Address

on

SOME CONCEPTS OF UNFAIR COMPETITION AT HOME AND ABROAD

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By

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SOME CONCEPTS OF UNFAIR COMPETITION AT HOME AND ABROAD

Ladies and Gentlemen of the Bar:

In surveying the subject of unfair competition in this country, we find an expanding concept. The early view here, as in many other countries, limited the term primarily to cases of passing off the product of one competitor as and for that of another. In today's broad view of the term in America it is conceived of as embracing not only all those business practices deemed to be legally unfair to competitors or business rivals, but also those considered to be unfair to the public generally, either because of their capacity to deceive or because of their undue tendency to monopoly. The injurious effect upon what is commonly referred to as the interest of the public has become a large element in our present-day concept of the subject as contrasted with the earlier and more limited common law view which, because jurisdiction depended upon the presentation of a justiciable controversy by a party having sufficient interest to maintain suit, made injury to a competitor a primary consideration.

In the metamorphosis of the United States from an essentially agricultural nation to a great industrial power, it was inevitable that there should develop a large number of business practices which in practical effect proved to be unfair or detrimental to the maintenance of a fair relationship between business rivals and between business and the public. A great number of these practices have been recognized in American law and are now, broadly speaking, included in our concepts of unfair competitive methods if not in those of the more restricted phrase, unfair competition.

The antitrust laws and the decisions thereunder have served to crystallize our concept of what many of these practices are. Following the light thrown on the subject by the early decisions under the Sherman Act, we find in the Clayton Act of 1914, congressional recognition of the unfairness of some of these practices and a definite crystallization of the legal concept thereof in specific statutory provisions forbidding as unlawful certain price discriminations, so-called tying contracts, the acquisition of competitor's capital stock and interlocking directorates. In the same year Congress passed the Federal Trade Commission Act by which it incorporated in the law that flexible phrase "unfair methods of competition." It did this with the express purpose of covering not only those practices theretofore known to the common law as unfair competition, but also all practices developed and resorted to in the then future which, upon investigation and hearing, were found to be unfair and against the public interest.

In this regard the report on the bill by the managers of the House of Representatives stated:1/

1/House Report No. 1142, 63rd Congress, 2nd Session, September 4, 1914, at page 19.

"It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances."

Thus has the law in this country kept pace with our industrial and commercial development by a corresponding expansion of the concept of unfair competitive practices from its narrow limitations under the common law in the early days of the Republic to the broad present-day view as embracing all business practices which constitute an undue interference with the fair relationships between individual competitors, and between business and the public generally, including all those practices which tend unduly to monopoly.

Of course, the broad standards of the Sherman and Clayton Anti-trust Acts as well as those of the Federal Trade Commission Act are largely responsible for incorporating into our National Law the expanded concept of unfair competitive practices.

Some of the many practices condemned as unfair by the Commission in Federal Trade Commission Act and Clayton Act cases may briefly be cataloged as follows:

1. False and misleading advertising or misbranding of products as to composition, quality, purity, origin, source, properties or nature of manufacture.

2. Sale of rebuilt, second-hand, renovated or old products, or finished articles made from used materials, as and for new.

3. Use of containers or packages customarily associated in the minds of purchasers with standard weights or quantities when such weights or quantities are not therein contained.

4. Various schemes to create the impression in the mind of a customer that the terms of an offer of sale are unusually advantageous when such is not the fact. This classification includes misrepresentation of the regular price, or use of trade names or advertisements misrepresenting the business status of the seller.

5. Passing off articles as those of a competitor through appropriation or simulation of trade names, labels, dress of goods, etc.

6. Disparagement of the goods, services, financial condition or reputation of competitors, sometimes accomplished under the guise of tests or reports of supposedly disinterested agencies.

7. Threats of patent infringement suits or other court actions not made in good faith.

8. Unfair use of patent rights.

9. Use of concealed subsidiaries, ostensibly independent, to obtain competitive business otherwise unavailable.

10. Bribery of buyers or other employees of customers without the customers' knowledge or consent.

11. Procuring the trade secrets of competitors or inducing employees of competitors to violate employment contracts.

12. Inducing breach of contract between competitors and their customers.

13. Use of schemes involving chance or lottery distribution of goods.

14. Granting of unjustified price discriminations contrary to Robinson-Patman Act.

15. Boycotts or combinations of traders to prevent competitors from procuring goods on the same terms accorded them, or for the purpose of coercing competitors or manufacturers from whom they buy into adopting a policy considered desirable.

