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THE FEDERAL TRADE COMMISSION
ITS PRESENT SCOPE AND INCREASING IMPORTANCE
BY TRACY J. PEYCKE*

A VARIETY of things have coincided in the time since the close of the war to make the Federal Trade Commission and its functions and possibilities matters of increasing interest to lawyers and laymen alike. The volume of business coming before that body has been and still is being rapidly multiplied; the hearings on the so-called "Pittsburgh Plus" controversy have brought the commission into the northwest in a very definite way; and finally recent decisions of the courts¹ have served to give the commission a standing which had theretofore been challenged, and in large measure to allay the apprehensions of its friends and advocates as to its ultimate usefulness.

It is believed that these considerations furnish sufficient reason and timeliness for a discussion of a governmental agency which seems to bid fair to become in future increasingly powerful and ubiquitous. The subject matter with which the Federal Trade Commission deals is as varied and intricate as the economics of modern business. No more can be done here than to suggest its outlines. The strictly legal considerations which are necessarily involved in its operation are many and difficult, and it is not here the purpose to discuss them all exhaustively. However, there have been only few decisions by the courts construing the act creating the Federal Trade Commission and some of these may fairly be examined.

In a word it is purposed to outline, for the information and from the standpoint of those who do not in the course of a day's business have generally to do with administrative commissions, the scope of the Federal Trade Commission, its practice and procedure, the field of substantive law with which it deals, together with a possible basis for a prediction as to its future development and usefulness.

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¹See particularly *Federal Trade Commission v. Beech-Nut Packing Co.*, (1922) 42 S.C.R. 150.

The Federal Trade Commission was created by act of Congress of Sept. 26, 1914.² The Clayton Act³ was passed a few days later, and the two acts must be construed together. Both acts were manifestly intended to be supplementary to previous legislation directed against trusts and monopolies restraining interstate trade.⁴ The Bureau of Corporations had been created by act Feb. 14, 1903,⁵ the act creating the Department of Commerce and Labor. This body had carried on extensive investigation. The Supreme Court of United States had but a short time before decided the Standard Oil and Tobacco Cases.⁶ The feeling had gained strength that further legislation was necessary in this field. The legislation of 1914 was passed upon a definite theory and for the purpose of making effective the purpose underlying the earlier legislation. The theory adopted was that competition is an essential to be preserved.⁷ The function of the Federal Trade Commission, stated in broad terms, was to be to preserve it.

DIVISIONS OF ACTIVITY

The Federal Trade Commission has organized its forces and functions into three main divisions, one of which is entirely administrative. A second is known as the legal division, and it is with work of that division that we are here mainly concerned. The other is the economic division. The main concern of the legal division of the Federal Trade Commission is the enforcement of section five of the Federal Trade Commission Act, an act frequently referred to as the Trade Law, and of sections two, three, seven and eight of the Clayton Law. The economic division carries on the investigative work of the commission,⁸ which though vast in scope is not properly of primary concern in this article.

²38 Stat. L. 717, U. S. Comp. Stat. (1918) Secs. 8836ff., 4 Fed. Stat. Ann. 575.

³Act. Oct. 15, 1914, ch. 323, 38 Stat. L. 730, 9 Fed. Stat. Ann. 730, U. S. Comp. Stat. (1918) Secs. 8835 aff.

⁴Federal Trade Commission v. Gratz, (1920) 253 U. S. 421, 40 S.C.R. 572, 64 L. Ed. 993, (dissenting opinion of Mr. Justice Brandeis).

⁵32 Stat. L. 825, 2 Fed. Stat. Ann. 475.

⁶Standard Oil Co. v. United States, (1911) 221 U. S. 1, 31 S.C.R. 502, 55 L. Ed. 619, 34 L.R.A. (N.S.) 834, Ann. Cas. 1912D 734; American Tobacco Co. v. United States, (1911) 221 U. S. 106, 31 S.C.R. 632, 55 L. Ed. 663.

⁷See report of Senate Committee on Interstate Commerce, June 13, 1914, 63rd Congress, Second Session, No. 597, p. 10.

⁸Secs. 6, 7 and 8.

