ADDRESS OF

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FEDERAL TRADE COMMISSION

BEFORE THE
CINCINNATI BAR ASSOCIATION

HOTEL SINTON, MONDAY EVENING, OCTOBER 24, 1938.

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"PRACTICE BEFORE THE FEDERAL TRADE COMMISSION"

MR. PRESIDENT AND MEMBERS OF THE CINCINNATI BAR ASSOCIATION:

I almost said, "Fellow Members", because, although I have been in government service in Washington for more than thirteen years, I still retain an active interest in my home bar association. In fact, up until the change in your constitution a few years ago, I retained my membership as well as my interest in this association. I consider it a great honor to be invited to address you and a rare privilege to be able to be here and to see so many of my old and valued friends and fellow practitioners at the Cincinnati Bar at one time and place.

One of the most serious problems facing the average practitioner at the bar today roots in the general trend toward providing administrative procedures to supplement or replace the traditional judicial processes. Determination of a host of conservatives historically in the province of the courts, has been placed in the concurrent or exclusive jurisdiction of boards, commissions and other administrative or quasi-judicial agencies.

Effects of this shift are many and of varied importance. To a large extent the technicalities of pleading and to some extent even the rules of evidence have been relaxed. Limitations have been placed upon the power of the courts to review orders of administrators - and where powers of review are granted, the courts are often limited to so-called "questions of law".

The Cincinnati Bar Association has a fine and recent background of interest in the problems of administrative law. The Fourth Conference of your association, held in March of this year, brought together a distinguished group of contributors to the literature on this subject. I have read with interest and profit the report of the conference as contained in a recent issue of the University of Cincinnati Law Review.

Against the background of this conference on administrative law, I should like to outline briefly for you the substantive part of the work of the Federal Trade Commission, and then to sketch its procedure and the manner in which its varied tasks are handled.

NATURE OF COMMISSION'S JURISDICTION

The Federal Trade Commission Act and the Clayton Act were both enacted in the fall of 1914 to supplement the Sherman Anti-Trust Act. The Clayton Act proscribed a number of specific business practices which were considered as contributing to monopoly, such as certain types of price discrimination; contracts tying several articles of commerce together for purposes of sale; exclusive dealing contracts; acquisitions of capital stock of competing corporations and interlocking directorates.

The Federal Trade Commission Act, however, contained no such detailed list of unlawful practices. It created a Commission of five members for the purpose, among others, of "preventing unfair methods of competition in commerce."

In the words of the Supreme Court in the Schechter case, (295 U. S. 495) this was "an expression new in law". And as the court said further:

> "Debate apparently convinced the sponsors of the legislation that the words 'unfair competition', in the light of their meaning at common law, were too narrow. We have said that the substituted phrase has a broader meaning, that it does not admit of precise definition, its scope being left to judicial determination as controversies arise."

The jurisdiction thus conferred upon the Commission is by language broad enough to permit of flexibility of administration, while containing adequate legal standards for the guidance of both the Commission and the courts.

It is my opinion that this was indeed a fortunate approach to the problem from the standpoint of good administration. The Commission was designed to be an expert body, trained and experienced in the problems of business relationships. While a list of all the practices considered in 1914 to be detrimental to the public and to honest business men might have been attempted and the results incorporated in the form of proscriptions in a statute, no one could foretell what unfair practices might in the future be devised, or what practices, then considered unobjectionable, might under new conditions become undesirable.

In the public interest, the Commission has exercised jurisdiction over many methods and practices which are also actionable under the common law, such as, fraud and deceit, boycott, restraint of trade and monopoly. In addition, its jurisdiction has been upheld by the courts over many types of cases which could not be reached at common law. For instance, in an action for fraud and deceit, reliance on the false representation, and injury flowing from such reliance must be shown at common law. The Federal Trade Commission may proceed against use of false advertising in commerce as an unfair method of competition without proving actual deception of any customer, providing the advertisement is

characterized by what the Supreme Court has called "an inherent capacity and tendency to deceive."

But the principal dissimilarity between the common law action and the procedure of the Federal Trade Commission springs from the fact that the Commission acts ex parte and only where substantial public interest is involved. Private controversies between competitors, where a private remedy at law is available, are seldom entertained by the Commission and then only where substantial public interest is involved. And even in such a case, the aggrieved competitor is not a party to the proceeding.

