

appropriate in all respects to dispose of this proceeding and that the appeal of counsel supporting the complaint should be denied.

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

It is further ordered, That the hearing examiner's initial decision be, and it hereby is, adopted as the decision of the Commission.

IN THE MATTER OF

SCOTT MITCHELL HOUSE, INC., ET AL.

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

Docket 8591. Complaint, Aug. 22, 1963—Decision, Sept. 24, 1964

Order dismissing for failure of proof, complaint charging Yonkers, N.Y., distributors of various articles of merchandise with representing falsely, in promotional materials including newspaper and magazine advertising, that light bulbs and grinding mills were unconditionally guaranteed for stated periods, that the "Magi-Carver" electric knife had a substantially superior performance to the conventional carving knife, and that the Robinia Tree was suitable for shade and ornamental purposes.

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 Scott Mitchell House, Inc., a corporation, and Juanita Linet, individually and as an officer of said corporation, and David Wittels, individually and as General Manager of said corporation, hereinafter referred to as respondents, have violated the provisions of 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 Scott Mitchell House, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 415 South Broadway, in the city of Yonkers, State of New York.

Respondent Juanita Linet is an officer of the corporate respondent and Respondent David Wittels is general manager of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices here-

inafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of various articles of merchandise such as electric light bulbs, grinding mills, knives, trees and other articles of merchandise to the public by mail.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of their aforesaid merchandise, respondents have made numerous statements and representations in promotional materials including advertisements inserted in newspapers of general circulation and magazines respecting the guarantee, performance and quality of said merchandise.

Typical, but not all inclusive of said statements and representations, are the following:

5 yr. Guarantee on Regal Lite Bulbs

Blender-Liquifier and Grinding Mill * * * fully guaranteed for 1 year

Amazing "Magi-Carver" Electric Knife. Takes the chore out of slicing and carving

Now! A Flowering Shade Tree that Grows Roof-High in Just One Single Year

But this year, thanks to Robinia, instead of slaving half a life time playing nursemaid to a tree * * * you are actually going to grow a beautiful, soaring tree, incredible, as it may seem, in just one year! And remember * * * Robinia's almost unbelievable growing power has been demonstrated in Botanical Gardens * * * on State Parkways * * * by professional landscapers on the grounds of million-dollar estates. Is it any wonder it has been hailed in banner headlines from coast to coast.

PAR. 5. Through the use of the aforesaid statements and representations and others of similar import and meaning not specifically set out herein, respondents have represented, directly or by implication, that:

(a) Said light bulbs and grinding mills are unconditionally guaranteed for the stated period;

(b) That the "Magi-Carver" knife by virtue of its electrical operation has a performance substantially superior to the conventional carving knife;

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(c) That the Robinia tree has characteristics which makes it suitable for shade and ornamental purposes.

PAR. 6. In truth and in fact:

(a) Said light bulbs and grinding mills are not unconditionally guaranteed for the stated period. The "guarantees" referred to are subject to numerous conditions and limitations not disclosed in the advertisements.

(b) The "Magi-Carver" knife by virtue of its electrical operation does not have a performance substantially superior to the conventional carving knife.

(c) The Robinia tree does not have characteristics which make it suitable for shade and ornamental purposes.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. James A. Ryan and *Mr. Charles W. O'Connell* for the Commission.

Mr. Sidney Schreiber of New York, N.Y., for the respondents.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

MAY 1, 1964

The Federal Trade Commission, by complaint dated August 22, 1963, has charged that the respondents, Scott Mitchell House, Inc.,

Juanita Linet and David Wittels have engaged in false, misleading and deceptive advertising in the conduct of a mail-order business operated by them (Federal Trade Commission Act, Section 5, 15 U.S.C.A. Par. 45). While admitting generally that they have engaged in advertising "substantially as set forth" in the complaint, the respondents deny those allegations which are to the effect that the advertising was false, misleading and deceptive. The subject matter of the advertising and the allegations with respect thereto, as will appear in greater detail below, involve guarantees on electric light bulbs and a blender-liquefier-grinding mill, a representation as to the performance of a battery-operated carving knife, and a representation as to the shade and ornamental characteristics of a locust tree. The tree is technically known as the *Robinia, pseudacacia*.

The respondents are Scott Mitchell House, Inc., a New York corporation conducting a mail-order business from 415 South Broadway, Yonkers, New York, Juanita Linet, its president and a member of its board of directors, and David Wittels, its general manager. Mrs. Linet is a housewife. She has retained the offices mentioned in name only, having abdicated all her functions to her husband, Abraham Linet, and to Wittels. Such abdication, the examiner would rule should it become necessary in this case, is no reason to relieve her from charges of false and deceptive advertising if, in fact, an order became appropriate. Respondent's attorney agrees (Tr. p. 147). Wittels, by reason of his acceptance of full responsibility for the advertising practices of the company, also would be subject to an order, if entered in this proceeding (Tr. p. 259). In fact, this was not in issue. Nor is there any issue as to interstate commerce and competition in commerce, the allegations as to those also having been admitted.