The functions of these divisions properly overlap, and it is obvious that the activities of the commission occupy a field where legal and economic principles meet and must be fused. The Federal Trade Commission inherited the property and functions of the Bureau of Corporations.⁹ By section six of the Trade Law the commission is given power to conduct investigations into the affairs of corporations engaged in interstate and foreign commerce except banks and interstate carriers, both of which are subject to investigation and control by other boards. Under this section the commission has carried on numerous investigations, the result of many of which have from time to time been published in special reports. It is given express authority to make public information so obtained "except trade secrets and names of customers, as it shall deem expedient in the public interest."¹⁰

It may also require reports as to the affairs of corporations of the class just referred to.¹¹ It may on its own initiative, and must when so required by the attorney general, investigate the manner of carrying out a decree against a defendant corporation under the antitrust acts.¹² Other duties in connection with these acts may be required of the commission by other departments of the government,¹³ and other investigations of a more special character are authorized.

When a decree is to be made against a defendant in an equity suit under the antitrust acts, the court may refer the suit to the commission, as a master in chancery, to report an appropriate form of decree.¹⁴

Substantial penalties are provided for failing to make reports required by the commission, for falsifying such reports, or for refusing to testify or produce evidence when subpoenaed to do so.¹⁵

All these investigative and advisory functions are of the same type as those required of many administrative boards and warrant little comment here. The act creating the commission, together

⁹32 Stat. L. 825, 2 Fed. Stat. Ann. 475.

¹⁰Sec. 6 (f).

¹¹Sec. 6 (b).

¹²Sec. 6 (c).

¹³Sec. 6.

¹⁴Sec. 7. District courts declined the assistance of the commission in this capacity in *United States v. Reading Company*, (1915) 226 Fed. 229, 285, and in *United States v. Eastman Kodak Company*, (1915) 226 Fed. 62, 80-81.

¹⁵Sec. 10. It is provided by section 9 that a person is not to be excused from testifying or producing records for the reason that this might tend to incriminate him, but he may not be prosecuted for anything concerning which he may testify, except for perjury in so testifying. It will be interesting to notice whether this section is given full effect.

with the Clayton Act did, however, impose upon it duties of a highly distinctive character. These duties are in the enforcement of the sections of the Clayton Act heretofore referred to,¹⁶ and of section five of the Trade Law. The only rule of conduct contained in the Trade Law is in the initial words of section five, which provide "that unfair methods of competition in commerce are hereby declared unlawful." The commission is then empowered and directed to prevent persons, partnerships, or corporations, subject to the act, from using unfair methods of competition in commerce. The remainder of section five provides the manner in which and the machinery by which this mandate is to be carried into effect.

Section eleven of the Clayton Act substantially re-enacts the procedural portion of section five of the Trade Act insofar as it is related to the duty imposed on the commission to enforce compliance with sections two, three, seven and eight of the Clayton Act. This is true with one important reservation. Whenever the commission shall have reason to believe that a violation of section two, three, seven or eight of the Clayton Act is involved, section eleven of that act provides that the commission shall issue its complaint and proceed. Whenever the commission shall have reason to believe that a violation of the prohibition of employing unfair methods of competition under the Trade Law is involved, section five of that statute provides that it shall issue its complaint and proceed, only "if it shall appear to the commission that a proceeding by it in respect thereof *would be to the interest of the public.*"

The Federal Trade Commission Act was obviously designed in the public interest. It lays down, as we have seen, but one rule of conduct, namely the prohibition of "*unfair methods of competition in commerce.*" But this rule would seem to be intended in protection of broad public interests, and not as a basis for the redress of private grievances. Only the commission may institute proceedings. Private parties may be allowed to intervene, but it was plainly not the intention of Congress that such parties should become the prosecutors. And it is *unfair methods* that are inhibited, and not *unfair acts.*¹⁷ These considerations tend to stamp this statute as one for the protection of the public, and

¹⁶Secs. 2, 3, 7, and 8.

¹⁷See dissenting opinion of Justice Brandeis in *Federal Trade Commission v. Gratz*, (1920) 253 U.S. 421, 40 S.C.R. 572, at p. 576, 64 L. Ed. 993.

only in an incidental way as furnishing a remedy for private wrongs. Accordingly, there is incorporated the requirement that a proceeding should be to the interest of the public.

