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Remarks of

EVERETTE MACINTYRE

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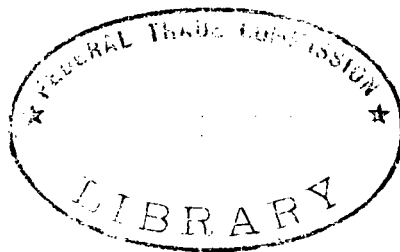
INSTITUTE ON HOSPITAL PURCHASING, WASHINGTON, D. C.,

April 21, 1949

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ON THE APPLICATION OF THE ROBINSON-PATMAN ACT TO  
HOSPITAL PURCHASING AND ON FAIR TRADE LAWS

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REMARKS OF  
EVERETTE MACINTYRE<sup>1/</sup>  
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I wish to preface my remarks with the explanation that the opinions and conclusions I express here today are not necessarily views held by the Federal Trade Commission.

We who are not in your position cannot appreciate the importance of your work. Few of us have information concerning how much of a factor hospital purchasing is in the interstate sale and shipment of commodities. We do know that Mr. John H. Hayes, president of the Hospital Bureau of Standards and Supplies of New York City, stated as long ago as 1937 that 2700 voluntary nonprofit hospitals of the country were spending more than \$150,000,000 a year on foodstuffs and supplies. That information indicates hospital purchasing is a substantial factor in the interstate sale and shipment of commodities. It is hoped that this opportunity of discussing with you the application of the Robinson-Patman Act to hospital purchasing will prove helpful and provide a better understanding of your problems.

The Federal Trade Commission is a nonpartisan agency made up of five members appointed by the President and confirmed by the Senate. Not more than three of the five members may be of the same political party. It was created by Congress in 1914 for the primary purpose of protecting the public interest in connection with matters relating to interstate trade in commerce. The public interest includes the interest of all producers, sellers, and buyers. However, since all members of the population are consumers, the interest of consumers in the commerce of this country is broader than that of any group of producers or any group of sellers.

In constitutional theory the Commission is not a part of the executive branch of the government, though it has certain law-enforcement powers. It is not a part of the judicial branch, though it perforce exercises quasi-judicial functions in the application of those powers. The Commission's place in our federal constitutional system is that of an arm of the legislative branch, exercising certain powers of regulating interstate and foreign commerce delegated to it by Congress and originally conferred upon Congress by constitutional grant.

The primary statute under which the Commission operates is the Federal Trade Commission Act. It is the organic act under which the Commission was created almost thirty-five years ago. By this legislation there was, in 1914,

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<sup>1/</sup>Mr. MacIntyre is Chief of the Division of Antimonopoly Trials of the Federal Trade Commission. That Division handles the trials of all Commission cases arising under the Robinson-Patman Act.

for the first time, introduced into the Federal laws of our country that short but far-reaching clause which reads "unfair methods of competition in commerce are hereby declared unlawful." To that Congress, in 1938, added condemnation of unfair acts and practices. Those provisions were and still constitute the cornerstone of the F.T.C. regulation of competitive practices in interstate commerce.

In 1914, the same year the original Federal Trade Commission Act was passed, the Clayton Antitrust Act was approved. By it the Congress legislated, among other things, against specific practices, the probable effect of which would lessen competition and restrain trade: namely, (1) discriminations in price as were then covered by Section 2 of that Act; (2) the use of tying contracts and exclusive dealing agreements in the distribution of goods, wares and merchandise, as covered by Section 3; (3) the practice of one competitor acquiring control over and through stock acquisitions or mergers covered by Section 7 of the Act; and (4) the use of interlocking directorates between normal competing corporations. Section 11 of that Act authorized the Federal Trade Commission to enforce sections 2, 3, 7 and 8 of the Clayton Act relating to commerce other than that having to do with carriers, communications, and banks.

Prior to the passage of the Clayton Antitrust Act, in 1914, it was widely recognized not only by Congress but by President Wilson, and so stated by him in a message to the 63rd Congress, that the public need demanded the Federal Trade Commission Act and the Clayton Act to prohibit discriminations and other specific trade practices. He said:

① "We are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limit of which experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain."

A study of the debates upon these measures in Congress clearly discloses the intent of Congress to declare illegal all practices regarded as likely to promote monopolies and to get at them in their incipiency, nipping them in the bud, and forestalling an evil before its development into full bloom.

During the course of the debates, Senator Walsh of Montana, in referring to the Clayton Act, said:

"The purpose of the legislation of which the pending bill forms a part is to preserve competition where it exists, to restore it where it is destroyed and to permit it to spring up in new fields."

