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be regarded as guilty of conduct so anti-social in nature as to preclude his taking final refuge behind a discharge in bankruptcy.

Therefore, it might be suggested that since the courts are willing to individualize the various situations involving moral conduct of the bankrupt, it would be appropriate to proceed in this manner in the animal cases. The defendant, as in the principal case, would be discharged in bankruptcy under this procedure if his act in keeping the dog was not for the purpose of committing an intentional wrong or in reckless disregard of the safety of others. The arbitrary rule of fixing liability based on defendant's knowledge of a single prior attack by the animal would be dispensed with.

CRAWFORD H. DOWNS

ACTION BY THE FEDERAL TRADE COMMISSION AGAINST UNTRUTHFUL ADVERTISING SINCE 1940

As a part of a symposium in the George Washington Law Review under the title "Unfair Competition and the Federal Trade Commission,"[1] Professor Milton Handler discussed twenty-seven methods of competition which have been condemned as violative of Section 5 of the Federal Trade Commission Act. The introduction traces the reaction of the courts toward the work of the Commission from its inception in 1914 to the time of the publication in 1940. Under various subsections, a resumé of the work of the Federal Trade Commission in preventing untruthful and misleading advertising is discussed and an array of the cases set forth. As a supplement to this latter phase of the above work, this study seeks to show subsequent developments in the principles of what constitutes untruthful and misleading advertising as applied by the Commission, and brings the cases up to date, discussing in somewhat greater detail the application of these principles to the factual situations involved.

Something of a requisite maturity seems to have been attained in the work of the Federal Trade Commission. Progressing from its earliest decisions in which only the grossest type of misstatements were forbidden as untruthful (which decisions only too often were then set aside by the courts), the Commission is

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1. Handler, Unfair Competition and the Federal Trade Commission (1940) 29 Geo. Wash. L. Rev. 399.

finally on the way to the serious business of issuing orders against the more subtle forms of false advertising. This progress is attributed to a greater liberality on the part of the courts, new legislation, and trial and error of the Commission in finding its own way through the very chaos it was created to remedy. It is in this twilight region between truth and falsity that the greatest harm is done by untruthful advertising.

The Quality and Character of Goods

The Ford Motor Company advertised its so-called "six percent plan" of refinancing automobiles manufactured by it. On the face of the advertisement appeared the notation that the plan did not call for six percent interest, but offered simply a convenient multiplier which anyone could use and understand. The Commission found that the opposite impression was intended and created by the general purport of the advertisement.

In reviewing the cease and desist order,[2] the court sustained the finding of the Commission that the total impression likely to be given was that the interest rate was six percent simple interest on the unpaid balance, whereas six percent was actually charged on the account originally financed from the date it began to run until the account closed, and there were no computations on the declining balances as the installments were paid; that when the interest was thus calculated the rate would be approximately eleven and one-half percent; that the general purport of the advertisement was misleading. The order to cease and desist from the use of the word "six-percent" or the figure and symbol "6%" in connection with the company's refinance plan was affirmed.

This was held to be sufficient ground to warrant the order since the false advertising would tend to mislead the public into buying at one price in the belief that it was purchasing at another. The alleged good faith of the advertiser was disregarded. The court refused to accede to the argument that the practice had become so prevalent that those engaged in the trade were no longer deceived,[3] and it insisted that the advertisement must be construed from the viewpoint of the prospective purchaser. Two possible constructions were attributable to the advertisement.

2. Ford Motor Co. v. Federal Trade Commission, 120 F.(2d) 175 (C.C.A. 6th, 1941), cert. denied 314 U.S. 668, 62 S.Ct. 130, 86 L.Ed. 535 (1941).

3. General Motor Co. v. Federal Trade Commission, 114 F.(2d) 33 (C.C.A. 2d, 1940). An indistinguishable situation in which an identical order was affirmed. In this opinion as well as in the principal case it was stated that the practice had become prevalent throughout the trade.

First was the impression that an addition of six percent to the purchase price of the car would be made. Equally plausible was the impression that ordinary interest at the rate of six percent on the deferred installment payments would be required. This uncertainty was regarded as being misleading.

In *Benton Announcements, Incorporated v. Federal Trade Commission*,[4] a cease and desist order issued against the use of the words "engraved," "engraving," or "engraver's" to describe the stationery of the petitioners or the process by which it was made. The Commission defined engraving as the impression made on paper by pressing upon it a metal plate into which lines have been cut and ink applied. In the process described the ink is wiped from the plate and remains only in the lines. To this plate the paper is applied, and the engraved effect is the result.