We are not to understand that the commission may proceed under the Clayton Act in cases where no public interest is involved. In none of its activities is the commission to be regarded as a free legal aid bureau for corporations nursing competitive grievances. But the practices denounced by the Clayton Act fall under its prohibition only if they tend to substantially lessen competition or create a monopoly. Such a tendency, of course, stamps them with a public interest.¹⁸

PROCEDURE AND PRACTICE

The procedure and practice of the Federal Trade Commission is regulated by the provisions of the act¹⁹ and by the rules of practice adopted by the commission.²⁰ As has been seen, all proceedings are instituted by the commission. No private individual or corporation can institute a proceeding before that body. Here is to be found a radical departure from the practice of the Interstate Commerce Commission, after which the Federal Trade Commission is largely modeled. The commission has provided by rule, however, for filing by private parties with the commission of what is known as an application for complaint. This is required to contain "a short and simple statement of facts," constituting the alleged unfair method of competition. No docket of applications is kept or information given of the source of the application. The commission thus took cognizance at an early stage of the fact that its information as to possible violations would almost necessarily come from competitors conceiving themselves to be injured. Such in practice has been the case.²¹

The act provides that proceedings shall be initiated by the complaint of the commission. The complaint must state the

¹⁸The requirement of public interest is not included in the Clayton Act "presumably because such violations would per se be of interest to the public, as distinguished from an unfair method of competition, which might only involve a private injury." Annual report of the Federal Trade Commission for the year ending June 30, 1916, p. 5.

¹⁹Secs. 5 and 9.

²⁰118 C.C.A. XV, 202 Fed. XIII.

²¹See rule II of the rules of practice of the Federal Trade Commission. Up to June 30, 1921, 2416 applications for complaints had been filed. Of these 1349 were dismissed without publicity. On that date 788 formal complaints had been served by the commission; 379 orders to cease and desist had been entered, and 101 complaints had been disposed of by orders of discontinuance or dismissal. Annual report for 1921.

charges of the commission,²² and contain notice of hearing. In practice the formal complaint is preceded by a notice to the prospective defendant and an opportunity to cease the practice complained of. Very many cases are disposed of in this way: the method of unfair competition being abandoned, it is no longer in the interest of the public to issue a complaint. In disposing of these and similar matters, the commission has followed the practice of the Interstate Commerce Commission of issuing "conference rulings," which are published. This is also done to some extent upon requests for advice relating to the laws the commission is empowered to enforce.

The act makes no provision for an answer by the defendant, but the rules of practice²³ of the commission have supplied such a provision. There is no such thing as a default or an order entered upon default. The orders of the commission to cease and desist from a particular practice are enforceable only by an independent proceedings in the circuit court of appeals, and there a decree will be entered in favor of the commission only insofar as the order of the commission being reviewed is supported by testimony. However, a respondent would undoubtedly be seriously prejudiced in later proceedings by failure to answer. Three copies of the answer are required to be filed,²⁴ and the specifications as to paper, type, margins, etc., are full and minute. Neither the law nor the rules of practice appear to contemplate any pleading serving the office of a demurrer, although a motion to dismiss may be entertained.²⁵

The complaint cites the defendant to appear and show cause why an order should not be entered directing it to cease and desist from the violation complained of. This, of course, has never been construed as placing an affirmative burden on the defendant, the commission assuming the burden of proof throughout.²⁶ The act provides for intervention by any person, partnership, or corporation upon good cause shown, by order of the commission.²⁷ The act appears to suggest no particular standard for determining what

²²See *Federal Trade Commission v. Gratz*, (1920) 253 U. S. 421, 40 S. C. R. 572, 64 L. Ed. 993, *infra*.

²³Rule III.

²⁴Rule III.

²⁵*Fruit Growers Express Inc. v. Federal Trade Commission*, (C.C.A., 7th Circuit, 1921) 274 Fed. 205.

²⁶Annual report, June 30, 1916, p. 11.

²⁷Rule V. This rule sets out in detail the specifications to be observed in preparing this application.

constitutes "good cause," and the rules of practice adopted by the commission have not sought to clarify the phrase. Apparently the matter of intervention is in the discretion of the commission, presumably divorced from the technical requirements ordinarily associated with intervention.

The matter comes on for hearing, normally before an examiner of the commission. These hearings may be held at any convenient place, and evidence is frequently taken in many different cities in the same proceeding. The commission thus takes on a more ambulatory character than is commonly the case in similar proceedings. Depositions may be taken on order. The testimony upon a proceeding is reduced to writing and filed. Objections to testimony are required to be in short form, and the transcript contains no debate.²⁸

The attitude of the commission toward the usual rules of evidence seems not to be radically unlike that of an ordinary judicial tribunal, with perhaps some relaxation, and upon hearings one hears objections to testimony with about the accustomed frequency and upon the usual grounds. In a proceeding the findings of the commission are conclusive only if supported by "testimony." Presumably this means competent testimony, and while we may assume that evidence is to be rather freely admitted,²⁹ yet the importance to a respondent of reserving his objections on the record is apparent.³⁰

When the evidence has been taken the examiner makes proposed findings and a proposed order, which is served on the parties or their attorneys. The latter then have ten days in which to file exceptions.³¹ At the close of the hearing briefs may be filed with the commission, twenty copies together with the proof of service being required to be filed in such case. Oral argument is had only as ordered by the commission.