16. Cooperative schemes and practices for compelling wholesalers or retailers to maintain resale prices.

17. Combinations or agreements of competitors to enhance prices, maintain prices, bring about substantial uniformity in prices or to divide sales territories or cut off competitors' sources of supply.

18. Contracts or agreements among competitors to restrict exports or imports.

19. Payment of excessive prices for raw materials for the purpose and with the effect of eliminating weaker competitors dependent upon the same sources of supply.

20. Use of tying contracts or employment of full-time forcing policy in the sale of goods.

In foreign countries, the law of unfair competition has been generally considered as part of that body of law dealing with industrial property rights. Laws for the regulation of trusts or combinations in restraint of trade, cartel acts, and legislation for control of production and prices, have been held separate and apart from those relating to unfair competition.

This conception of unfair competition is reflected in the terms of the International Convention for the Protection of Industrial Property,

signed at Paris in 1883 and last revised at London in 1934. The scope of industrial property covered by the convention includes "patents, utility models, industrial designs and models, trade-marks, commercial names and indications of origin, or appellations of origin, as well as the repression of unfair competition." The unfair competition clause, Article 10 bis, states that:

> (1) The countries of the Union are bound to assure to nationals of countries of the Union an effective protection against unfair competition.
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> (2) Any act of competition contrary to honest practice in industrial or commercial matters constitutes an act of unfair competition.
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> (3) The following particularly are to be forbidden:
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> 1. All acts whatsoever of a nature to create confusion in any way whatsoever with the establishment, the goods, or the services of the competitor.
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> 2. False allegations in the conduct of trade of a nature to discredit the establishment, the goods, or the services of a competitor.

The Union formed by this convention includes Belgium, Danzig, Denmark, Finland, France, Germany, Hungary, Italy, Liechtenstein, Morocco, Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Tunisia, Turkey and Yugoslavia; and also Great Britain, Ireland and Australia, the United States of America, Cuba, Mexico, Brazil, and Japan.

In Europe the basis of the law of unfair competition is found in the civil codes which provide for civil action against a competitor to enjoin or obtain damages in cases of injury; and in the penal codes under which criminal penalties may be imposed for injurious or unfair practices. And in some countries special acts have been passed to deal with unfair trade practices.

Unfair competition has been actionable in France since the adoption of the Civil Code in 1808, and articles of that code have been copied into the laws of other countries. There is in France no specific unfair competition act, but certain laws have been passed to prevent certain unfair practices such as:

alteration of names affixed to manufactured products (1824);

misuse of the title of patents (1844);

misappropriation or misuse of trade-marks (1857);

fraud in the sale of merchandise and through adulteration of foodstuffs and agricultural products (1905);

misappropriation of awards (1886 and 1912);

interference with freedom of tenders and bidding at auction by violence, threats or bribery (Penal Code, Art. 412);

as well as laws for the labeling of cheese (1925), soap (1928), milk and milk products (1930), silk and artificial silk (1933, 1934 and 1935), coffee and coffee substitutes (1934).

The German Civil Code followed the lines of that in France, and the Statute Concerning Trade-marks offered protection against the use of another's mark. In 1896, however, a special law called the Statute Against Unfair Competition was passed, which was revised in 1909 and further amended in February 1935. This act is intended to prevent misleading advertising, false statement of weight, the jeopardizing of credit, abuse of trade names, betrayal of trade secrets, abuses in connection with backruptcy sales, liquidation and clearance sales, bribery, and other unfair practices. The law has been applied to a bidding cartel or agreement under which one contractor makes the lowest bid and others submit higher bids, if it is found that the purchaser is deceived thereby. But generally speaking, cartels and trade agreements have been dealt with under the German cartel acts and decrees which provide for Governmental control of production and trade and the fixing of prices by a Price Commissioner.