Restraints of trade and monopolistic practices which at common law would reach the courts only when enforcement was sought or when someone was particularly injured, may be curbed by the Commission through a proceeding initiated upon its own motion solely for the benefit of the public.

The Federal Trade Commission, exercising the broad jurisdiction granted to it by Section 5 of its organic act, in formal cases has held numerous practices and methods of competition to be unfair methods of competition, and, in the large majority of its cases, it has been sustained by the courts. Practices and methods which are generally regarded as falling within the prohibition of Section 5 when carried out in commerce or when substantially affecting commerce, include:

(a) Combination or conspiracy to fix or control prices.

(b) Combination or conspiracy between competitors to hamper or obstruct business of rivals.

(c) Misbranding, mislabeling, or misrepresenting products as to composition, origin, quality or source.

(d) False and misleading advertising.

(e) Passing off one's goods as those of another.

(f) Sale of products by means of lottery or chance devices.

(g) Concerted refusal to sell or refusal to buy where the effect is to suppress competition.

(h) Monopolization of trade channels.

(i) Combination and conspiracy to obstruct a competitor's source of supply.

(j) White-listing, black-listing, or other forms of concerted boycotting.

(k) Commercial bribery.

(l) Threats of litigation not in good faith.

(m) Disparagement or misrepresentation concerning a competitor.

(n) Causing breach of contract between competitor and customers.

(o) Secret control of a supposed competitor.

(p) Unfair use of patent rights.

(q) Full line forcing.

RECENT AMENDMENTS TO THE ACT

An important opinion of the Supreme Court of the United States affecting the Commission's jurisdiction was handed down in the Federal Trade Commission v. Raladam (283 U. S. 643). The Commission had proceeded against the advertiser of a patent reducing compound for representing it to be safe and harmless. It was found that the medicine contained desiccated thyroid, a potentially dangerous drug. Appeal was taken from the Commission's cease and desist order to the Circuit Court of Appeals for the Sixth Circuit. That Court, sitting in Cincinnati, reversed the Commission's order, holding that the only competitors affected by the practice were guilty of substantially similar conduct. The Supreme Court upheld reversal of the Commission's order, stating that there are three essential jurisdictional elements to a Commission proceeding against "unfair methods of competition." First, a method must be unfair. Second, a method must injure or affect actual or potential competitors, and, third, there must be substantial public interest in the prevention of the method of competition. The court stated that it doubted that the Commission was intended to "protect one knave from the unfair competition of another." The effect of this decision was to make the Commission's protection of the consumer merely an incident to the protection of honest competitors, likewise injured by the practices of unethical traders.

This was considered by the Commission to present a serious defect in its Act and recommendations were made to Congress for curative amendments. As early as 1935, bills were introduced in Congress in response to these recommendations and for the purpose of amending the Act. In March, 1938, the Wheeler-Lea Act was passed, and approved, making the first direct amendments to the Federal Trade Commission Act since its original passage in 1914. The principal change effected by the Wheeler-Lea Act broadens Section 5 to make unlawful "unfair or deceptive acts or practices" as well as "unfair methods of competition." Under the new language, it will not be necessary for the Commission to allege or prove injury to competition where an act or practice in commerce can be shown to be unfair or deceptive and that there is substantial public interest in its prevention.

Seven entirely new sections were also added by Congress to the Act and five of these implement the Commission with definite and specific

power over the dissemination of false advertisements regarding food, drugs, curative devices and cosmetics. A highly interesting section relating to advertising of these products directs the Commission "in determining whether any advertisement is misleading" to take into account, among other things -

> "not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual."

The Commission is given additional and specific jurisdiction over advertising of food, drugs, curative devices and cosmetics when disseminated in interstate commerce by any means; or when disseminated either locally or in commerce where it is intended or is likely to induce a purchase in interstate commerce; or when disseminated by United States mails irrespective of commerce.

Another new section empowers the Commission, when it has reason to believe that a party is engaged in or is about to engage in the dissemination of any false advertisement of food, drugs, curative devices, or cosmetics, in violation of the Act, to seek an injunction in any district court of the United States. These courts are directed, upon proper showing, to issue a temporary injunction or restraining order. About one month ago, the first injunction under this new section was granted in the Federal District Court in Chicago, restraining the advertisement of a reducing compound which the Commission had reason to believe was dangerous to health.