The False Guarantee Charge

The advertising claimed to be deceptive is portrayed in the complaint as follows:

"5 yr. Guarantee on Regal Lite Bulbs"

"Blender-Liquefier and Grinding Mill * * * fully guaranteed for 1 year"

Each of these quotations is from separate box advertisements, each containing much additional text, arranged with other boxes under a bannerhead clearly and unmistakably showing Scott Mitchell House, Inc., as the offeror and advertiser.

It is charged " * * * [S]aid light bulbs and grinding mills are (represented as) unconditionally guaranteed for the stated period * * *" when, in truth and in fact, " * * * said light bulbs and grinding mills are not unconditionally guaranteed for the stated period. The 'guar-

antees' referred to are subject to numerous conditions and limitations not disclosed in the advertisements." The complaint does not make clear, and no bill of particulars was filed for the purpose of setting out, what, if any, conditions and limitations were not disclosed in the advertisements. Cf. Administrative Procedure Act, Section 5(a), 60 Stat. 239, 5 U.S.C. 1004(a). It appears, however, from Commission counsel's proposed findings, that he contends that a requirement that the grinding mills be returned before the guarantee would be honored was not disclosed in the advertisement, that the purchaser was required to pay postage in returning the product and that the advertisements failed to reveal the identity of the guarantor.

In making these contentions, he relies on the Commission's Guides Against Deceptive Advertising of Guarantees. They provide that an advertisement should show "What, if anything, anyone claiming under the guarantee must do before the guarantor will fulfill his obligation under the guarantee, such as return of the product and payment of service or labor charges; * * * and, The identity of the guarantor should be clearly revealed in all advertising, * * *." The Guides are not substantive law. They put the public and advertisers on notice as to "the interpretation which the Commission, unaided by further consumer testimony or other evidence, will place upon advertisements using the word and phrases therein set out." *Gimbel Brothers, Inc.*, Docket No. 7834 [61 F.T.C. 1051, 1073], Slip opinion, pp. 15, 16, July 26, 1962.

That the identity of the guarantor was not revealed in the advertising is not charged in the complaint. This is hardly "a condition" or "limitation" unless someone other than the advertiser is the guarantor. Even if failure to disclose identity of guarantor had been charged, the examiner is of the opinion that Scott Mitchell's obligation is clear. The reason given in the Guides for the requirement that the identity of the guarantor be disclosed is, "* * * Confusion of purchasers often occurs when it is not clear whether the manufacturer or the retailer is the guarantor." The confusion is the "run-around" resulting when a claimant under the guarantee goes to his vendor for performance and is told that the manufacturer and not the vendor is the guarantor. In these advertisements, Scott Mitchell House, Inc., the respondent in this proceeding, is the guarantor. It is the offeror and seller and there is nothing in either advertisement or in actual practice which suggests that someone else is the guarantor. It agrees that if the bulb does not last five full years, the buyer will "get a brand new bulb with the same guarantee." It says that the blender-liquefier is "Fully guaranteed for 1 year." It says, also, as to the 10-day test period, if the buyer is "not

completely satisfied that this is the finest appliance (he's) ever owned (he may) return it for a complete money-back refund." There is nothing confusing about either of these advertisements with respect to the identity of the guarantor, which is clearly disclosed at the top of the "spread." The testimony is to the same effect (Tr. pp. 268-269, 271-273).

Heavenly Creations, Inc., a recent case, Docket No. 8448, February 25, 1964 [64 F.T.C. 978], involved an advertisement which did, in fact, create a confusion as to who might have been represented as the guarantor. Immediately following the words of guarantee, the product advertised was described as "Made in U.S.A. by the International Silver Co." The Commission, in modifying the initial decision, pointed out that "the deception *charged in the complaint* and found by the examiner involved, not failure to disclose the guarantor's identity, but falsely stating the guarantor's identity." (Page 4, Commission's Opinion. Emphasis mine) [64 F.T.C. 1008]. While there is reference to the bulbs as having been "made of Corning glass" and the blender-liquefier-grinding mill as a Moulinex article "manufactured by one of France's largest appliance makers * * *," these references are not in any way related to the guarantees and it is obvious that any claims under the guarantee are to be made to the vendor. Moreover, the complaint, as already noted, did not charge either a failure to disclose the guarantor's identity or a deception with respect thereto.