Most German trade-marked goods are distributed at retail under a system of fixed resale prices; and the courts have held that selling below the fixed price is an act of unfair competition under the Statute of 1909. As in other countries, special acts have been passed in Germany for the marking and grading of certain goods. For instance, the Statute Concerning Foodstuffs makes the use of certain trade designations compulsory; and uniform classes of commodities, standardized grades, kinds, quantities and qualities have been established for dairy products, poultry, meat, cattle, grain, and other farm products. The Emergency Decrees of 1932 and 1933, and the Law for the Protection of the Retail Trade, 1933, regulated the granting of discounts, prohibited the giving of premiums, and marked the first steps toward curtailment of unit price stores (such as our ten-cent stores).

The German Statute Against Unfair Competition has been applied for the most part to the protection of competitors, and not that of the purchasing public. In 1934, however, a very comprehensive plan for the control of advertising was made effective under a law passed in September 1933. An Advertising Council was created with authority to supervise, coordinate and control all forms and media of commercial and business advertising, publicity, fairs and exhibitions. Members of the Council are appointed by the Minister of Propaganda and Public Enlightenment, and function under the direct guidance of the central Government at Berlin. This control is broad enough to protect not only competitors but the public at large. All advertising contracts were abrogated and new ones formed under direction of the Council. All who engaged in the business of commercial advertising for themselves or for others, must obtain permits. The Council is authorized to fix all charges for services and space, to standardize and simplify the methods of advertising, and to establish that only true facts appear. Orders issued by the Council have prohibited the use of billboards on buildings, landscapes or other public places, the use of exaggerated statements in describing the articles to be sold, or of statements calculated

to degrade a competitor or to imply that his goods are inferior. Rebates and private or secret understandings are prohibited. To avoid the evil of padded circulation figures, magazines, newspapers and periodicals must publish regularly their true circulation figures. Special attention has been given to advertisements used in the sale of drugs and medicines. The advertising of medicinal preparations deemed harmful to health will not be permitted. In addition to its regulatory functions, the Council itself undertakes to advertise German goods through publications, stores, motion pictures and the radio. It has campaigned for the use of national products within the country; and for the development of foreign trade, in cooperation with the Control Boards under which all German imports and exports are regulated. Speaking in generalizations this German control plan exemplifies a planned economy as contrasted with the American idea of a few rules to preserve competition and keep it fair.

One of the first of European countries to pass a special unfair competition statute was Denmark. The Danish Unfair Competition Law of 1912 was replaced by the Law Concerning Regulations against Unfair Competition and Designation of Goods, in 1924, which provides for criminal prosecution in the Marine and Commerce Court, in the case of false statements in the sale of goods, including statements and advertisements as to the place of production, the art or method of production, the substance, putting together, quality, attributes, effects and price relation of the goods. Seasonal sales, selling out and bankruptcy proceedings, and auctions, are regulated in detail. Untrue statements intended to injure a competitor, divulging of trade secrets, and the giving of premiums are prohibited. The right of a producer or wholesaler to indicate on the goods or on the original package the price at which they shall be sold at retail, is recognized and protected. The Minister of Commerce is empowered to determine and issue orders concerning weights and measures, and indications of origin. He is also authorized to receive complaints from business organizations and to approve the initiation of suits for violation of the law.

The Norwegian Law on Improper Competition, passed in 1922, covered much the same unfair practices as cited in the Danish law, providing for civil suits under the commercial code, and penal proceedings instituted by a Government department upon complaint by a business man, company or trade organization. As to certain violations set out in the law, it must be shown that the prosecution is "demanded by the general welfare."

The Belgian Unfair Competition Decree issued in 1934 gives to the President of the Commercial Court, authority to issue an order to stop certain actions which are contrary to honest commercial or industrial practice, set out in the law as:

(a) creation of confusion between one trader, his establishment and his products, and those of a competitor;

(b) circulation of false charges against the personal character, enterprise, goods, or personnel of a competitor;

(c) the giving of false information in regard to business activities, patents, trade-marks, references, and the nature, conditions of manufacture, origin or quality of goods;

(d) use of a label, trade-mark or description of any nature whatsoever likely to cause deception as to the real origin of products;

(e) wilfully misleading as to the origin of products by alteration of a trade-mark, name or label, by advertising matter, or by the production of fictitious invoices or certificates of origin, etc.;

(f) unauthorized use of a competitor's models, samples, formulas, etc.;

(g) unauthorized use of a competitor's material, packing, containers, etc., even without any intention of assuming ownership or of creating any confusion between the respective establishments or their products.