Petitioners' method was accomplished by a secret process, much cheaper than engraving as described by the Commission. This process involves the engraving of a metal plate in the usual way; but the text or design is printed upon paper with ordinary type. The printed paper is then pressed upon the surfaces of the uninked plate with sufficient force to cause an embossed appearance. The Commission relied upon the testimony of those familiar with the craft to the effect that the layman understands the word "engraved" to mean the older process. Testimony of those whose business carried them among the buyers of the product was accepted in preference to the dictionary definition of the term. It was conceded by the court that only an expert could determine the difference between the two methods. But the court said:

> "people like to get what they think they are getting, and the courts have steadfastly refused in this class of cases to demand justification for their preferences; . . . but if the buyers wish to be snobs, the law will protect them in their snobbery."[5]

An interesting case illustrating the recent tendency of the Commission toward insistence upon the most implicit truthfulness is *Gimbel Brothers, Incorporated v. Federal Trade Commis-*

4. 130 F.(2d) 254 (C.C.A. 2d, 1942).

5. Id. at 255. The origin of this doctrine was first announced in Federal Trade Commission v. Algoma Lumber Co., 291 U.S. 67, 78, 54 S.Ct. 315, 320, 78 L.Ed. 655, 662 (1933): "the public is entitled to get what it chooses, . . . though the choice may be dictated by caprice of fashions or perhaps ignorance." Accord: Federal Trade Commission v. Non-Plate Engraving Co., Inc., 49 F.(2d) 766 (C.C.A. 2d, 1931); Fioret Sales Co. v. Federal Trade Commission, 100 F.(2d) 358 (C.C.A. 2d, 1938).

sion.[6] Petitioners ran two newspaper advertisements of a job-lot of fabrics for sale as "woolens." Most of these materials contained part wool, and part cotton, rayon and other fabrics. The Commission found that this representation had a tendency to deceive the public. Its cease and desist order forbade the use of the term except as to materials of one hundred percent wool content, provided that when applied to material not wholly composed of wool that words to be added describing each constituent fabric in the order of prominence by weight, or by percentage of fiber when not present in substantial amounts by weight.

The court affirmed the first part of the order, but modified the latter part by requiring merely that words of equal size and conspicuousness be used to describe other materials. The basis of this modification was the well known case of *Federal Trade Commission v. Gratz.*[7] This decision was quoted:

> "The gist of the complaint was that petitioners represented mixed goods as all-wool; but there was no charge that the petitioners had been selling mixed goods as such without describing each constituent fiber in the order of its prominence by weight, or specifying the percentage of the various ingredients. An order to desist from such a practice goes beyond the complaint, and to that extent it is improvident."[8]

In view of the recent tendency of the courts to refrain from undue interference with the work of the Commission[9] and dicta contained in the opinion it appears that equitable and practical considerations of the difficulty of carrying out the Commission's decree may have been the moving factors in prompting the court to modify the order. It pointed out that compliance with the order by petitioner would require a chemical analysis of each piece of fabric, since the products constituted a job-lot of odds and ends without any uniformity of constituent fibers. Reference

6. 116 F.(2d) 578 (C.C.A. 2d, 1941).

7. 253 U.S. 421, 40 S.Ct. 572, 64 L.Ed. 993 (1920).

8. Gimbel Bros., Inc. v. Federal Trade Commission, 116 F.(2d) 578, 579 (C.C.A. 2d, 1941).

9. Alberty v. Federal Trade Commission, 118 F. (2d) 669 (C.C.A. 9th, 1941). The Commission restrained the claim that preparations called Alberty's Food Regular and Alberty's Food Instant rendered milk more readily digestible, constituted competent remedies, cures or treatments for cancer or ulcer, or had any remedial or therapeutic or medical value. Petitioner complained that testimony of medical experts representing one school of thought had been accepted to the exclusion of those of another which was equally recognized under the law. The court indicated that experts who were, and who were not, adherents of the homeopathic school of medicine were allowed to testify and having given conflicting testimony it was stated that "Conflicts in testimony are for the Commission, not this court to resolve."

was also made to the fact that on a prior occasion when a complaint of untruthful advertising was brought before the Commission, it expressly found that a competitor "truthfully represented" similar merchandise as "mixtures of wool and rayon." Apart from the above considerations there may have been no serious intention to reassert the doctrine of the *Gratz* case.