As to whether the terms of the guarantee were not fully disclosed in the advertisement in that, as contended by Commission counsel, the purchaser was required to return the product or pay a service charge or a labor charge or do anything before the guarantor would fulfill his obligation, the examiner cannot agree that the respondents engaged in deception in any of these respects.

The bulb advertisement said nothing about a return and imposed no conditions. The only testimony related to this charge is that of respondent Wittels. He said there was no other guarantee but that set forth in the advertisement, that the bulb did not have to be returned by the purchaser in order to get satisfaction, that the new bulb is sent to the customer postpaid and without charge, and all that the customer has to do is to notify Scott Mitchell that the bulb has burnt out (Tr. pp. 267-269).

The remaining guarantee charge involves the blender-liquefier-grinding mill. The advertisement sets forth (1) that this appliance is fully guaranteed for one year and (2) that if the purchaser is not satisfied, he may return it for a complete money-back refund after trying it for 10 days. In pressing this charge, Commission counsel

asserts that "it was necessary to return the product and the purchaser was responsible for the postage involved." His conjunctive reference to the requirement that the buyer pay the postage incurred in returning the article to Scott Mitchell suggests that he does not press seriously the mere fact that it had to be returned for performance of the guarantee. After all, this article did cost about \$10 or more (Commission Ex. 2 and Tr. p. 271). There is no likelihood that any confusion would result because the entire transaction is a mail-order transaction. There are no relations other than by mail. The situation might be different if the article were purchased in a store and the return for performance had to be made to a distant place other than the store. Nor would any person except one motivated by unscrupulous design expect performance of the guarantee without returning the article. There is no testimony that anyone was misled. This may be a negligible factor because the Guides suggest that none is necessary when they are applicable. But, it should be observed the guide is in the conjunctive. It says, "* * * such as return of the product and payment of service or labor charges; * * *."

The hearing examiner's attention has been directed to only one case on the basis of which it might be argued that an undisclosed requirement for payment by the purchaser of his expenses incurred in returning the article for performance of the guarantee was a breach. This case resulted in a consent order, *Roberts Electric Company*, 59 F.T.C. 848, October 17, 1961. While he is of the opinion that a Commission decision based on a mere consent is not a precedent in the same sense as one made in a litigated case, he is further of the opinion that there is no substantial evidence in this record to justify a finding and conclusion that the respondents imposed upon purchasers the obligation to pay the expense for returning the purchased article before performance of the guarantee. Commission counsel's only basis for reliance on his request for such a finding is the testimony of respondent Wittels. This, the hearing examiner finds, refutes rather than supports counsel's position. While, in response to a question as to who pays the postage in returning the article, Wittels did say, "The customer would have to," there is no evidence whatsoever that any customer who did not pay it was denied performance of the guarantee. On being pressed further by Commission counsel, the following (Tr. p. 271) transpired:

Q. You say that the purchaser pays the postage? A. Well, he would have to, to get it back to us, yes.

Q. Yes. A. Although many people do send it in collect.

Thus, not only is there no evidence of failure to perform the guarantee because of a requirement that the postage for returning the article to Scott Mitchell be paid by the claimant, but the testimony is clearly pregnant with the conclusion that such persons as send the article "in collect" also obtain performance. There was no followup of this testimony with any additional interrogation as to what, if anything, would happen if the articles were returned collect. The hearing examiner cannot assume that performance of the guarantee would be denied and it is not unreasonable to assume, from the manner in which the testimony was elicited, that it would be performed in that event as well.

It should not be overlooked that this case does not involve conditions such as time limit of the guarantee, service charges, handling charges, etc. None of these appears here. For these reasons, the examiner cannot find or conclude as proposed in Commission counsel's Eighth Proposed Finding that, "The light bulbs and grinding mills are not unconditionally guaranteed. The 'guarantee' referred to is subject to numerous conditions and limitations not disclosed in the advertisement."

The Performance of the Magi-Carver Electric Knife

The advertisement which gives rise to the charge of deception as to the performance of the Magi-Carver Knife, in addition to other material contained in its body, leads off with the words quoted in the complaint:

Amazing "Magi-Carver" Electric Knife. Takes the chore out of slicing and carving

Some additional statements contained in the advertisement and not quoted, but which ought to be read together with the quoted material, are:

Stainless steel power knife is battery operated and has power plus. Eliminates the annoyance of a blade sliding around without cutting, takes the effort out of carving turkeys or roasts. Perfect for slicing meats, cheese, vegetables or anything. A must in every kitchen. (Commission Ex. 2)

The complaint alleges in the innuendo that the representation quoted means: "That the 'Magi-Carver' knife by virtue of its electrical operation has a performing substantially superior to the conventional carving knife;" whereas "In truth and in fact * * * The 'Magi-Carver' knife by virtue of its electrical operation does not have a performance substantially superior to the conventional carving knife" (Complaint, Paragraphs Five and Six). (The examiner does not reach the question whether the innuendo pleaded follows fairly the