If the ruling of the President of the Commercial Court is not complied with, the Court may impose fines and in case of a second offense, imprisonment. This Decree was supplemented in 1935 by others regulating the use of gifts, premiums and rebates.

Other European acts include the Bulgarian Law for the Repression of Unfair Competition, passed in 1932, which provides for a civil action for damages, a suit to enjoin, or a penal action by the public prosecutor; the Unfair Competition Law of Iran (formerly Persia), 1931, which is essentially a penal statute; the Unfair Competition Act of Hungary, 1924, which followed the lines of the German law; and the Lithuanian Law against Unfair Competition, passed in 1932, which provides for civil, penal and administrative action, giving certain regulatory powers to the Minister of Finance.

It is noteworthy that all of these European laws set out in detail the unfair acts which they are intended to prevent, and thereby limit the courts and administrative offices in their application of an expanding concept to their laws of unfair competition. None of the European measures have a broad clause such as is found in the Federal Trade Commission Act of this country. Nowhere else has a legislative body declared unlawful

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce,"

and left to the administrative body enforcing the law, the responsibility of determining what specific methods, acts or practices are unfair.

In England, unfair methods of competition are largely dealt with under the common law, supplemented by a number of specific statutes. The courts will not enforce a contract which is held to be contrary to good morals or to the detriment of public interest. English court cases have involved such unfair practices as betrayal of trade secrets

or of confidential information, inducing breach of competitor's contracts, enticing employees of competitors, defamation of competitors and disparagement of his goods, intimidation of competitors' customers by threats of infringement suits, conspiracy to cut off the supplies of a competitor, bribery, and fraud or misrepresentation in the sale of goods.

In the case of a contract containing illegal clauses, the person injured has a choice of a number of civil law remedies, in the English courts. He may treat the contract as binding and demand fulfillment; he may sue for damages for loss sustained by reason of nonfulfillment; he may void or repudiate the contract by having it canceled in an equity court on the ground of fraud; he may resist a suit for performance or an action for damages in respect to it; or he may bring an action in deceit to recover any damages which he may have sustained.

"Passing off" is the legal term applied in England to cases of misrepresentation, where one party palms off his goods or business as that of another. Secret commissions and bribery are also dealt with under the Prevention of Corruption Act of 1906. The patent and trademark laws include clauses in protection of these forms of industrial property. The Merchandise Marks Act of 1887 made it an offense to apply false trade description to goods as to their number, quantity, measure, gage or weight, the place or country of origin, the mode of manufacturing or of producing them, or the material of which they are composed. An amendment to that law in 1926 added provisions for the marking of imported goods with indications of origin.

Several early laws of England were passed to prevent the misbranding of gold ware, cutlery and linens, in order to protect those important industries. Another early law prohibited false representations of a trader, that he had obtained medals or certificates at trade expositions. The Profiteering Act of 1919 provided fines and imprisonment for the unlawful raising of prices, but this was not termed an unfair method of competition. Nor is resale price maintenance prohibited or actionable as an unfair practice. The common law concept of restraint of trade has been modified by the more recent regulatory schemes under which prices are fixed and production controlled in a number of industires. The British Safeguarding of Industries Act passed in 1921, was for the purpose of protecting domestic industries from foreign competition, and included anti-dumping clauses. The Companies Acts and the recently passed Prevention of Fraud Act include what we call "blue sky" provisions and safeguard the public in the purchase of securities. In some parts of England there are found trade associations, such as the Liverpool Trade Protection Society which has been actively functioning since 1823 to protect tradesmen from fraud.

Some of the British laws have been copied into the colonial statutes. Provisions of the British Merchandise Marks Act are found in the Canadian Criminal Code. Canada too had a Gold and Silver Marking Act; and all of the colonies passed antidumping legislation. In the Australian Industries Preservation Act of 1906 and 1910, dumping and certain forms of monopoly were expressly declared to be unfair competition. In most of the colonies, however, the antitrust laws have been kept separate from unfair competition measures. In Canada monopolistic

practices are dealt with under the Combines Investigation Act. The Canadian Unfair Competition Act, passed in 1932, is directed chiefly to protection of patents, trade-marks and designs, although one clause prohibits any false statement tending to discredit the wares of a competitor, directing public attention to his wares in such a way as to create confusion between his wares and those of a competitor, and adoption of "any other business practice contrary to honest industrial and commercial usage." Suits thereunder are civil actions brought in the Exchequer Court of Canada.