To the petitioners' contention that a single incident of misrepresentation could not constitute a violation of the statutory prohibition against untruthful advertising the court replied that innocence of deception is no defense since the purpose of the statute is protection of the public—not punishment of the wrongdoer.[10] A deliberate effort to deceive is not necessary to bring acts within the prohibition of the statute.[11]

In another case[12] a cease and desist order was issued against the use of the term "Olive Oil" denominatively on a soap which had only a fifteen percent olive oil content. Various other denotations of the word, olive, which had been used by petitioners to designate their brands of soap were included in the order. It included the brand "Palm and Olive Oil," and was based on a finding that the use of the brand would lead the public to believe that it was one hundred percent olive oil soap. The order directed that if this designation be used on soap whose oil or fat content was not wholly olive oil an explanation must be included. This should identify each constituent oil successively in the order of its predominance by volume. If any particular oil in the soap was not present in an amount sufficient to affect substantially its detergent qualities, then the percentage must be specifically disclosed. In setting aside this latter part of the order the court held that the petitioner could not be compelled to detail the constituency of the soap; that an appropriate legend eliminating the probability of deception resulting from the use of the name was sufficient.

10. Federal Trade Commission v. Klesner, 280 U.S. 19, 27, 50 S.Ct. 1, 3, 74 L. Ed. 138, 145 (1929): "to justify the commission in filing a complaint . . . the purpose must be protection of the public. The protection thereby afforded to private persons is the incident. Public interest may exist although the practice deemed unfair does not violate any private right." Accord: Royal Baking Powder Co. v. Federal Trade Commission, 281 Fed. 744, 752 (C.C.A. 6th, 1922).

11. Federal Trade Commission v. Algoma Lumber Co., 291 U.S. 67, 79, 54 S.Ct. 315, 321, 78 L.Ed. 655, 664 (1934): "Competition may be unfair within the meaning of this statute and within the discretionary powers conferred on the commission, though the practice condemned does not amount to fraud as understood in courts of law." Accord: Federal Trade Commission v. Blame, 23 F.(2d) 615, 621 (C.C.A. 2d, 1928).

12. Allen B. Wrisley Co. v. Federal Trade Commission, 113 F.(2d) 437 (C.C.A. 7th, 1940).

Judge Treanor, in his dissenting opinion, insisted that the petitioners were in a better position to have special knowledge of the reaction of the purchasing public to the trade name or brands which identified their soaps. Upon this consideration alone the view was expressed that the Commission's order was warranted by the facts and that the provisions of the order went no further than was necessary for the protection of the public.

In view of the basis of this dissent, as well as the fact that in both this and the *Gimbel* case[13] the court was of the opinion that the order was highly impractical and unduly burdensome, it is doubtful that if the issue were directly presented in a case free of these objections, the court would nevertheless burden the Commission with the procedural requirement that the findings of fact and the order be confined to the issues raised in the complaint.[14]

Many shibboleths concerning the courts' powers to review orders issued by the Commission which formerly were used freely now appear to be brought into play only on occasions where the courts feel that the action of the Commission has wholly transgressed all bounds of propriety. An excellent illustration is afforded by *Kidder Oil Company v. Federal Trade Commission.*[15] The order forbade petitioner from making certain representations concerning Kostal, a lubricating oil treated with graphite. The petitioner had advertised that his product (1) penetrates and adheres to all metal surfaces and soaks into the metal. It further stated (2) that an automobile lubricated with Kostal will run a greater distance without oil in the crankcase, and (3) that the lubricating qualities of its product are greater than the lubricating oil contained in it. These representations were forbidden by the Commission. The court affirmed the order insofar as the prohibited claims were represented as applicable to full-film conditions (conditions under an adequate supply of oil). But it set aside the order as applied to boundary conditions (those that obtain when the oil supply is low). However, the latter condition was the one toward which the petitioner's advertisements were primarily directed, so the part of the order left intact was wholly ineffectual.

The trial examiner's report was at variance with the Commission's findings of fact. This report was not made a part of

13. 116 F.(2d) 578 (C.C.A. 2d, 1941).