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advertising attacked.) Basic ingredients of the proof of a charge such as this would seem to be, first, proof that the directions for the operation of the knife were followed by the persons who used it and contended that its performance was not substantially superior to that of the conventional carving knife, and, next, an actual demonstration of the performance of the knife, plus, possibly, but perhaps not necessarily, a simultaneous demonstration of the performance of a conventional carving knife. Neither of these ingredients appears in the evidence submitted in support of the charge. The knife was offered and received in evidence (Commission Ex. 5-A), and along with it there also was offered and received a set of printed instructions (Commission Ex. 5-C). After preliminary instructions for setting up the knife and getting it to operate by moving the switch forward, the instructions say:

For best results CUT FORWARD. DO NOT tug back and forth. Clean and even slices will result from a firm forward cutting motion. If the object being carved is large or tough, lift the blade slightly and repeat the forward cutting procedure as many times as required.

Neither of the witnesses called by Commission counsel testified that he or she, prior to testing or using the knife, attempted to follow the instructions or even read them. It is not proper to attempt to judge the performance of a mechanical contrivance without making certain in advance that the operator has familiarized himself with the instructions for its operation and has followed them in the test or use. Although the examiner took note of the failure to submit the knife to an actual demonstration in the hearing room, Commission counsel did not avail himself of the opportunity to do so for the purpose of actually demonstrating performance (Tr. p. 128). True, a similar observation and invitation was made for the benefit of respondents' attorney who chose not to accept it (Tr. p. 329). He, however, did not have the initial responsibility for demonstrating performance. That was the responsibility of the Commission attorney and, consequently, the failure of respondents' attorney to do so is of no consequence.

For the purpose of proving this charge, Commission counsel called two witnesses, one, a chef in a Washington restaurant, and the other, a lady who had purchased the knife. Apart from the basic deficiencies of proof just mentioned, the testimony of neither of these witnesses impressed the examiner as being reliable or sufficiently substantial to justify a conclusion that the knife's performance was represented in a deceptive manner. The chef appeared to be somewhat belligerent and, in his testimony, seemed to resent the knife. For example, in his anxiety

to testify that the knife did not assist him at all in the cutting of meat, he did not give Commission counsel an opportunity to finish his question. Commission counsel inquired, "Did that assist * * *, do you feel that assisted you in the * * *." The witness interrupted the question in his haste to answer "None whatsoever. Whatsoever." (Tr. 108.) He testified that he had used the knife that morning on "A roast beef. Tender roast sirloin of beef." All that he noticed was a little vibration, a little noise, and that "It felt like (he) was holding a flashlight or something, handled it awkward. It is larger than the ordinary slicer." He was looking for more than the advertising offered. There was nothing in the advertising to suggest that the knife would work by itself. He concluded his testimony by saying he helps his wife at home, knows what the conventional carving knife is, and couldn't say this one was as good. He said, "It isn't good for slicing" and that he couldn't use it for slicing because "it is awkward and clumsy to handle. For an electric knife I would think we would have something like an electric saw, revolving chain or something to assist us. No assistance whatsoever in that." (Tr. pp. 107-109.) On cross-examination, when asked whether the knife annoyed him by its vibration, he answered, "I was looking for a miracle to happen. I was trying to see what would happen with the knife." (Tr. p. 120.) The attitude of this witness is quite understandable. After all, he is an experienced, professional meat carver and is accustomed to special knives developed for particular types of cutting, all of which are continually maintained in razor-sharp condition. This knife was not produced or advertised for the professional butcher or chef. This knife obviously is directed to the ordinary uses to which such a knife may be put in the home. The witness's resentment of and prejudice against the knife and his irrelevant objections to it, coupled with his complete failure to show that he had attempted to follow the instructions for its operation, renders his testimony of no value in this proceeding.

Next, we have the housewife who purchased the knife. Here, again, we find no effort to show a sincere desire or genuine wish that the knife perform in the manner advertised. All that this witness did was to try it once at home on a roast beef. She testified, "The results were that it was nothing that was claimed for it. It certainly didn't ease any chore at all. It didn't help anything. I just felt a vibration in my hand from the batteries; that was all." And, after letting her husband use it, she packed it up and sent it to the Federal Trade Commission. While she said repeatedly that the knife "cut as a conventional carving knife without the extra that it was supposed to give," she also stressed several times her opinion that it was constructed flimsily and not of good

quality, matters which were not in issue at all (Tr. pp. 217-224). It developed on cross-examination that this witness works for a company that either imports or manufactures a carving knife with a guide on it and also a frozen-food saw; also that the witness, despite the fact that she was "angry" with the knife, made no effort whatsoever to obtain any satisfaction from the respondent, but complained directly to the Federal Trade Commission (Tr. pp. 227-228, 234). (That she had made the complaint was disclosed by her in her direct testimony. Her letter of complaint, demanded by defense counsel during cross-examination, was not produced by Commission counsel. In view of the result below, the examiner does not reach the question whether the rule of *Jencks v. United States*, 353 U.S. 657 at 672 ought to be invoked. But, see *Alexander v. United States*. — U.S. App. D.C. —, — F. 2d —, No. 18124, decided April 16, 1964, particularly dissenting opinion of Circuit Judge Washington.)