When the matter has been fully considered the commission may make its order requiring the respondent to cease and desist from the practice complained of, or dismissing the complaint. Until the record is filed with the circuit court of appeals, in the event that there is to be a review, an order of the commission may be modified or set aside by it at its will. Instead of a hearing, it

²⁸Rule IX.

²⁹Annual Report, June 30, 1916, p. 11.

³⁰See Harlan & McCandless, (1916). The Federal Trade Commission, Sec. 33 (4), and cases there cited.

³¹Rule XII.

is a common practice in simple cases to make the facts upon which any order is to be based appear by stipulation.

Like many other administrative boards the Federal Trade Commission presents what will probably always seem an anomaly to many lawyers in that it sits in judgment in proceedings in which it is the complainant. In practice this possible incongruity is mitigated by the conscious effort made by the commission to keep the department which is actively engaged in prosecuting complaints separated from the examiners who preside at the hearings. It is easy to see that actual partizanship under these circumstances might largely be dissipated.

REVIEW

It is noteworthy that the commission has no power of its own for enforcing its orders. Neither the Clayton Act nor the Trade Commission Act provides any penalty for a failure to obey any order of the commission, or for a violation of a section of which the commission has jurisdiction. There are certain drastic penalties imposed in aid of the commission's investigative powers, but no such penalties are provided in aid of the enforcement of section five of the Trade Law or of sections of the Clayton Act above referred to.³²

The commission can enforce its orders only by a proceeding in the circuit court of appeals. While with respect to the enforcement of its orders the commission does not appear on paper to be formidable, in practice its orders are obeyed with the necessity for but very infrequent resort to this judicial proceeding.³³ Where the aid of the court is invoked, its jurisdiction is original, not appellate. Where its order is not obeyed the commission may apply to the circuit court of appeals for its enforcement, filing at the same time the entire record of the proceeding before the commission;³⁴ or the party against whom an order has been made may petition the court to set aside the order. In the latter case also the commission is required forthwith upon being served with a copy of such petition to file in the court a transcript of the record. In practice either method is used. In either event the proceedings are not de novo. Additional evidence may be ordered

³²Compare the provisions of the Interstate Commerce Act.

³³See note 47, *infra*.

³⁴In a proper case the record may be condensed and the testimony put in narrative form, in analogy with the practice under general equity rule 75, 115 C.C.A. XL, 198 Fed. XL. *National Harness Mfrs. Asso. v. Federal Trade Commission*, (1919) 261 Fed. 170.

taken, but it is taken before the *commission* and not before the court, and the commission may thereupon modify its findings of fact.

It has previously been pointed out that the findings of fact of the commission, if supported by testimony, are conclusive. This is, of course, a familiar provision with respect to administrative boards of this kind. The court is not concluded as to the legal effect of such findings,³⁵ nor is the court concluded where matter which is properly a conclusion of law is denominated a finding of fact.³⁶ The rule here, like that applied to the Interstate Commerce Commission, will probably be that a mere scintilla of evidence will not suffice; it will be enough, however, if there is *substantial* testimony.³⁷

The jurisdiction of the circuit court of appeals "to enforce, set aside, or modify orders of the commission" is exclusive.³⁸ Interesting attempts have been made to enjoin in district court the prosecution of complaints by the commission. In *T. C. Hurst & Son v. Federal Trade Commission*,³⁹ such an effort was made, the basis of the objection being the alleged unconstitutionality of the statute creating the commission. The court held the act valid and denied the injunction.

The possibility of resisting the commission by injunction in a court of equity was a question more sharply raised in suits for injunctions begun in the supreme court of the District of Columbia by Butterick Co., and affiliated companies to enjoin the commission from prosecuting a complaint, which it was claimed failed to state facts sufficient to constitute a violation of the Trade Law or the Clayton Act. The commission resisted on the ground that the proceeding in the circuit court of appeals prescribed in the statute was an exclusive remedy, and that the court was without jurisdiction to enjoin the commission. The bills were dismissed and the injunction denied.⁴⁰ An appeal has been noticed by Butterick Company.

³⁵Great Northern Ry. Co. v. Minnesota, (1915) 238 U. S. 340, 345, 35 S.C.R. 753, 59 L. Ed. 337.