To that end, the Clayton Act was approved October 15, 1914. Section 2 of that Act provided:

"Sec. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which

commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition."

In 1936 Congress took another step to strengthen the Clayton Act in further condemning discriminatory practices. It did so by enacting the Robinson-Patman Antidiscrimination Act as an amendment to Section 2 of the Clayton Act and empowering the Commission to deal with additional discriminations. Congressional condemnation of discriminatory prices was broadened to prohibit sales of commodities in interstate commerce at discriminatory prices where the effect may be to substantially lessen competition, tend to create a monopoly or to injure, destroy, or prevent competition with the person who grants the discrimination with or among any of his customers, with the person who knowingly receives the discrimination with or among any of his customers, or with or among the customers of any of them. That amendment also cataloged and declared as unlawful the granting of certain types of brokerage, commissions, discriminatory advertising or promotional allowances and discriminatory services or facilities.

Rapid growth of monopolistic conditions in the field of retail food distribution was the backdrop pointed to with alarm by independent retail merchants in their plea that Congress strengthen the law against price discriminations and related practices. The conditions then existing were disclosed in part by the Federal Trade Commission in its "Final Report on the Chain Store Investigation" (Senate Document No. 4, 74th Congress, 1st Session, 1934), and in part by evidence collected and considered by the Patman Committee in the House of Representatives which dealt mainly with the discriminatory benefits extended to chain stores by manufacturers to the detriment of smaller distributors. (See H.R. Report No. 273, 74th Congress, 2nd Session, on American Retail Federation and Big Scale Buying and Selling.) In its Report the Commission analyzed the concessions of various kinds forced by large distributors from manufacturers and pointed out that unwholesome effects were traceable to those concessions. The Report traced the rapid growth of chain store organizations in the retail food field and the corresponding drop in the number of independent retail merchants and the volume of business carried on by them. The report to the House of Representatives by the Patman Committee confirmed the Commission's findings that manufacturers and other sellers were granting discriminatory price concessions and trade advantages to favorite buyers. That Committee recommended legislation. Thereafter bills were introduced by Congressman Wright Patman in the House of Representatives and Senator Joseph Robinson in the Senate. Out of these and other bills developed the present law known as the Robinson-Patman Antidiscrimination Act, which was approved June 19, 1936.

Section 2 of the Clayton Antitrust Act as amended by the Robinson-Patman Antidiscrimination Act of 1936, when analyzed in the light of the

legislative history and existing economic conditions of 1934-1936, may be regarded principally as an effort to save the small independent merchants from the effects of discriminatory practices. When viewed in that light it would appear that its application would be needed less in those instances where purchases are made by consumers for their own use and not for resale. Indeed, such instances logically give rise to the question, "How can the buyer who consumes the merchandise he purchases and does not sell any commodity utilize price advantages he receives to the competitive disadvantage of other buyers?" The logic underlying the obvious answer to that question can be said to have been in part responsible for the opinion expressed by the Attorney General in a letter to the Secretary of War, December 28, 1936, to the effect that the Clayton Antitrust Act as amended by the Robinson-Patman Antidiscrimination Act is not applicable to Government contracts for supplies. The same reason played a prominent part in prompting Congress to enact Public Law No. 550 during the third Session of the 75th Congress, and as approved May 26, 1938, providing that the Robinson-Patman Antidiscrimination Act shall not apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals and charitable institutions not operated for profit.

You of this Institute who are engaged in hospital purchasing and represent hospitals exempted from the application of the Robinson-Patman Antidiscrimination Act probably see little point in my taking your time to discuss the niceties and the refinements of various provisions of that law. Furthermore, when Mr. Goudy invited me to speak to you, he requested that I make some remarks regarding "fair trade laws." Therefore, I shall utilize the remaining portion of my time to refer to those laws.