It does not appear what this witness did to prepare herself to use the knife. Certainly, there is no testimony either that she read the instructions or that she attempted to follow them. Considering her testimony as a whole and in retrospect, and assuming that her participation in this case had no relation whatsoever to her employment by a company which may be competitive with the respondent, the examiner concludes that the best that can be said for her testimony is that she was disappointed in that she received a knife which did not rise to her expectations in sturdiness or quality and not that the knife did not perform in the manner in which it was advertised. Thus, separate from the lack of proof as to following directions and of the actual performance of the knife, the examiner is unwilling to accept her testimony for the purpose of supplying reliable evidence of probative value in support of the charge.

Other than the testimony of the chef and the housewife there is no evidence to support the charge of deception with respect to the knife's performance.

The Robinia Tree

The final charge concerns a locust tree bearing the technical name "Robinia." Closer reading of the advertisement (Commission Ex. 4) shows that the variety of Robinia involved is *pseudacacia*.

The language from the advertisement quoted in the complaint as being typical of the alleged false advertising is:

Now! A Flowering Shade Tree that Grows Roof-High in Just One Single Year But this year, thanks to Robinia, instead of slaving half a life time playing nursemaid to a tree * * * you are actually going to grow a beautiful, soaring tree, incredible, as it may seem, in just one year! And remember * * * Robinia's

almost unbelievable growing power has been demonstrated in Botanical Gardens * * * on State Parkways * * * by professional landscapers on the grounds of million-dollar estates. Is it any wonder it has been hailed in banner headlines from coast to coast.

The innuendo is, "That the Robinia tree has characteristics which makes (sic) it suitable for shade and ornamental purposes" and the deception alleged is that "In truth and in fact * * * The Robinia tree does not have characteristics which makes (sic) it suitable for shade and ornamental purposes."

In the consideration of this charge, the pleader has limited us to some extremely definite and narrow wording. Thus, in order to make a finding of violation, it is necessary to find that this tree, in fact, "does not have characteristics" which make it suitable for shade and ornamental purposes. The pleader has assumed the obligation to prove that the tree involved has no characteristics which would make it suitable for shade and ornamental purposes. Consequently, given the assumption that we can determine what is suitable for shade and ornamental purposes, if we find that the Robinia tree has any such characteristics, the charge must be dismissed and, if we find that the tree does not have any such characteristics, the charge must be sustained.

For the purpose of supporting this charge, after having the advertisement received in evidence, counsel called three witnesses. The first, the Secretary of a nurserymen's trade association; the second, a salesman employed by a District of Columbia florist and nursery; and the third, the Director of Horticulture for the New York City Department of Parks. These witnesses were asked many questions and gave much testimony about undesirable and objectionable features of the Robinia *pseudacacia* tree, about its growing habits and about its susceptibility to borers. These, however, are all entirely irrelevant because the charge was *not* that the tree has objectionable characteristics. Similarly, many questions were asked and much testimony was given with respect to possibly deceptive statements contained within the advertisement but not charged in the complaint. While it is entirely possible that some of the statements did stretch or distort the truth, because of the failure so to charge, such testimony is irrelevant. [While it would not absolve them, it may be noted that respondents did not prepare the advertisement. This was prepared by the nursery for which they acted and they adopted it (Tr. 149, 278).] The quotations from and references to the testimony to which I shall now resort are all testimony of witnesses called in support of the complaint. The quotations deliberately exclude most of the irrelevant testimony and include mainly that demonstrating characteristics which make the tree suitable for shade and

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ornamental purposes because, as already stated, the charge is that the tree had none. *Cf. Mary Carter Paint Co., Inc.*, Docket No. 8290, Slip opinion, pp. 3-4, June 28, 1962 [60 F.T.C. 1827]; also, second decretal provision, Final Order, *Sacks Woolen Co., Inc.*, Docket No. 8436, Nov. 27, 1962 [61 F.T.C. 1226, 1236]. (Respondents continually objected to the irrelevant testimony and their objections were in large sustained Tr. 169, 182, 191.)