Another new section makes it a misdemeanor to violate the provision forbidding false advertisement of food, drugs, curative devices, or cosmetics, if violation is with intent to defraud or mislead or if the suggested or customary use of the commodity advertised may prove injurious to health. When the Commission had reason to believe the party has violated this section, it is to certify the facts to the Attorney General. A party may be punished upon conviction by a fine of up to $5,000.00 or by imprisonment of not more than six months. Second offenders run the risk of fines up to $10,000 and imprisonment for one year.

Other amendments are made by the Wheeler-Lea Act to procedural functions of the Commission, and I shall discuss these as I go along in describing to you the method by which cases are handled.

COMMISSION PRACTICE

With relation to practice, I suppose many of you will be interested in knowing just who may appear before the Commission. Any party to a proceeding may appear for himself, or may be represented by an attorney at

law who has been admitted to practice before the Supreme Court of the United States, or the highest court of any State or Territory or of the District of Columbia.

No register of attorneys is maintained, nor is formal application for admission to practice required. A written notice of appearance on behalf of a specific party in the particular proceeding should be submitted by attorneys desiring to appear before the Commission, and such notice should contain a statement that the attorney is eligible under the rule. Any attorney practicing before the Commission, or desiring to practice, may be disbarred or suspended for good cause shown, but only after he has been afforded an opportunity to be heard in the matter.

Perhaps the clearest exposition of practice before the Federal Trade Commission can be obtained from a description of the actual manner and method by which cases are handled.

Bear in mind that the Commission is not required to wait until a method of competition has been called to its attention by some injured competitor or member of the public. While a large proportion of its cases do originate through such informal complaints, investigations are initiated by the Commission on its own motion. Where the Commission's attention is called to an alleged violation of one of the laws committed to its jurisdiction, the matter may be handled in one of several ways. If the evidence of violation submitted in application for complaint is fairly clear, the matter is assigned for such field investigation as is necessary to ascertain the facts in a preliminary way. This usually involves interviewing both the applicant for complaint and the party complained about. In this connection, investigations conducted by the Commission prior to formal action are confidential, and no publicity is given to the fact that such an investigation has even been initiated before a stipulation is accepted from or a formal complaint is served upon a respondent. The Commission's examining attorney upon completion of his investigation summarizes the evidence in a report, reviews the law and recommends the action he considers appropriate for the Commission. The record is then reviewed by the Chief Examiner and, if in his opinion no further investigation is necessary, is submitted to the Commission with his conclusions and recommendations.

The Special Board of Investigation was created in 1929 as a separate division for handling false and misleading advertising matter as published in newspapers and in magazines and as broadcast over the radio. Just last week this branch of the Commission was reorganized and its name changed to "Radio and Periodical Division". Attorneys for this Division review advertising in nearly every magazine of interstate circulation, current issues of hundreds of newspapers, and approximately a million pages per year of advertising continuity broadcast on the radio. Advertising matter from these sources which is considered by the Division to be false or misleading is made the subject of preliminary inquiry, usually by correspondence. It is possible in this way to contact hundreds of advertisers each year. The procedure of the Division is rather informal, and advertisers may appear for conferences before it and submit evidence to explain or justify representations which on their face appear misleading.

Stipulation Procedure - To proceed formally by issuing complaints and trying all cases involving unfair practices would require a greatly augmented staff and much larger expenditures. Since most business men are willing on notice to modify or abandon unfair practices, the Commission usually affords them the opportunity of executing what is known as a stipulation. These stipulations set out the facts and the agreement of parties executing them to cease and desist from unfair practices in the future. The Commission's policy is against allowing any respondent to stipulate when the practice involved is tinged with fraud or where there is a restraint of trade prejudicial to the public. Stipulations are also denied parties respondent who cannot give satisfactory assurance to the Commission that the stipulation will be adhered to.

Stipulations are negotiated directly with advertisers by the Radio and Periodical Division in matters handled by it, and by the Chief Trial Examiner in other cases.