The term "fair trade laws" is used to designate laws enacted in a number of the States providing for resale price maintenance agreements. One of the first States to enact such legislation was California. It enacted legislation approximately 20 years ago which provided for resale price maintenance agreements between the seller and resellers of a product. About the time the National Industrial Recovery Act was held unconstitutional in 1935, the movement was under way in many States to have resale price maintenance laws passed. The movement gained momentum. Today the only jurisdictions where resale price maintenance contracts are prohibited are Missouri, Texas and the District of Columbia. No statute expressly prohibits or expressly permits such contracts in Vermont. Of course since the Sherman Antitrust Act of 1890 makes unlawful agreements in restraint of trade involving interstate commerce, these State "fair trade laws" left open to attack by the Federal Government under the Sherman Act and the Federal Trade Commission Act resale price maintenance agreements when interstate commerce was involved. Therefore the parties and the movement responsible for the enactment of the resale price maintenance laws in the various States sought amendment to the Federal Antitrust Laws so as to permit resale price maintenance agreements legalized under the State laws to apply to transactions involving interstate shipments. Those efforts resulted in Congress passing the so-called Miller-Tydings Act, Public Law No. 314, 75th Congress, as approved August 17, 1937. By its terms the Sherman Antitrust Act and the Federal Trade Commission Act were amended. The Miller-Tydings Act provided that nothing contained in the Sherman Act and the Federal Trade Commission Act shall render illegal contracts or agreements prescribing minimum prices for the resale of commodities, when such contracts or agreements are lawful as applied to intrastate

transactions under any State law. However, the conditions are that to qualify under the Miller-Tydings Act a product must (1) carry the trade-mark, brand or name of its producer; (2) be in free and open competition with commodities of the same general class produced or distributed by others; (3) be sold in States where resale price maintenance contracts are legal; and (4) be fair traded down a vertical line only. This means that a seller may set minimum prices for his own customers and for their customers. Agreements may not be made horizontally among manufacturers, among wholesalers, or among retailers.

Under the laws which were enacted by the States, 21 States permitted only the owner of a trade-mark or a brand name, or its authorized distributor, to establish retail prices. The remaining 24 States which enacted resale price maintenance legislation permitted any seller to establish resale prices. However, all State laws conform to the provision of the Miller-Tydings Act in prohibiting combinations of groups of resellers, whether wholesalers or retailers, from acting to determine the retail prices which a supplier will establish for them. Therefore, combinations of that kind violate both State and federal antitrust laws.

On a number of occasions representatives of the Department of Justice have appeared before Committees in Congress and advocated repeal of the Miller-Tydings Act. On December 13, 1945, the Federal Trade Commission submitted to Congress its Report on Resale Price Maintenance. In that report the Commission concluded:

"The Tydings-Miller amendment legalizes contracts whose object is to require all dealers to sell at not less than the resale price stipulated by contract without reference to their individual selling costs or selling policies. The Commission believes that the consumer is not only entitled to competition between rival products but to competition between dealers handling the same branded product."

The March 28, 1949 issue of the trade journal "Drug Topics" featured an article entitled, "House Committee May Ask Repeal of Tydings-Miller Act." The committee referred to was a Subcommittee of the House Judiciary Committee. Since then H.R. 4003 has been introduced by Congressman Donald L. O'Toole, of New York, representing the 13th District in Brooklyn. That bill simply strikes out the Miller-Tydings exemption proviso that appears in Section 1 of the Sherman Act. In other words, it would completely repeal the Miller-Tydings amendment to the Sherman Act and the Federal Trade Commission Act. Also in recent days resale price maintenance legislation in at least two States has fared badly. The Florida Fair Trade Act was declared unconstitutional on April 7, 1949, by a six-to-one decision of the State Supreme Court. The decision by the Court in that case is the first against a State law which provided for enforcement of resale price maintenance contracts of private parties. An earlier decision in Illinois voided a mandatory resale price maintenance law administered by the State Liquor Authority. On March 12, 1949 a court in Mississippi handed down a decision under circumstances similar to those present in the Florida case. The decision in Mississippi also was adverse to the State resale price maintenance legislation.

The controversy over the merits and demerits of the resale price maintenance legislation continues in the meantime. On page 75 of the April 1949 issue of "Fortune" appears an article entitled "The 'Fair' Trade Controversy."

In that article by the staff of "Fortune" it was urged that there be a re-examination of the issues. "Fortune" in an earlier article had referred to the State statutes providing for resale price maintenance as the "not so fair trade laws." However, in its article of April 1949 it was stated: "We think the issue should be reopened by the retailers, the manufacturers, State legislatures, Congress, and all interested parties. With any such efforts Fortune pledges its cooperation."

In conclusion, let me say that the Federal Trade Commission is grateful for the assistance it has received from those of you engaged in purchasing who have so kindly supplied information to the Commission regarding the state of competition or the lack of it you have found in your dealings. As you know, commerce in the United States is based on the theory of a free competitive market where buyer and seller can meet on more or less equal ground and to which any citizen has access as a matter of right, provided he can survive the competition.

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