In our own country, when Congress in 1914 established the Federal Trade Commission to deal with monopoly in its incipiency and to prevent unfair methods of competition, it was motivated by the manifest need for adequate machinery to protect the public's interest in these matters. The Commission, an independent quasi-judicial body, consisting of five members and a staff of lawyers, economists and accountants, is broadly empowered to prevent unfair methods of competition and unfair or deceptive acts or practices in commerce and to proceed against anyone using such unfair practices or methods "if it shall appear to the Commission that a proceeding by it * * * would be to the interest of the public * * *."

Under this language the Commission is not a mere substitute for the courts in settlement of private controversies nor is to act merely in the interest of any private party. It is to deal with unfair competitive practices through an injunctive rather than a penal proceeding and from the standpoint of protecting the public's interest rather than from that of determining a justiciable question presented by a private party who alleges injury at the hands of another. The statute does not supplant remedies available through private suits at law or in equity, such as actions against infringement of trade-marks and unfair competition in passing off the goods of one trader as and for those of another. Such remedies remain available and where the controversy in question is of such private nature and involves no specific substantial public interest action it is not the Commission's duty or policy to proceed.

However, where the adverse effect upon the public appears to be substantial, that is, where the public interest in an unfair method of competition appears to the Commission to be sufficiently affected to warrant the institution of formal proceedings to require its cessation, the Commission will not refrain from proceeding even though a private right of action may also exist in favor of some competitor of the respondent, such as a right of action for fraud or deceit, boycott, or restraint of trade.

The procedure to be followed by the Commission in the unfair competition cases in prescribed in the statute.2/

2/"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. * * *" (Section 5 of Federal Trade Commission Act)

Briefly, the Commission proceeds by way of a formal complaint served upon respondent stating the charges and containing notice of hearing with opportunity to appear and show cause why a cease and desist order should not be issued. Where factual issues are drawn, testimony and other evidence are taken in support of the complaint and in opposition thereto. Upon the entire record and after opportunity for briefs and oral argument, the Commission, if it concludes that the practice in question constitutes an unfair method of competition, makes and serves upon the respondent its findings as to the facts and its order requiring respondent to cease and desist. The respondent has a right to appeal to the appropriate United States Circuit Court of Appeals, which may modify or set the order aside or affirm and enforce it. This decision is final unless the Supreme Court of the United States receives and determines the case upon certiorari granted upon the petition of either party. If no appeal is taken from the Commission's cease and desist order within 60 days, it becomes final, and subsequent violations of such an order result in the assessment of civil penalties by the federal district courts in actions brought by the Department of Justice.

It is my opinion that the American method of employing an expert commission, trained and experienced in the problems of business relationships and operating under a broad standard was indeed a fortunate approach to the problem from the standpoint of public protection. While a list of all the practices considered in 1914 to be detrimental to the public and to honest businessmen might have been incorporated in the form of proscriptions in a statute, no one could then foretell what practices might in the future be devised, or what practices, then considered unobjectionable, might under new conditions become highly undesirable.

The statute under which this procedure is operative, it will be noted, contains the broad prohibition to the effect that "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are declared unlawful." Unlike the approach in various foreign countries, our statute does not contain a detailed list or specification of the practices constituting such unfair methods of competition. Such detailing of specific practices was purposely not attempted by the Congress in order to preserve flexibility of the law and make possible the application of the statute to new practices which may in the future be devised and found to be unfair.

Were it not for this flexibility, each new unfair device as it steals upon the business world would have to be allowed to continue unchecked until new legislation could be introduced and passed, adding it to the list of specific competitive practices theretofore declared unlawful. Thus a premium would be placed on the development of a series of cleverly devised schemes of unfair methods to be used successively by the unscrupulous until amendment of the law.