Complaints and Answers - In the event a proposed respondent rejects the privilege of stipulation and wishes to contest the matter, where the stipulation procedure is not appropriate, or where a prior stipulation has been violated, the Commission issues its formal complaint setting out the facts as indicated by its investigation and charging the respondent with a violation of the law.

The Commission's Rules of Practice provide that an answer shall be filed by the respondent within twenty days of service of the complaint. In the event a respondent desires to admit all material allegations he may do so without forfeiting his right to urge that the facts do not constitute a violation of law.

Hearings - Where no answer is filed or where the answer raises any issue of fact, the matter is set down for the taking of testimony before a Trial Examiner, to conduct hearings at convenient places throughout the country. Hearings before Trial Examiners bear much resemblance to ordinary equity procedure. All testimony is stenographically reported and witnesses and exhibits may be introduced both by the trial attorney for the Commission and by respondent's attorney.

I suppose that many of you will be particularly interested in this stage of the proceeding. Much has been said recently on the subject of applicability of the rules of evidence to such hearings before administrative tribunals. Only two formal rules have been adopted by the Commission relating to evidence in a hearing before a Trial Examiner. They are contained in Rule XIX of the Commission's Rules of Practice. The first relates to documentary evidence and is as follows:

> "When relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evidence, such immaterial or irrelevant parts shall be excluded, and shall be segregated insofar as practicable."

The second part of the Rule is to the effect that objections to the admission or exclusion of evidence shall state briefly the grounds of objection relied upon, and that the transcript shall not include argument or debate thereon.

I suppose that the best way of stating the Commission's policy with reference to the rules of evidence would be to say that it requires as close adherence to them as possible. Of course, many of the common law rules of evidence which were designed to protect lay juries from irrelevant material are not applicable to a Commission which is designed to be expert in its particular field. Both the Trial Examiners and the Commissioners have a special and expert knowledge of the questions involved in these cases and are much more able to sift the wheat from the chaff. Thus, while it is our policy to preserve all the essentials of a fair hearing no slavish adherence to the rules of evidence as such is required. Then too, some respondents are not represented by counsel, and requirements of technical rules would place them under considerable hardship.

It is the Commission's practice upon seasonable motion and proper showing to permit appeals to the Commission from rulings of the Trial Examiners on admissibility of evidence or other procedural matters. Where essential, the Commission may hold a hearing on such appeals during the course of trial of the case; in other instances, the Commission hears the appeal at the time of final argument on the merits.

Trial Examiner's Reports, Exceptions, Briefs and Arguments - After evidence has been presented by both sides to the proceeding, the Trial Examiner who has heard the matter prepares a report upon the evidence setting forth the evidentiary facts elicited in the hearing. This report is sent with the entire record to the Commission and a copy is served on counsel for respondent and upon the Commission's trial attorney. Exceptions may be taken to the Trial Examiner's report upon the evidence by either attorney. Briefs are then in order to be filed, and if the respondent desires, final oral argument may be had before the Commission sitting en banc.

Commission's Decisions - Following this the Commission makes its final decision on the basis of the entire record and the briefs and oral arguments. This decision may be either to dismiss the complaint for lack of jurisdiction or for failure of proof or it may be to issue an order directing the respondent to cease and desist from such of its practices as are found to violate the law. In the event the Commission decides to issue an order to cease and desist it prepares and publishes, along with its order, its findings as to the facts, setting out the facts as found by the Commission from the public record.

Right at this point I should like to call your attention to the fact that these findings are made on the basis of the public record. Before a complaint is issued a record is built up consisting of interview reports and exhibits secured in a preliminary investigation. This preliminary record is confidential and never published. Facts relied upon by the Commission in issuing its complaint, and which are contained in the preliminary record,

may not be relied upon in preparing findings of fact unless they have also been established in the public record. And to protect parties investigated by the Commission from indiscriminate use of information gained in preliminary investigation criminal penalties are provided for unauthorized disclosure of such information by Commission employees.

JUDICIAL REVIEW AND ENFORCEMENT OF ORDERS

Under the Federal Trade Commission Act before its recent amendment, a Commission order could reach the courts in one of two ways: the respondent had a right to petition any of the Circuit Courts of Appeals of the United States for review of the Commission's order, and that court was empowered to affirm, set aside or modify the order of the Commission, the Commission's findings as to the facts, if supported by testimony, to be conclusive on the court.