14. Cf. Charles of the Ritz Distributors Corp. v. Federal Trade Commission, 143 F.(2d) 676, 678 (C.C.A. 2d, 1944), where the issue was raised collaterally.

15. 117 F.(2d) 892 (C.C.A. 7th, 1941).

the transcript certified by the Commission. In failing to certify the report the Commission relied upon Rule 13 which provides, in effect, that the trial examiner's report upon the evidence is not a decision, finding, or ruling of the Commission; that it is not a part of the formal record of the proceedings, and is not to be included in the transcript of the record. The court held that Rule 13 was in conflict with the statute requiring that the entire record of the proceedings be certified by the Commission, and was therefore invalid. A copy of the report was sent to the petitioner so that he could file objections to it, hence the court concluded that it thereby became a part of the record, and the court had at least the discretionary right to require that it be included to determine if the findings were supported by substantial evidence. It follows that the court reviewed the evidence in the light of the reports, although it disavowed that it was so doing. It found that part of the findings upon which the order was based was insufficient. The following quotation from the opinion is noteworthy in this connection:

> "We recognize that our province is not to weigh the testimony, but we think it is not inappropriate to briefly refer to some of the direct positive testimony which contradicts many of the uncertain statements made by witnesses relied upon by the commission, and the inferences indulged in by such witnesses."[16]

The court seemed to manifest a regression to a former policy of recognizing the advertiser's time-honored claim to the right to "puff." With reference to the petitioner's claim that its product was a perfect lubricant the court stated:

> "We can conceive of situations where the use of such words might be deceptive and even fraudulent. As used by petitioner, however, we are of the opinion that they are nothing more than a form of 'puffing' not calculated to deceive."[17]

The court refused to make an additional finding of fact and held that, assuming the authority to make such a finding exists, it should be exercised only when the findings by the Commission are insufficient to dispose of the issues presented. In ordinary cases where the petitioner is plainly mis-stating the quality or character of his goods the court readily affirms the order.[18]

16. Kidder-Oil Co. v. Federal Trade Commission, 117 F.(2d) 892, 899 (C.C.A. 7th, 1941).
17. Id. at 901.
18. 142 F.(2d) 577 (C.C.A. 5th, 1944).

Origin of Products

Where goods of a particular geographical locality have acquired a reputation of exceptional quality, the misuse of such locality as a trade name is an untruthful and deceptive practice within the meaning of the statute. The Commission requires that names indicating source of origin of goods be accurately used, principally for the protection of the public, rather than competitors. Those doing business at places other than the place whose name appears on their goods are not permitted to use such geographical name merely for the purpose of false representation.[19]

A Pennsylvania manufacturer of cigars, which contained only Pennsylvania tobacco but were branded "Havana Smokers," was ordered to cease and desist from using the word Havana to designate its product.[20] The petitioner requested the privilege of retaining the word "Havana" with an appropriate legend indicating the domestic source of the tobacco content. In refusing this request the court stated that the implication in the word "Havana" was totally false; that the purchaser could be guided either by the label or the legend, but not both.

The recent tendency of the courts to modify orders of the Commission prohibiting the use of deceptive brands and names by allowing continued use of explanatory legends will apparently not be extended to cases where the implications of the name are wholly false.[21] In 1867 the Supreme Court of Pennsylvania in

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19. Nims, Unfair Competition and Trade Marks (3 ed. 1936) 298-299, § 105.

20. H. N. Heusner & Son v. Federal Trade Commission, 106 F.(2d) 596 (C.C.A. 3d, 1939).

21. Federal Trade Commission v. Army & Navy Trading Co., 66 App. D.C. 394, 400, 88 F.(2d) 776, 780 (1937). This identical circumstance was presented to the Court of Appeals for the District of Columbia. After a careful review of the authorities the court concluded: "But the phrase 'Army and Navy Trading Company' makes the single representation that at least the major portion of the merchandise offered for sale is in some sense Army and Navy Goods. This single representation being untrue, it cannot be qualified; it can only be contradicted. The cases . . . justify the qualification . . . where qualification is possible; they do not justify contradiction."

