test to determine the existence of a *prima facie* case, but actually gets an advantage it might not get under the current Rules of Civil Procedure.

The remaining point in the respondent's appeal requires little additional discussion. In stating that he "is of the opinion that dehydrated onion and dehydrated garlic comprise the lines of commerce involved in this proceeding," the hearing examiner, of course, was not making a final determination of this question any more than he was finally determining any other question. Applicable here is an observation made by the Commission in its ruling on a similar contention in the matter of *Brillo Manufacturing Company, Inc.*, Docket 6557, May 23, 1958 (on cross-appeals from an initial decision):

> * * * No showing has been made in the appeal that the hearing examiner heretofore has excluded evidence pointing to a substantial competitive interrelationship between industrial steel wool and other abrasives. As noted above, the issue as to the bounds of the relevant market in Section 7 proceedings is one of fact. Thus, the respondent's right to present evidence showing that products other than steel wool are included within the area of effective competition and, therefore, are a part of the relevant line of commerce is fully protected * * *.

The respondent's appeal will be denied.

Chairman Kintner and Commissioner Tait concur in the result.

CONCURRING OPINION

By TAIT, *Commissioner:*

I concur in the result. The respondent's challenge to the hearing examiner's denial of its motion to dismiss cannot succeed in any event because respondent has not shown that the application of a standard differing from the one enunciated in the matter of *Vulcanized Rubber and Plastics Company*, Docket 6222, 52 F.T.C. 533, would have produced a different result.

However, after long reflection and careful consideration, I have reached the conclusion that the standard employed in *Vulcanized Rubber* is erroneous.

Although the *Vulcanized Rubber* opinion flatly declared that the standard set forth therein regarding establishment of a *prima facie* case was "likened" to that used by the Federal district courts in *non-jury* trials, the interpretation now placed upon that opinion by the majority herein seems to be at variance with that previous frank assertion. It is not clear to me what is being proposed at this time by my able colleagues. However, I am now certain of one thing with respect to the *Vulcanized Rubber* standard and that is this: As expressed originally and unqualifiedly it parallels the standard employed by the Federal district courts in *jury* trials rather than *non-jury* trials.

Even though the *Vulcanized Rubber* rule was originally misstated in its comparison with the test used by the Federal district courts, it does not necessarily follow that the rule adopted for use by the Commission in its own adjudicatory proceedings is improper. In determining what rule is properly adaptable to our own quasi-judicial proceedings, however, it would be helpful, although not conclusive, to examine some of the reasons which led to the development of the different standards used by the Federal courts in jury and non-jury trial cases.

The "most favorable inference" standard used in passing upon mid-trial motions to dismiss in jury trials was developed primarily to accord with the allocation of decisional functions in such cases. In a jury case the role of the judge is a limited one; he determines the law, but the jury is the sole trier of the facts, and its role is protected from direct judicial invasion by the strictures of the Seventh Amendment. It follows that the judge in passing upon a mid-trial motion to dismiss cannot be given an unrestricted commission to try the facts. The jury standard is consistent with the limited role of the judge. The judge must send the case to the jury if there is substantial proof of the elements of the plaintiff's charge, even if the judge, if he were the trier of the facts, would himself decide the case against the plaintiff. *Slocum* v. *New York Life Ins.*

Co., 228 U.S. 364 (1913); *Gunning* v. *Cooley*, 281 U.S. 90 (1930); *United States* v. *United States Gypsum Co.*, 67 F. Supp. 397, 416–421 (D.D.C. 1946), *reversed on other grounds*, 333 U.S. 364 (1948).

But in an action tried without a jury this division of functions no longer obtains. And if a standard prescribing a limited role for the judge lacks utility in this different setting, it should not be applied. Justice Stephens of the Court of Appeals for the District of Columbia in his classic discussion of the two standards states emphatically that:

> It is not reasonable to require a judge, or motion to dismiss under Rule 41(b), to determine merely whether there is a *prima facie* case, such as in a jury trial should go to the jury, when there is no jury—to determine merely whether there is a *prima facie* case sufficient for the consideration of a trier of the facts *when he is himself the trier of the facts. United States* v. *United States Gypsum Co., supra*, at 418.

A number of learned commentators have acknowledged the force of Justice Stephens' reasoning. In the commentary, *The Motion to Dismiss in Non-Jury Cases*, 9 Federal Rules Service 986 at 991–992 (1946), the point was made that:

> Since * * * the judge, in passing upon a motion to dismiss at the close of the plaintiff's evidence, can refer the decision upon * * * [conflicting inferences, the weight of the evidence and credibility] * * * only to himself, there is no necessity for him to "assume" the truth of the plaintiff's evidence in the first instance, and by inquiring of himself concerning the weight and credibility of the evidence in the next.

Another anomaly inherent in the use of the two-step procedure in a non-jury case where functions have coalesced can best be revealed by posing a hypothetical: A judge sitting without jury in passing upon plaintiff's motion to dismiss employs the jury standard. He is of the opinion that if he were sitting as trier of the fact he would be compelled to grant the motion. However, after resolving all conflicts in favor of the plaintiff, the judge finds that there is a "case for the jury," and denies the motion. The defendant immediately rests without presenting evidence. The judge, as trier of the fact, is compelled to find for the defendant immediately after denying defendant's motion to dismiss. This anomaly has long haunted judicial minds. See *Lambuth* v. *Stetson & Post Mill Co.*, 14 Wash. 187, 190–191, 44 Pac. 148, 149 (1896), cited with approval in *United States* v. *United States Gypsum Co.*, *supra*.