In the event a respondent did not file an appeal, and continued to engage in the practice in violation of the order, the Commission's only method of enforcement was to apply to one of the U. S. Circuit Courts of Appeals for a decree affirming the order and directing compliance therewith. The court in such a proceeding, of course, had the power to modify or set aside the Commission's order, but if it affirmed it and directed compliance, any subsequent violation was punishable as for contempt of court.

The recent amendments to the Federal Trade Commission Act provided a time limit upon appeals and an important additional enforcement procedure. In the event no appeal is made to the U. S. Circuit Court of Appeals within sixty days a cease and desist order becomes final automatically. Each subsequent violation of an order which has become final either through affirmance or failure to appeal within sixty days subjects a respondent to a civil penalty of not more than five thousand dollars, recoverable in any of the District Courts of the United States upon application of the Attorney General. In the event of an appeal within the sixty-day period, the court may review, modify, set aside or affirm the Commission's orders, and the Commission, no doubt, may still seek enforcement through the contempt process of a U. S. Circuit Court of Appeals whose decree directing compliance with a Commission order is violated.

TRADE PRACTICE CONFERENCES

One of the most important functions of the Commission is accomplished through its trade practice conferences.

An ideal visualized by President Wilson in the creation of the Federal Trade Commission was that it was -

> "a means of inquiry and of accommodation in the field of commerce which ought to both coordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law,"

and he stated that the Commission had been created with -

"powers of guidance and accommodation which have relieved business men of unfounded fears and set them upon the road of helpful and confident enterprise."

It is through its trade practice conference procedure that the Commission is able to furnish to business and industrial groups the "guidance and accommodation" which President Wilson had in mind.

Any industry or important group within an industry may have a trade practice conference if it appears to the Commission that it is desired by a substantial majority of members of the industry, and that there are prevalent in the industry practices which are prejudicial to the best interests of the industry as a whole and inimical to the public. Due and proper notice is given so that every member of an industry may have opportunity to be present and participate in such a conference.

It is obvious that all industry cannot be poured into one mold. Hence, the members of an industry, with the aid and counsel of the Commission's staff, consider their peculiar problems, and such trade practice rules as fit the need of the industry are formulated. If within the law and otherwise acceptable, they are approved and promulgated by the Commission.

There are many advantages in the trade practice conference procedure and trade practice rules. For one thing, the Commission's jurisdiction under Section 5 is contained in a broad grant which has been interpreted by the Commission and the courts to apply to a variety of situations. The ordinary business man, and for that matter the practitioner at the bar, has no way of determining the extent to which the Commission's jurisdiction affects a particular industry without research into Commission and court decisions. Group I rules codify and clarify the requirements of the broad language of Section 5, and in such a way as to make them specifically applicable to a particular industry. Thus, for instance, in the recently approved trade practice rules for the rayon industry, provisions are contained requiring, to avoid deception of the public, positive identification of the different fibers in textiles and making it clear that an advertiser of mixed goods must, in describing such textiles, name the constituent fibers in the order of their predominance by weight, i. e. rayon, silk and cotton, for a product containing fifty percent rayon, thirty percent silk and twenty percent cotton.

The fact that the trade practice conference procedure permits of wholesale and simultaneous abandonment of unfair practices is one of its greatest advantages. Often the Commission will find on investigating an unfair practice engaged in by a single concern that a number of its competitors are likewise engaged. Usually in such situations offenders are only too glad to abandon the practice if some assurance can be given that competitors will also be bound to cease; thus, if the Commission institutes formal proceedings against one concern engaged in an unfair practice, others so engaged may derive a competitive advantage unless proceedings can be instituted against them at the same time. When a trade practice conference is held in such an industry, all those engaged in unfair practices may voluntarily abandon them at the same time and without the necessity of numerous formal cases.

In so-called Group II rules, the Commission receives and publishes expressions of industry policy encouraging even more ethical practices than the law requires. While violation of Group II rules is not ordinarily an infraction of the law, the fact that a substantial majority of members of an industry or business sit down together and agree among themselves to adopt such a policy has a moral weight almost as forceful as that of the law itself. A typical Group II rule is that adopted in the trade practice rules for the rayon industry, which sets out that it is considered a desirable practice for sellers to give consumers information in advertising and labels on the best method of cleansing, caring for and using the particular fabric.