³⁶Standard Oil Company v. Federal Trade Commission, (1921) 273 Fed 478.

³⁷Interstate Commerce Commission v. Union Pacific R. Co. et al., (1912) 222 U. S. 541, 547-8, 32 S.C.R. 108, 56 L. Ed. 308.

³⁸Sec. 5.

³⁹(1920) 268 Fed. 874.

⁴⁰See annual report of Federal Trade Commission, June 30, 1921, p. 26.

PRESENT STANDING OF THE COMMISSION

The Federal Trade Commission was largely modeled after the Interstate Commerce Commission, and it may be fair to assume that the framers creating the former intended the Trade Commission to assume a degree of power and importance commensurate with that of the Interstate Commerce Commission. The Trade Act and Clayton Act provide machinery which in its larger outlines has been tested and found effective. A system of procedure is afforded which has developed no considerable weaknesses in practice. In a word, we may look for the Federal Trade Commission to become one of the major agencies of the federal government, subject to one condition. That is that the commission should have been afforded a sufficiently ample field of substantive matter in which to function.

Sections two, three, seven and eight of the Clayton Act cover fairly well defined practices—price discrimination, “tying” contracts, intercorporate shareholding, and interlocking directorates, under certain conditions. At this point of time it seems safe to say that Congress in enacting the Clayton Law added somewhat to the substantive law relating to the above mentioned practices as contained in the antitrust acts.⁴¹ Nevertheless Congress purported to deal only with a very small group of cases, and the activities of the commission in enforcing the Clayton Act have not been particularly marked.⁴²

If that body is to be rounded into a powerful regulative agency it will be because it has been given to it to deal with the initial paragraph of section five of the act creating it, declaring “that unfair methods of competition in commerce are hereby declared unlawful.” The accurate appraisal of the scope of the commission depends upon the meaning to be attached to the words “unfair methods of competition.” The term “commerce” is defined in the act, and means substantially interstate and foreign commerce. But the term *unfair methods of competition* is nowhere defined. Its definition was debated by the legislators and deliberately avoided.⁴³ The validity of this section

⁴¹See 4 MINNESOTA LAW REVIEW 287.

⁴²Of about 700 complaints served up to the early part of 1921, 572 charged violation of section 5 of Trade Law, and 135 charged violation of various sections of the Clayton Act. Annual report of Federal Trade Commission, June 30, 1921.

⁴³Report of Senate Committee on Interstate Commerce, June 13, 1914, 63rd Congress, Second Session, No. 597, p. 13.

was challenged, on the score of the indefiniteness of this term, in *Sears, Roebuck & Company v. Federal Trade Commission*,⁴⁴ but the court was not impressed with the objection. No doubt the term is as definite as "unjust discrimination," "unreasonable restraint," and many other concepts perfectly familiar to all lawyers. It is worth noting in this connection that the section does not establish a rule of criminal liability.⁴⁵

The meaning of the term is a question for ultimate determination by the courts and not by the commission.⁴⁶ The number of cases construing the phrase in the courts is limited, and those decided by the Supreme Court is very small. The normal activities of the commission were interrupted by the war, at which time it devoted itself largely to assisting the government's war-making branches. For that reason the act has been slow to receive judicial construction. It is also remarkable that the orders of the commission have been very largely complied with without review by the court.⁴⁷ It must be assumed that business interests generally regard the commission as a helpful agency, and are in the main willing to cooperate with it. So long as this is true the commission may well accomplish things not possible strictly as a matter of powers conferred by the act.

As a result of the matters just referred to it is difficult to predict the scope which will be assigned by the courts to section five of the Trade Law. It is quite probable that its limitations will be marked out by a process of slow development and definition. In the interests of a sound jurisprudence this may be most desirable.

The term "unfair methods of competition" is one to which the courts had up to the passage of the Trade Law never had occasion to give a settled construction. The term "unfair competition" did have a meaning in the language of the law. It consisted shortly of representing one's products, etc., as those of an-

⁴⁴(1919, C.C.A. 7th Circuit) 258 Fed. 307, 169 C.C.A. 323, 6 A.L.R. 366. The constitutionality of the law was also unsuccessfully attacked in the following cases: *Hurst & Son v. Federal Trade Commission*, (1920) 268 Fed. 874; *National Harness Mfrs. Assn. v. Federal Trade Commission*, (1920 C.C.A. 6th Court) 268 Fed. 705.

⁴⁵See 5 MINNESOTA LAW REVIEW 298.