In Commission proceedings the Commission both determines the law and finds the facts, just as does the judge in an action tried without jury. All the reasons that support the adoption of the non-jury standard in judicial proceeding where these functions are combined equally support the use of the non-jury standard in administrative proceedings. And there is an additional reason why

the non-jury standard would appear to be better fittted for agency use. The Commission is an expert body. Its specialized knowledge and experience should give it a heightened sensitivity to the factual situations before it. There is little reason to impose an artificial restraint on a body so equipped. In addition, it should be noted that the anomaly discussed in the *Lambuth* case, *supra*, is just as apt to occur in proceedings before this Commission as in judicial proceedings.

The principal reason for the development of the standard used in non-jury trials was the enhancement of the cause of justice through the elimination of delay. Justice Stephens states the principle in this manner:

> * * * [If] the reason for the jury trial practice does not exist in non-jury trials, where the judge is the trier of the facts, the jury trial practice ought not to be applied but should give way in favor of a practice consistent with the spirit of the Federal Rules of Civil Procedure. Rule 1 expressly provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Therefore, a court should dispose of a case at the first opportunity which is appropriate under the rules and in accord with the rights of the parties. When a court sitting without a jury has heard all of the plaintiff's evidence, it is appropriate that the court shall then determine whether or not the plaintiff has convincingly shown a right to relief. 67 F. Supp. at 417–418.

Due considerations of "just, speedy, and inexpensive determination of every action" are no less applicable to the administrative adjudicatory process. If it is unfair to require a defendant in a non-jury trial to expend the time and money necessary to put in his case where the plaintiff has failed to show a right to relief without the aid of most favorable inferences, then it is no less unfair to impose this requirement upon a respondent in our proceedings. If the expenditure of the time of the court and of public funds required in the continuation of the trial after the plaintiff has failed to show a right to relief cannot be justified, then the expenditure of the time of this Commission and its appropriated funds in a similar situation is also unjustifiable.

Plaintiffs contending for the application of the jury standard in non-jury cases have argued that the use of the Rule 41(b) standard deprives them of the opportunity to hear the defendant's witnesses and to bolster the case-in-chief through the use of cross-examination. Justice Stephens rejected this contention, saying:

> A plaintiff who has had full opportunity to put on his own case and has failed to convince the judge as trier of the facts, of a right to relief has no legal right under the due process clause of the Constitution, to hear the defendant's case, or to compel the court to hear it, merely because the plaintiff's case is a *prima facie* one in the jury trial sense of the term. 67 F. Supp. at 418.

This contention was rejected also by Judge Learned Hand in *Global Commerce Corp. S. A.* v. *Clark-Babbitt Industries, Inc.*, 255 F. 2d 105 (2d Cir. 1958).

The foregoing considerations would seem to apply with equal force to our own proceedings. In a number of cases the result will be the same regardless of which standard is employed. This is so where the operative facts are not disputed, where only one inference reasonably may be drawn from a basic fact, and where there are no issues of credibility. And there is a penumbral area of substantial breadth where there are conflicts in the evidence or issues of credibility present, but the trier applying the jury standard nevertheless grants motions to dismiss. This result is reached whenever the trier decides that the evidence adduced so clearly fails to establish the essential elements of the proponent's case that further hearings would be a waste of time.

It should be borne in mind as well that Federal Rule 41(b) is a discretionary rule. Among other things, it provides that:

> In an action tried by the Court without a jury the court as *trier of the facts* may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. (Emphasis supplied.)

In a close case the judge may either deny the motion and require the defendant to put in his case, or dismiss the complaint without prejudice. See 5 Moore, Federal Practice, Para. 41.13 [4] (1951). I cannot agree with the majority that the Commission's hearing examiners are wholly without a similar discretion. The powers of the hearing examiner derive basically from Section 7(b) of the Administrative Procedure Act. Attorney General's Manual on the Administrative Procedure Act, pp. 74, 75. The enumerated powers therein, coupled with our own Rules of Practice, notably Section 3.15(c)(7), seem to indicate that a hearing examiner has the necessary discretion. Nor does Section 3.8(e) of our Rules appear to impose any limitation as intimated by the majority. To the contrary, the negative inference to be drawn from Section 3.8(e) itself is that the hearing examiner can *deny* a motion to dismiss at close of the case-in-chief and do so without the necessity of making findings and rendering an initial decision as would otherwise be required by the granting of such a motion. Should any reasonable doubt exist as to the authority of the hearing examiner, it would be a simple matter to clarify our Rules of Practice. There need be no fear that a close and doubtful case involving a substantial public interest would be dismissed prematurely.

The "public interest" is not a unitary concept. One of the criteria of "public interest" in the broad sense is that decisions will be reached on the basis of a record developed under fair rules of pro-

cedure. Indeed, in order to retain full public confidence the procedure, in the words of Mr. Justice Holmes, "must not only be fair, but give the appearance of being fair."

It is my firm belief that the Commission should abandon the standard adopted in *Vulcanized Rubber* and adopt the standard now employed by the Federal courts in non-jury cases. By doing so our hearing examiners and counsel will also have readily available a body of precedents to guide them.

Chairman Kintner joins with Commissioner Tait in this concurring opinion.

ORDER

The respondent having filed an interlocutory appeal from the hearing examiner's order denying its motion to dismiss the complaint; and

The Commission, for the reasons set forth in the accompanying opinion, having determined that the appeal is not one to be granted under the provisions of §3.20 of the Rules of Practice:

It is ordered, That said appeal be, and it hereby is, denied.

Chairman Kintner and Commissioner Tait concurring in the result.

INTERNATIONAL PAPER COMPANY [1]