GENERAL AND SPECIAL INVESTIGATIONS

Certain other important powers are granted to the Commission in Sections 6 and 7 of the Act. Under Section 6(a) the Commission is granted power to gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce and its relation to other corporations and to individuals, associations, and partnerships. Other subdivisions of Section 6 empower the Commission to require annual or special reports from any corporations engaged in commerce; and, upon the direction of the President or of either House of Congress, to investigate and report the facts relating to any alleged violations of the Anti-Trust Acts by any corporation. It is also empowered, upon application of the Attorney General, or upon its own initiative, to investigate the manner in which any final decree against any defendant corporation in a suit brought by the United States to prevent and restrain a violation of the Anti-Trust Acts, is carried out. The Commission may also, upon the application of the Attorney General, investigate and make recommendations for the re-adjustment or re-organization of any corporation alleged to be violating the Anti-Trust Acts, in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with the law. It is also empowered to investigate from time to time, foreign trade and to make such reports to Congress as it deems advisable.

Section 7 of the Act provides that when a suit in equity is brought by or under the direction of the Attorney General as provided in the Anti-Trust Acts, the court may, if it is of the opinion that the complainant is entitled to relief at the conclusion of the testimony, refer the suit to the Commission as a Master in Chancery. to report an appropriate form of decree.

Under the general power to investigate, the Commission has completed a number of broad and general economic surveys of great importance. Probably its largest job in this respect was the investigation into the public utility field, which contributed in no small measure to the passage of the Public Utility Act of 1935, and resulted in the reduction of many utility rates in the various states.

At present the Commission is investigating the motor vehicle industry, at the direction of Congress, and has recently completed investigations of the Farm Implement Industry and of Agricultural Income.

NATURE OF COMMISSION'S POWERS AND FUNCTIONS

A very clear and concise statement from a legal viewpoint, of the nature of the Commission's functions, is contained in Rathbun v. United States, (295 U. S. 602,) where the court said:

> "The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of 'unfair methods of competition' — that is to say in filling in and administering the details embodied by that general standard — the commission acts in part quasi-legislatively and in part quasi-judicially. In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function — as distinguished from executive power in the constitutional sense — it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government."

It is perhaps this mixture of the types of functions described by the court in the Rathbun case that has most perplexed members of the bar confronted with problems of practice before administrative agencies. The mixture of functions in the Federal Trade Commission was not created inadvisedly. On the contrary, it was considered necessary by the Congress in order to allow the Commission to reach effectively the objectives of the basic legislation and the problems toward the solution of which the anti-trust laws are directed. As you who are familiar with the legislative history of the antitrust laws will recognize, various different approaches to the solution of the problem were suggested. The Bureau of Corporations, for instance, which was the Commission's immediate predecessor, was established in 1903 with the power to gather, compile and publish reports concerning business practices, on the theory that adequate publicity would so activate public opinion as to make it expedient for those engaged in undesirable practices to abandon them. Another approach is expressed in the Sherman Act, which places largely in the courts the power of preventing combinations and monopolies in restraint of trade. Still another approach is expressed in the Clayton Act which proscribes certain specified and enumerated practices. The Federal Trade Commission as finally constituted embodied something of all these approaches but with the addition of the power to implement a broad standard by rule, regulation or order, either generally or in specific cases, and to act as an arm of the Congress in defining and proscribing unfair methods of competition which might not be specifically covered by the other legislation.

CONCLUSION

Bearing in mind these broad objectives, I am sure you will see that what might appear to be a departure from the traditional constitutional division of powers between strictly legislative, judicial and executive agencies was both necessary and desirable.

Criticism has at times been advanced to the combination in administrative agencies of the functions of "judge, jury and prosecutor." Specifically this charge was made against the Federal Trade Commission in some of the earlier literature.

However, the analogy of "judge, jury and prosecutor" applied to procedure before the Commission is not apt. The Commission has no power to punish or inflict penalties. If penalties or punishment are exacted from a party to a Commission proceeding, it must be by a court of law in the usual manner. Nor has the Commission any power to enforce its orders — this must be effected through a court of law. Nor can the Commission issue any cease and desist order which is not subject to review in a court of law as provided in the statute.