A case in accord is El Moro Cigar Co. v. Federal Trade Commission, 107 F.(2d) 492 (C.C.A. 4th, 1939), where the Commission issued an order forbidding the advertising of cigars made entirely of domestic tobacco as "Havana Counts" on the ground that the testimony before the Commission showed that the word "Havana" had acquired a special meaning or significance when applied to cigars—that it had come to mean that at least a portion of the tobacco was grown in Cuba and was known for its very fine quality. The petitioner insisted that its use of the name in advertising for thirty-three years—seventeen years after the establishment of the Commission—established for it a privilege resting in property with which the Commission had no right to interfere. The court took the position that this was no defense to an implication which was totally false; that time did not create an estoppel since the Commission acted on behalf of the community at large;

Palmer v. Harris[22] was the first tribunal to announce the doctrine followed in the principal case. It described the practice as "a falsehood as to the place where goods are manufactured, in order to have the benefit of the reputation which such goods have acquired in the market."[23] The Federal Trade Commission has followed this early doctrine in giving the public affirmative protection from misrepresentation as to the origin of products.[24]

Since this brand had been used and advertised since 1902—thirty-seven years—the petitioner insisted on the right to retain the name, Havana, with the legend, on the basis of the secondary meaning acquired. Invoking a rough analogy to the unclean hands doctrine as applied in unfair competition suits, the court refused to permit permanent user of a name which was untruthful in its inception. Such a practice, it declared, would permit the petitioner to profit by his own wrongdoing. However, in other cases the rigidity of this position has been tempered in the interest of the public by taking into account the confusion likely to result from sudden elimination of a name which has acquired a secondary meaning in connection with a particular product.[25] Accordingly, the order was so modified to allow a period of two years within which to discontinue the use of the brand "Havana."

In *Establissments Rigaud, Incorporated v. Federal Trade Commission*,[26] the petitioners were using French names denominatively upon their perfumes. A part of the constituent elements were imported from France, but others were of American origin. The Commission issued a cease and desist order against the use of the term "Paris" or "Paris France" without an accompanying legend that the perfumes were not wholly of French origin and

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that there was no bar to a proceeding in the public interest. Seemingly, the same reason was present in the *Heusner* case for which the court modified the order allowing two years for discontinuance of the prohibited brand.

22. 60 Pa. 156 (1867). Accord: Solis Cigar Co. v. Pozo, 16 Colo. 388, 26 Pac. 556 (1891).

23. 60 Pa. 156, 160 (1867).

24. Federal Trade Commission v. Winstead Hosiery Co., 258 U.S. 483, 42 S.Ct. 384, 66 L.Ed. 729 (1922) ("natural wool" for cotton); Federal Trade Commission v. Algoma Lumber Co., 291 U.S. 67, 54 S.Ct. 315, 78 L.Ed. 655 (1935) ("California white pine" for yellow pine); Proctor & Gamble v. Federal Trade Commission, 11 F.(2d) 47 (C.C.A. 6th, 1926) ("Naphtha soap" without naphtha); Federal Trade Commission v. Bradley, 31 F. (2d) 569 (C.C.A. 2d, 1929) ("English tub soap" made in America); Lighthouse Rug Co. v. Federal Trade Commission, 35 F.(2d) 163 (C.C.A. 7th, 1929).

25. Masland Duraleather Co. v. Federal Trade Commission, 34 F.(2d) 733 (C.C.A. 3d, 1929), where petitioners described their imitation products as "Duraleather." They were given six months to adopt some other acceptable trade name that would not be misleading, yet would retain the benefit of their good will.

26. 125 F.(2d) 590 (C.C.A. 2d, 1942).

that they were compounded in the United States. The order contained a general prohibition against the use of French words as brand names for perfumes without similar inscriptions following, and without English translations. The order was based on a finding of fact that purchasers prefer perfumes of French origin, and such names would lead them to believe that the perfumes themselves—not merely the ingredients—were of French origin. Regarding the order as too broad, the circuit court of appeals eliminated the requirement that English translations must accompany French names. The court justified its position by stating that in its opinion French names are prevalently applied to domestic perfumes, and that the fact of their having been packed in America is of too small a consequence to burden the petitioners with so indicating. The court mildly rebuked the Commission for taking cognizance of a matter of such trifling consequence. However, it affirmed the order as modified on the ground of the broad discretion given the Commission by the statute.

In *Grand Rapids Furniture Company, Incorporated v. Federal Trade Commission*[27] the court sustained an order of the Commission forbidding manufacturers of furniture from using "Grand Rapids" as a part of their corporate name, or from so designating furniture not in fact manufactured in Grand Rapids, Michigan, or from otherwise misrepresenting the place of origin of their furniture. There was substantial evidence found to support the order.