The trade association executive testified, "The leaflets are fairly small, so that it does give sparse shade." (Tr. p. 35): "in this area it is blooming in late May." (Tr. p. 36); * * * for home planting (a desired characteristic), if planted to achieve a desired view or a desired object, it may be for its flowering or may be for some other effect that you want it, and usually it is because of the color of the leaves, the color of the flowers, the shape of the tree. * * * (Tr. p. 48); in its flowering state, "It blooms, well, generally it blooms May to June. In this area it blooms in late May, late season would be in early June. In Michigan it blooms in June, possibly mid-June." (Tr. p. 81); "It is among a group of trees, a group of species, that do grow well but this one certainly would not be a super-growing species, particularly in the tree stage once it has become branched * * * By tree stage I mean once it has branches and is recognized as a tree, in contrast to it having a single stem, or if I may use the nursery term, being a whip." (Tr. p. 83): "The layman would think of a tree as a plant with a central stem and then branches, so that you get what is commonly thought of as a tree shape." and this particular tree "would begin to approach this at the ages of somewhere beyond 3 years. It is possible with care for it to begin to approach it in 3 years." (Tr. p. 85); if this tree were permitted to grow without pruning or trimming "It would in time branch and develop into the shape that is characteristic of that tree * * *" (Tr. pp. 86-87); "Bailey's Encyclopedia of Horticulture which is over 3,000 pages has many illustrations of trees in it * * *" (Tr. p. 88) and is one of various books to which the witness refers in his work. The tree "starts losing its leaves in September. By the first of October in this area it has completely lost them. Further north, it would be a little earlier. Then, it is just the bare tree, branches, from then on through the winter, until the buds and leaves begin coming out, the tree starts budding and the leaves begin coming out the following spring." (Tr. 93); "In this area (Washington, D.C.) it flowers in late May and it is in flower for approximate 10 days to 2 weeks." During the winter months, it is completely bare, but there are seed pods on the tree, these being three or four inches long, approximately an inch wide, brown in color, and the quantity of them depends on

the amount of blooming in any particular year. (Tr. p. 94); "The trunk is dark brown, very dark brown to black." (Tr. p. 95); when asked as an expert whether "this Robinia tree has no characteristics which make it suitable for shade and ornamental purposes," he testified, "The only characteristics that would approach this would be its blooming * * * Under some people's opinions it would be possible for this tree to be considered ornamental in the sense that it does have blossoms and is showy at that particular time, and even within the species there are varieties * * * This one is not offered in the trade for ornamental purposes." (Tr. pp. 97-98); "The fact that the tree does have bloom which is in contrast to the foliage on the tree at the same time, this would be the only ornamental characteristic that I would see in the tree * * * It can cast sparse shade." (Tr. p. 100); "Except for ever-green trees * * * all trees in the winter time lose their leaves." (Tr. p. 103.) Nurserymen producing shade trees advertised the Robinia *pseudacacia* as shade trees (Tr. pp. 104-105).

The salesman employed by the Washington florist and nursery testified as follows: The Robinia *pseudacacia* "has a blackish fissured bark that is from brown—dark brown to black * * *" with " * * * small leaf growing on a central stem. And it flowers sometimes, around here by May-June, late May generally, and not reliably. It will flower, oh, about every 3 years, I think, it is considered to generally give a good display." (Tr. p. 54.) The tree is in bloom "Generally, late May, sometimes early in June, depending on your season * * * It gives a light filtered shade * * * it has compound leaves, lots of small leaves, and the sun will come through it and you get a dappled shade, a mottled shade.", its greatest shade being given "probably June, July, August." (Tr. p. 57); a tree in his mother's yard, which had been a sprout from an old tree that had been cut down, after having been cut off several times by a mowing machine, is now "about 20 feet high, 20, 25 feet high. It is not as full as this (pointing to a tall, well-shaped, full-branched and leafy tree depicted in the advertisement) but it is about half that full. And that is in 5 or 6 years." (Tr. pp. 61-62); "It gives a little bit of shade. It is filtered shade.", and shade being "nice on a hot day", it casts shade in July and August. (Tr. p. 62); and in 28 years of employment as a tree salesman, this witness had sold only one Robinia tree (Tr. p. 60).