The power of the Commission to initiate proceedings on its own motion is highly important to the objectives of the Act. In fact, this power represents one of the principal departures from the common law method dealing with the situations which are within the Commission's jurisdiction. This was recognized by the Congress at the time and has been referred to since passage of the Act by the courts as one of the impelling reasons for the legislation. Under the common law doctrines of unfair competition, fraud and deceit, restraint of trade and monopoly, the courts could only act when a justiciable controversy was presented to them by a party having sufficient interest to maintain a suit. Thus a voluntary agreement among manufacturers to fix prices might never reach the courts unless one of the parties to the agreement brought suit, either to enforce the agreement against one who had breached it or because of special injury from its operation. And the public, which might be most seriously injured by such an agreement, would have no protection unless one or more of the chief beneficiaries of the agreement brought it to court.

A more specific illustration of the advantage in having an agency with the power to institute a case involving unfair competition on the basis of the public interest is contained in American Washboard Company vs. Saginaw Manufacturing Company, (103 Fed. 281.) The American Washboard Company, a manufacturer of genuine aluminum-faced boards, brought suit to restrain use by a competitor of the word "aluminum" on a washboard which did not contain any of that metal. Judges Taft, Lurton and Day, each of whom later served upon the Supreme Court of the United States, held that the facts as shown did not entitle the complainant to relief. In the course of his opinion, Judge Day said:

> "Can it be that a dealer who should make such articles only of pure wool could invoke the equitable jurisdiction of the courts to suppress the trade and business of all persons whose goods may deceive the public? We find no such authority in the books, and are clear in the opinion that, if the doctrine is to be thus

extended, and all persons compelled to deal solely in goods which are exactly what they are represented to be, the remedy must come from the legislature, and not from the courts."

In commenting upon the decision in the Washboard case, the Court in Royal Baking Powder Co. v. Federal Trade Commission (281 Fed. 744) stated:

"The above case illustrates one of the reasons which led Congress to enact the statute creating the Federal Trade Commission and making unfair methods of competition unlawful and empowering the commission to put an end to them. By that statute the identical situation which the court in the above case said it was beyond its power to suppress has been brought within the jurisdiction of the Federal Trade Commission — created to redress unfair methods of competition. Before the enactment of the Federal Trade Commission Act the courts appear to have had jurisdiction of an action for unfair competition only when a property right of the complainant had been invaded. But the Federal Trade Commission Act gave authority to the commission itself when it had reason to believe that any person, partnership, or corporation was using any unfair method of competition in commerce, if it appeared to it that a proceeding by it in respect thereof 'would be to the interest of the public,' to bring such offending party before it to answer to its complaint and after a hearing could, upon good cause shown, require it to cease and desist from its unlawful methods."

And in Armstrong Cork Company vs. Ringwalt Linoleum Works, (240 Fed. 1022,) the Circuit Court of Appeals for the Third Circuit, in an action by a manufacturer of linoleum to restrain misrepresentation by a competitor, specifically suggested, in view of the washboard case, that this type of action would properly be one for the jurisdiction of a body such as the Federal Trade Commission. It practically invited the complainant to call the Commission's attention to the practice. This suggestion of the court was followed, and through a cease and desist order of the Commission the misrepresentation was ended.

As indicated in these decisions, the Commission's right to initiate proceedings on its own motion is very important. It has never been questioned by the courts, and on the contrary it has been referred to in judicial opinion as an improvement over the common law.

While the Commission exercises certain functions which are quasi-judicial, and some which are similar to a prosecution at law, they are but parts of a general machinery designed as a whole to protect commerce and the public, and to prevent rather than to punish unfair practices. As President Roosevelt said on the dedication of the Commission's new building in Washington last year —

"The vision of Woodrow Wilson has been vindicated again. When that far-seeing statesman asked Congress in January, 1914, to create the Federal Trade Commission he saw in the realm of trade and commerce a field in which prevention was indeed better than punishment.

"Prevention of unfair business practices is generally better than punishment administered after the fact of infringements, costly to the consuming public and to honest competitors."

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