⁴⁶*Federal Trade Commission v. Gratz*, (1920) 253 U. S. 421, 40 S.C.R. 572, 64 L. Ed. 992; *Wholesale Grocers Ass'n v. Federal Trade Commission*, (C.C.A. 5th Circuit 1922) 277 Fed. 657.

⁴⁷On June 30, 1921, the commission had made a total of 379 orders to cease and desist. In respect to only 32 of these had there been a resort to the court for review, and 12 of these 32 cases involved the same question and may here be regarded as one. Annual report, June 30, 1921, p. 8.

other of established reputation.⁴⁸ This came to be an actionable wrong and was termed unfair competition. That it would be within the condemnation of section five of the Trade Law if it rose to the dignity of a "method" can hardly be doubted. It will be seen, however, that common law definitions have not proved of very material assistance.

Since the enactment of the Federal Antitrust Acts the courts have fallen into the habit of speaking of numerous other practices as "unfair competition."⁴⁹ Economic writers had previous to the creation of the Federal Trade Commission taken an interest in the subject and had cataloged numerous business practices as "unfair competition."⁵⁰ As has been pointed out the scope of this term is for the courts, and they have as yet hardly begun its consideration. The commission considers it the first instance, however, and there the term has been many times construed. In determining whether a method of competition is unfair the commission has recourse to all the available sources of information,—legal, economic, or of whatever character.⁵¹ In the annual report of the commission for 1920⁵² three classes of cases are recognized. The first includes those practices which involve an element of moral turpitude. The second embraces practices which were condemned at common law. The third class represents a rather miscellaneous group which had at that time been developed by the experience of the commission. In the same report⁵³ are listed numerous specific methods of competition which had been condemned by orders of the commission in particular cases.

The question must ultimately be settled by the courts, and it is to their decisions that we must finally look. One of the earliest cases to construe the Federal Trade Law was *Federal Trade Commission v. Gratz*.⁵⁴ The commission had there entered a cease and desist order directed against the practice of respondents of refusing to sell cotton bagging to customers unless the latter would take a corresponding quantity of ties. This order was re-

⁴⁸Rathbone, Sard & Co. v. Champion Steel Range Co., (1911) 189 Fed. 26, 110 C.C.A. 596.

⁴⁹Standard Oil Co. v. United States, (1911) 221 U. S. 1. 31 S.C.R. 502, 509, 55 L. Ed. 619, 34 L.R.A. (N.S.) 834, Ann. Cas. 1912D 734.

⁵⁰See W. S. Stevens, Unfair Competition, 29 Pol. Sc. Q. 284-306 and 463-485.

⁵¹Annual report, June 30, 1916, p. 6.

⁵²P. 48.

⁵³P. 56 ff.

⁵⁴(1919 C.C.A. 2nd Circuit) 258 Fed. 314, 169 C.C.A. 330, 11 A.L.R. 793.

versed. The court found that there was no evidence of a general practice to refuse to sell bagging without ties, and held the commission had no jurisdiction of individual grievances. The court declared:

"It seems to us that unfair methods of competition between individuals are not contemplated by the act."⁵⁵ "We think the unfair methods, though not restricted to such as violate the anti-trust act, must be at least such as are unfair to the public generally."⁵⁶

The case went to the Supreme Court of the United States, and was there disposed of on the narrow ground that the complaint of the commission failed to state facts sufficient to constitute a violation of section five of the Trade Law.⁵⁷ The court pointed out that the complaint failed to allege that either the public or any competitor suffered from the practice complained of. The court said:

"If, when liberally construed, the complaint is plainly insufficient to show unfair competition within the proper meaning of these words there is no foundation for an order to desist—the thing which may be prohibited is the method of competition specified in the complaint. Such an order should follow the complaint; otherwise it is improvident and, when challenged, will be annulled by the court."⁵⁸

The objection to the complaint was raised for the first time in the Supreme Court and was not taken by counsel at all. Justice Brandeis, Justice Clarke concurring, dissented upon the ground among others that it was contrary to ordinary practice to dispose of the case under these circumstances upon a question of pleading.

*Sears, Roebuck & Company v. Federal Trade Commission*⁵⁹ appeared at about the same time. The complaint there charged that respondent falsely advertised that it had sources for securing certain of its goods not enjoyed by competitors; that it purchased teas, etc., only after inspection had been made on the ground by its own expert. The complaint further charged that respondent sold sugar at a loss. An order was entered to cease

⁵⁵(1919) 258 Fed. 314, 316.