The last witness called to testify in support of the complaint was a horticulturist, the Director of Horticulture for the Department of Parks of the city of New York. He has been with the Park Department for about 25 years. Respondents concede his qualifications as an expert (Tr. p. 169). He testified that he is familiar with the locust tree,

Robinia pseudacacia, that "a developed specimen has a very, very deep furrowed bark on the trunk. The branching up above is rather limited because they are usually dying back. The foliage is a compound very fine leaf. It does have a flower, a white pea-shaped flower, which hangs in clusters of three or four inches. It lasts about two weeks." (Tr. p. 164); "The foliage falls in the fall. In this area (New York), they are quite thin in September. It is not a heavy foliage tree * * * it grows about as far west as Missouri, and about as far south as Georgia. It grows in New York State, Pennsylvania." (Tr. p. 165.) Trees which are used for shade and ornamental purposes have certain characteristics which are "a good deep-rooting root system: a single trunk, well developed, with a good branching habit: good foliage for shade, and above all, not susceptible to disease or insects that were difficult or hard to control." The *Robinia* does not have these characteristics (Tr. pp. 167, 168); "It doesn't develop a good branching habit until it gets at least five to ten years old. The foliage is very thin; it is not a heavy shade tree * * *" (Tr. p. 168). The tree would reach the tree stage, that is have the appearance of a tree in "say eight or ten years," but "it would have leaves when it was a sucker. Even though it was a whin, it would have some foliage on it. But it would be very light. It would not have the appearance of a shade tree for a number of years. It would depend upon the pruning attention that it was given * * * With proper attention, from five to ten years, * * * it would give the appearance of a tree," and its flowers "might have a blossom or two after three years * * * (with) extensive flowering (after) at least five years." (Tr. p. 176) It might have a blossom during the first year of its growth. It is in bloom in New York in "the latter part of May and early June * * * it might develop faster * * * under its natural conditions" in various parts of the United States (Tr. p. 177). It blooms for "About 2 weeks" and "it grows in pretty poor soil. It is very tolerant of poor soil and arid conditions. So far as I know, its range, as I indicated before, is as far south as Georgia * * * There are some that have been growing in the parks, and those are kept. But they require attention to keep them in shape." (Tr. pp. 179-181.) The witness is familiar with Bailey's *Cyclopedia of Horticulture* and knows Bailey to have been a professor at Cornell University. He is familiar with a statement quoted by Commission counsel from that work and agrees with it (Tr. p. 181). Shown the picture in the advertisement, a high, thickly-branched, well-leaved and nicely-shaped tree, the witness agreed that the tree "could grow that high" and said "this is a well-developed tree. In looking at the picture, I can only judge it to be at least five or six years old, perhaps eight or ten. It is very difficult to

tell from this picture how old it is. But it is a full, developed tree." (Tr. p. 186.) When asked as to whether the tree pictured was a Robinia, he said "It could be a robinia" and later said that the tree as pictured "is at least eight years old." (Tr. p. 187.) There are "faster-growing trees, and that is what I am going by. When you say 'super-growing,' it means faster than anything else." (Tr. p. 188.) It "is possible, depending on what size it was when shipped," "that at the end of the first year this tree could be from seven to ten feet high." He agrees that Bailey's Cyclopaedia is "an authoritative, well-thought-of work in the field of horticulture" and that "statements in it (are) likely to be true." When confronted with a quotation from Bailey's, The Standard Cyclopaedia of Horticulture, "The locusts are all handsome shrubs and trees with bright green and graceful pinnate foliage, and show white, pink or purple papilionaceous flowers," he disagreed with the portion of it which used the word "all," saying he would except "black and yellow locusts." (Tr. pp. 196-199.) He agreed, however, with other quotations from Bailey about the Robinia *pseudacacia* as to the areas in which it would grow and the soils and locations as well as with the transplanting habits (Tr. pp. 199-200). He agrees with Bailey that the locust involved in this case grows to a height of 80 feet and that, if Bailey said it has become extensively naturalized in Europe he would agree with that, too (Tr. p. 201). To grow to a height of 80 feet, the Robinia "would have to be more than fifty years old * * * it might be seventy-five * * *" Bailey's "gives you the top size that the tree can reach" and that would be "under natural conditions." (Tr. p. 211.)

All this leaves only for additional consideration the description of the tree found in the authoritative work, Bailey's Standard Cyclopaedia of Horticulture, The Macmillan Company, 1930. This work first was injected into the case by complaint counsel's witness, the trade association executive (Tr. p. 88). That having been done, the hearing examiner decided it would be well to look at it and, by notice dated February 11, 1964, filed on that day and mailed on February 12, he informed the parties of his intention to take official notice of the material concerning the Robinia tree as the same was set forth on Pages 2966 and 2967 thereof. (See, also, Tr. pp. 142-143.) This material is now pictured here.*

Now, to review all that has been said, as well as much of the testimony to which no reference has been made because it involved matters not alleged in the complaint, we have a tree with respect to which all the witnesses called in support of the charge unanimously recited

*Pictorial exhibit omitted in printing.