To cite only one example of the difficulty of prompt amendment of specific proscriptions, it was early found that the acquisition of assets of a competing corporation resulted in just as much of a tendency to monopoly as did the forbidden acquisition of its capital stock. As yet, however, Section 7 of the Clayton Act has not been amended so as to fulfill its intended purpose.

In the Federal Trade Commission Act, this difficulty is avoided. Moreover, flexibility so desirable in matters affecting the delicate balance and ever-changing operations of modern business is brought into the law and the legal processes for preventing unfair methods of competition. In discussing this flexibility and the scope of practices within the jurisdiction of the Federal Trade Commission Act, our Supreme Court has said:

> "Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories. The common law afforded a definition of unfair competition and, before the enactment of the Federal Trade Commission Act, the Sherman Act had laid its inhibition upon combinations to restrain or monopolize interstate commerce which the courts had construed to include restraints upon competition in interstate commerce. It would not have been a difficult feat of draftsmanship to have restricted the operation of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation.
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> "The Act undoubtedly was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed. See Federal Trade Commission v. Raladam Co., supra, 649, 650. But as this Court has pointed out it also had a broader purpose, Federal Trade Commission v. Winsted Hosiery Co., U. S. 483, 493; Federal Trade Commission v. Raladam Co., supra, 648. As proposed by the Senate Committee on Interstate Commerce and as introduced in the Senate, the bill which ultimately became the Federal Trade Commission Act declared 'unfair competition' to be unlawful.1/ But it was because the meaning which the common law had given to those words was deemed too narrow that the broader and

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"1/The Senate Committee on Interstate Commerce, in recommending the bill in its original form, seems to have adopted the phrase 'unfair competition' with the deliberate purpose of giving to the Commission some latitude for dealing with new and varied forms of unfair trade practices. The Committee said in its report of June 13, 1914, Senate Report No. 597, 63rd Cong., Second Session, page 13:

> 'The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.
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> 'It is believed that the term "unfair competition" has a legal significance which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition.'"
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more flexible phrase 'unfair methods of competition' was substituted.2/ Congress, in defining the powers of the Commission, thus advisedly adopted a phrase which, as this Court has said, does not 'admit of precise definition but the meaning and application of which must be arrived at by what this Court elsewhere has called "the gradual process of judicial inclusion and exclusion."' * * *" (Federal Trade Commission v. R. F. Keppel & Bro., Inc., 291 U. S. 304, 310)

Of course, the businessman generally desires certainty of the standards rather than their flexibility, and the Commission has developed what is known as its trade practice conference procedure, which provides a degree of concreteness as to the prohibitions of the law as applied to specific circumstances in particular industries. Specific methods of competition in a given industry are considered in these trade practice conferences, and rules describing and cataloging such practices as are found by the Commission to be unlawful and hence to be avoided, are devised to guide the businessman in the conduct of his business. The Commission's rule making bears a somewhat similar relation to its cases as Blackstone's Commentaries bore to the Year Books of his day. The rules, although specific, are the result of a process which does not depart, in principle, from the case-by-case method of interpretation by inclusion and exclusion. The necessary correlation of facts and principles required for such implementation of the broad standards of the statutes is achieved by making the rules paraphrase general principles, deduced from decided cases and legislative declarations of public policy, in terms of specific factual situations of particular industries.

In concluding a review of some concepts of unfair competition at home and abroad, we find that our home concept of unfair methods of competition is by far the broadest one, embracing as it does all those practices in trade and commerce which adversely affect the public interest and the freedom of opportunity to engage in business on a fair and equitable basis. Our administrative machinery for preventing unfair competition parallels the Anglo-American common law concept of a living law capable of solving new problems and meeting new situations with the aid of old principles. Like the common law process, it maintains the traditional Anglo-Saxon safeguards against arbitrary action and yet by its emphasis on public rather than private rights it boasts the greater flexibility so necessary to deal with new competitive devices as they are created and brought into use.

"2/The phrase 'unfair methods of competition' was substituted for 'unfair competition' in the Conference Committee. This change seems first to have been suggested by Senator Hollis in debate on the floor of the Senate in response to the suggestion that the words 'unfair competition" might be construed as restricted to those forms of unfair competition condemned by the common law. 51 Cong. Record 12145 * * *."