Status of the Manufacturer or Producer

In *Educators Association, Incorporated v. Federal Trade Commission*[28] petitioners were persons who could not qualify as teachers or educators. Nevertheless they published an encyclopedia, "The Volume Library," suitable for school children. Through their agents they had repeatedly represented to parents that this was required material of the school patronized by such parents, and that it was published by an association of educators whose objective was to further the cause of education, on a nonprofit basis. The order forbade deceptive advertising through the use of the name "Educators Association," and forbade the representation that this was a required text of any school. The court modified the order by allowing the use of the name, provided it was coupled with an appropriate expression revealing the character of the publisher's business, which would counteract the

27. 134 F.(2d) 332 (C.C.A. 3d, 1943).
28. 108 F.(2d) 470 (C.C.A. 2d, 1939).

false impression otherwise implicit. The court held that prior discontinuance of the false advertising was no defense to the Commission's order since the statute gave the Commission authority to issue a cease and desist order against anyone who " 'has been or is using any unfair . . . or deceptive act or practice in commerce.' "[29]

Subsequent to this decision the Commission and the petitioners failed to agree upon what explanatory phrase or expression should be added to the name "Educators Association." Upon a second appeal,[30] the court made its own modification of the decree by requiring that the words "Commercial Publishers of the Volume Library" be used in connection with the corporate name. One judge dissented on the grounds that these words were misleading and inadequate, that some expression such as "a private commercial enterprise" should be added.

In *Mancher v. Federal Trade Commission*[31] petitioners appealed for a modification of an order requiring them to cease representations that they were wholesalers and jobbers of jewelry with fifty years of continuous business experience. The petitioners sought to have the order modified by adding "when such is not the fact." In refusing this modification the court pointed out that if the petitioners were to change their business status and become wholesalers or jobbers this particular part of the order would no longer be applicable, and that they could not truthfully claim continuity of business despite intermediate bankruptcies. The court expressed the following reasons for the refusal:

> "An order must therefore issue; and we are not disposed to make amendations in the one framed by the commission in order possibly to soften the blow, but more probably to breed trouble by creating new ambiguities or at least illusory hopes in the petitioners' minds."[32]

In *Lane v. Federal Trade Commission*,[33] it was shown that the petitioner had been issuing pamphlets which purported to contain the conclusions of a testing bureau for the purpose of determining the relative utility of various consumer goods. He was ordered by the Commission to cease representing that his pamphlet was published on a non-profit basis, or that he or any

29. Id. at 473.
30. Educators Association, Inc. v. Federal Trade Commission, 108 F.(2d) 470 (C.C.A. 2d, 1939).
31. 126 F.(2d) 420 (C.C.A. 2d, 1942).
32. Ibid.
33. 130 F.(2d) 48 (C.C.A. 9th, 1942).

of his staff possessed the requisite qualifications for making scientific tests of products, and from representing that he was affiliated with Nelson Institute, the Massachusetts Institute of Technology, or any similar organization. The petitioner complained that the order was too broad in that it prevented his ever engaging in any legitimate business of this kind whatsoever. The court took the position that the Commission was not under the circumstances compelled to assume that the petitioner would ever engage in a legitimate enterprise.

Illustrative of the courts' tendency to affirm orders of the Commission founded upon very close factual considerations is the recent case of *Herzfeld v. Federal Trade Commission.*[34] Petitioners were ordered to desist from using "Mills" as a part of their title or otherwise indicating that they were manufacturers, thereby deceiving dealers and purchasers of their rugs into believing that no middleman's profit was involved; also enabling dealers to represent to consumers that petitioners were manufacturers. "Stephen Ray Mills," accompanied by a legend in substantially smaller letters "Importers and Wholesalers of Floor Coverings," was the title used. They controlled the fabrication of the rugs—gave all specifications for their construction, were the landlords of the manufacturers, and held a mortgage on most of the machinery. A poll conducted by the Commission revealed that over one-half of the dealers preferred to buy from manufacturers, and more than one-fifth of them thought that such was the status of the petitioners. No deception of the ultimate consumer was found, but the court relied on the established doctrine that none is necessary where there is a fair probability that such would be the ultimate effect.[35] Furthermore, the fact that the petitioner would be once removed from any such deception did not prevent his being considered a party to it. The court considered how far the probabilities of deception outweighed the inconvenience to the petitioner by compelling him to change his title, and it concluded that the exercise of discretion on this matter properly comes within the province of the Commission and had been properly exercised in this instance.