objectionable features. Such objectionable features as were the subject of testimony were not within the issues delineated by the complaint. As the most qualified of the witnesses conceded, some or perhaps many of these objectionable features are common to all plants, and all plants require more or less attention and care. That the Robinia may have a greater accumulation of objectionable features or may require more care, or may be more subject to the hazards of nature were not charged in the complaint. All that was charged (and it begins to sound like a monotonous refrain or broken record) was that the Robinia tree does not have characteristics which make "it suitable for shade and ornamental purposes." At best, this is a subjective test. What some people may regard as suitable for shade or ornamental purposes, others may not. Some people have preferences for color, some do not. Some have preferences for leafage, others prefer showy flowers and bloom. Some want a lot of shade, others want "dappled or mottled shade." Some demand shape. This examiner believes there is nothing more beautiful than a coating of ice on the bare wood of the branches of a tree in the wintertime or the bare branches of a tree silhouetted against the snow. There was no consumer testimony and surely we do not need experts to tell us of the whims and caprices of people. *Top Form Mills, Inc.*, Docket No. 8454, Slip opinion of the Commission, May 10, 1963, Page 4. A quick review of what was said by each of these three witnesses shows that the Robinia does, during times of the year, display flowers, blooms, buds and pods and that, in fact, it does cast shade. The acknowledged authoritative work on horticulture says that the Robinia are "Ornamental woody plants grown chiefly for their handsome white, pink, or purple flowers and the graceful foliage * * * The locusts are all handsome shrubs and trees with bright green and graceful pinnate foliage and showy white, pink, or purple papilionaceous flowers in usually pendulous or nodding racemes followed by pods attractive in some species by the dense covering of purple hairs. *R. Pseudacacia* and *R. viscosa* are hardy as far north as Ontario, and most other cultivated species as far north as Massachusetts. They are not particular as to the soil and they do well even in poor sandy soil and dry locations. They stand transplanting well and grow rapidly while young * * * *R. Pseudacacia*, on account of its heat- and drought-resisting qualities, together with its ornamental merits, has become a favorite street tree for cities, particularly in Europe;" The *pseudacacia* comes in many varieties, with none of which the tree in issue was specifically identified and from none of which the tree was distinguished in the evidence. For example, the *stricta* "is a broadly pyramidal form," the *pendula* has "somewhat pendulous branches,"

the *Ulriciana* has "spreading slightly pendulous branches and large drooping" leaves, the *aurea* has yellow foliage, the *purpurea* has "Young foliage purple," the *semperflorens* is "Flowering during the whole summer," the *Decaisneana* has "light rose-colored" flowers.

With a record such as this, the hearing examiner cannot make a finding that the *Robinia pseudacacia* "does not have characteristics which make it suitable for shade and ornamental purposes" and, therefore, this charge has not been sustained.

The foregoing should be regarded as the hearing examiner's reasons for his rulings on the Proposed Findings of Fact submitted by both counsels. Commission counsel's proposed findings, First, Second, Third, Fourth, Fifth, Seventh and Eleventh are found. His proposed Sixth, Eighth, Ninth and Tenth findings are rejected. His proposed conclusions and his proposed order are rejected. Respondents' proposed findings 1, 2, 3, 4, 5, 6, 7, 8, and 9 are substantially the same (with certain additions appearing in the evidence) as similar proposed findings submitted by counsel supporting the complaint and they, too, are found. Because of the limitations of proof, I am unable to make the conclusions of law numbered I and II, submitted on behalf of the respondent, but do agree with the third conclusion, that the complaint should be dismissed because of a failure of substantial, reliable evidence of probative value in support thereof. Consequently, the following is my

ORDER

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

ORDER DISMISSING COMPLAINT

On August 22, 1963, the Commission issued a complaint charging respondents in the above-captioned proceeding with unfair and deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act. After full evidentiary hearings, the hearing examiner ordered the complaint dismissed for failure of proof. Complaint counsel have appealed. The Commission, upon examination of the record, has concluded that the allegations of the complaint have not been proved and that the complaint should therefore be dismissed.

One of the charges in the complaint was that respondents falsely represented "That the *Robinia* tree has characteristics which make it suitable for shade and ornamental purposes." The record shows that, while the *Robinia* tree may have some such characteristics, it is not in fact a suitable tree for shade and ornamental purposes, but has many disadvantages for such use. Although the representation that

the tree has characteristics which make it suitable for shade and ornamental purposes may be literally true, it is, standing alone, misleading. Counsel for respondents conceded during the oral argument before the Commission that they were under a duty affirmatively to disclose the disadvantages of their product in this respect so as to dispel the misleading impression created by their representation. Failure to make such affirmative disclosure was, in the circumstances, a deceptive advertising practice. However, the complaint did not allege a violation of law on this ground, and to enter a cease and desist order against respondents based on this record would not be proper. Accordingly,