⁵⁶(1919) 258 Fed. 314, 317. See also as supporting this view *New Jersey Asbestos Company v. Federal Trade Commission*, (1920 C.C.A. 2nd Circuit) 264 Fed. 509; *Kinney Rome Co. v. Federal Trade Commission*, (C.C.A. 7th circuit 1921), 275 Fed. 665.

⁵⁷(1920) 253 U. S. 421, 40 S.C.R. 572, 64 L. Ed. 993.

⁵⁸(1920) 40 S.C.R. 572, 574-575, 64 L. Ed. 993.

⁵⁹(C.C.A. 7th Circuit 1919), 258 Fed. 307, 169 C.C.A. 323, 6 A.L.R. 366 and note.

and desist from these practices. The court affirmed the order with the exception of the item of selling at less than cost, a practice which standing alone the court declined to condemn. The court took occasion to say, "The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived."⁶⁰

The case of *Winsted Hosiery Company v. Federal Trade Commission*,⁶¹ as decided by the circuit court of appeals, furnished an interesting contrast to the view taken in the *Sears, Roebuck & Company Case*. In the *Winsted Hosiery Company Case* the order was to cease and desist from a practice of marking and branding shirts as "wool," "natural wool," etc., when in fact but a small amount of wool was present. It was in evidence that this system had been a trade practice for the past twenty years, and that the trade was familiar with it and was not misled by it. The order of the commission was reversed. The court remarked, "the commission is not made a censor of commercial morals generally." As against any other manufacturer or any competitor of respondent, no unfair method was employed. If a consumer was misled, the court was of opinion that this had nothing to do with "unfair competition."⁶²

The doctrine of this case apparently was that a business method will not be interfered with unless it is unfair to a competitor. Standing alone the term "unfair methods of competition" might easily bear this construction.⁶³ As we have seen, however, Congress was grappling with the large problem of business regulation, and opinion was divided between those who favored regulated monopoly and those who advocated competition as a sufficient remedy but who conceded that its regulation was necessary. That such regulation was deemed necessary primarily in the *public* interest can hardly be doubted. If any doubt should exist, it ought largely to be dispelled by the requirement, as a condition precedent to any action by the commission to prevent

⁶⁰258 Fed. 307, 311. See unfavorable comment on this case in 88 Cent. Law J. 425, where it is pointed out that false advertising is not unlawful at common law unless someone is deceived. And compare *Winsted Hosiery Co. v. Federal Trade Commission*, (1921 C.C.A. 2nd Circuit) 272 Fed. 957, *infra*.

⁶¹(1921 C.C.A. 2nd Circuit) 272 Fed. 957.

⁶²See adverse comment on this case in 20 Mich. Law Review 122-123. Certiorari in this case was granted by the Supreme Court. 255 U. S.—, 41 S.C.R. 625, 65 L. Ed. 735.

⁶³Dissenting opinion of Mr. Justice Brandeis in *Federal Trade Commission v. Gratz*, (1920) 253 U. S. 421, 40 S.C.R. 572, 577, 64 L. Ed. 993.

“unfair methods of competition,” that such action be “to the interest of the public.”

The *Winsted Case* was brought to the Supreme Court on writ of certiorari, and an opinion was there handed down on Apr. 24, 1922, reversing the decree of the circuit court of appeals.⁶⁴ Mr. Justice Brandeis wrote the unanimous decision of the court. The court held that the findings of the commission were supported by the evidence. The commission found that the labels employed deceived a large part of the buying public; and that the method was unfair to competitors in that the Winsted Co. was enabled thereby to get orders which would otherwise have gone to manufacturers of similarly branded articles which were genuine. An element of wrongdoing was found by the court in the fact that unscrupulous retailers were by this method supplied with a means of fraud.

The decision of the Supreme Court clearly proceeds upon the finding that honest competitors of the Winsted Co. were adversely affected by the practice. The circuit court of appeals had declared: “In this case there was obviously no unfair method of competition as against other manufacturers of underwear.”⁶⁵ The Supreme Court regarding the contrary finding of the commission, insofar as it represented a finding of fact, as supported by the evidence. Competitors were in fact no doubt damaged by the practice of the Winsted Co.

*Royal Baking Powder Co. v. Federal Trade Commission*⁶⁶ was a case in which the commission had issued an order against a certain plan of advertising by the Royal Baking Powder Co. the petitioner. This corporation, with its constituent companies, had according to the findings of the commission, been engaged for many years in making and selling a high grade cream of tartar baking powder. It ceased to manufacture this and in place thereof put out a phosphate powder, which was much less expensive. The containers remained very similar to those formerly used. Both powders were sold under the brand “Dr. Price’s Baking Powder.” It was advertised that the price of this brand had been reduced. The order of the commission in a general way prohibited these practices and required that the new powder be plainly designated as a phosphate powder.

⁶⁴Federal Trade Commission v. Winsted Hosiery Co., (1922) 42 S.C.R. 384.

⁶⁵(1921) 272 Fed. 957, 960.

⁶⁶(1922 C.C.A. 2nd Circuit) 281 Fed. 744.

The Supreme Court decision in the *Winsted Hosiery Co. Case* was strongly relied on by the court in affirming the order of the commission, and is cited as supporting the proposition that the commission has power to prevent the misrepresentation of the quality of the goods of a manufacturer in his advertising. It is interesting to notice that the practice condemned in the *Royal Baking Powder Co. Case* is that of representing one product of a manufacturer as being another and in fact different product of the same manufacturer.

The two cases last cited clearly go far to support the exercise of power by the Federal Trade Commission to prevent misbranding of goods and misleading advertising.

The case which is perhaps most important in defining the powers of the commission is that of *Federal Trade Commission v. Beech-Nut Packing Company*,⁶⁷ recently decided by the Supreme Court. The order of the commission in that case was directed against the so called Beech-Nut system of merchandising. It was found as facts by the commission or appeared by stipulation that this system was employed by respondent and consisted briefly in refusing to sell to jobbers and wholesalers who in turn sold to retailers not observing the "suggested" prices. Such jobbers and wholesalers were subject to be reported to respondent by its agents or other dealers, and distributors not maintaining the indicated resale prices were listed and remained in disfavor until they could give satisfactory assurances of future compliance with the company's schedule of prices. This system was not maintained by contract, but by the practice and the tacit understandings indicated above.

The circuit court of appeals reversed the order of the commission.⁶⁸ This was done upon the authority of *United States v. Colgate & Company*,⁶⁹ which the court considered as controlling and as establishing the proposition that a manufacturer might refuse to sell at his choice so long as there was no contract, express or implied, effecting a combination.

The decision of the circuit court of appeals was reversed by the Supreme Court. It was pointed out that the *Colgate Case* arose under the Sherman Act while the proceeding in the instant case

⁶⁷(1922) 42 S.C.R. 150, 19 A.L.R. 882.

⁶⁸*Beech-Nut Packing Company v. Federal Trade Commission*, (1920) 264 Fed. 885.

⁶⁹(1919) 250 U. S. 300, 39 S.C.R. 465, 63 L. Ed. 992, 7 A.L.R. 443.

was under section five of the Trade Law. It was not regarded by the court as essential that a contract be established. The court remarked:

“The specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose.”⁷⁰

Competition among retailers was substantially restricted by the Beech-Nut system. As bearing upon the scope to be given the term “unfair methods of competition” the court said:

“If the ‘Beech-Nut system of merchandising’ is against public policy, because of its dangerous tendency unduly to hinder competition or to create a monopoly, it is within the power of the Commission to make an order forbidding its continuation.”⁷¹

Justice Holmes, McKenna, Brandeis, and McReynolds dissented. Mr. Justice Holmes wrote a dissenting opinion the purport of which may fairly be summed up in his remark: “to whom respondent’s conduct is unfair I do not see.”⁷² The respondent already had a monopoly of its own goods. It was argued that the competition referred to is competition among the doers of the condemned act. In rejecting this view the Supreme Court has substantially broadened the meaning and force of section five of the Trade Law. In rejecting the view that the method of competition complained of must be one unfair to a competitor of respondent the court has likewise materially added to the power and effectiveness of the Federal Trade Commission. If the principle involved in the *Beech-Nut Case* is to be followed to its logical conclusion it means that a method of competition falls within the ban of the act if it is unfair to the public, regardless of whether it is or is not unfair to a competitor of respondent and regardless of whether it is unfair to any individual in the trade. This decision strengthens the hand of the Federal Trade Commission, and may result in making that body the medium through which we may expect to be made whatever substantial progress is possible for a considerable time to come in the regulation of interstate business.

⁷⁰(1922) 42 S.C.R. 150, 155.

⁷¹(1922) 42 S.C.R. 150,154.

⁷²(1922) 42 S.C.R. 150, 156.

See *Standard Oil v. Federal Trade Com.* (1922), 282 Fed. 81.