Therapeutic or Medicinal Value

Cases involving representations concerning therapeutic or medicinal value are by far the most prevalent with which the

34. 140 F.(2d) 207 (C.C.A. 2d, 1944).
35. Federal Trade Commission v. Winstead Hosiery Co., 258 U.S. 483, 42 S.Ct. 384, 66 L.Ed. 729 (1922).

Commission must deal. The importance of a careful and sound administration here can hardly be overemphasized. The victim seeking relief from pain makes this an unusually profitable field for the unscrupulous. Moreover, the extensive harm which may follow the use of deceptive advertising in connection with drugs requires the exercise of great care by the Commission. Advertisements of "medical" compounds which fail to acquaint the purchaser with possible dangers from their use are readily made the object of desist orders. Furthermore the action of the Commission in that type of case usually finds a ready affirmance by the courts.

The makers of a flesh-reducing compound which was sold under the name of "Re-Duce-Oids" were ordered by the Commission to cease and desist from advertising this product without disclosing its harmful potentialities.[36] The preparation was recommended as a safe, competent and effective remedy or cure for obesity. According to the findings of the Commission it was neither safe nor effective, and should be used only under competent medical supervision. The defense offered was that the Commission was without authority to compel the petitioner to disclose facts with respect to the consequences which might result from the use of its product. To this defense the following excerpt from the opinion aptly illustrates the attitude taken by the court:

> "The order does not require petitioners to reveal anything. It requires them to cease and desist from disseminating false advertisements . . . but does not require them to advertise at all. If petitioners do not choose to advertise truthfully, they may, and should, discontinue advertising."[37]

Another prevalent type of false and misleading advertising with which the Commission is frequently confronted is one which involves no particular danger to the purchaser; its objection lies in the fact that advertisers are thereby enabled to pawn off a worthless product on the public. An example of the all-too-prevalent practice is afforded in the case of *Seborne Company v. Federal Trade Commission.*[38] The petitioners were ordered to cease and desist from representing in their advertisements that their products were remedies or cures for dandruff, that they would

36. American Medicinal Products, Inc. v. Federal Trade Commission, 136 F.(2d) 426 (C.C.A. 9th, 1943).
37. Id. at 427.
38. 135 F.(2d) 676 (C.C.A. 7th, 1943).

remove the causes of odors, or that they were the results of new scientific discoveries. These representations were found by the Commission to be gross exaggerations which were both misleading and untruthful. Several defenses were interposed. First, the petitioners insisted that the representations were so awkward and exaggerated that they could not be effective as instruments of deception. Second, it was claimed that an advertisement which promises "relief" does not by the dictionary amount to a holding forth of an assurance of permanent cure. Finally, it was urged that all the petitioners were not parties to the questionable practice. The court properly held that a unity of action would be inferred in a joint enterprise. It further noted that the petitioners could not successfully contend that the public understood that continued application was necessary despite petitioners' representations that "'Most users of Seborne report their dandruff gone in one week or less.'"[39] The petitioners' insistence upon a literal construction of its advertisements was readily dismissed. The court declared that it would look to the spirit rather than the letter of the representations: "Words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive."[40] The Commission's findings and its order were sustained by the courts in all respects.

A recent case involving the false advertisement of drugs offers an illustration of the growing inclination of the courts to allow considerable latitude to the Commission in determining the weight of conflicting testimony. In *John J. Fulton Company v. Federal Trade Commission*[41] an order was issued against representing that "Uvursin," a compound of herbs, was an effective treatment for diabetes. The Commission received the testimony of physicians summoned by the petitioner who testified that diabetic patients had sometimes improved while taking the nostrum. This testimony was discounted on the ground that the treatments referred to were not administered under scientifically controlled conditions. On the other hand the statements of experts summoned by the Commission were accepted on the basis of their expert pharmacological knowledge, although these persons had never administered the drug. Admissibility of this latter type of testimony had been previously approved by the court in *Justin*

39. Id. at 679.
40. Bockenstette v. Federal Trade Commission, 134 F.(2d) 369, 371 (C.C.A. 10th, 1943).
41. 130 F.(2d) 85 (C.C.A. 9th, 1942), cert. denied 317 U.S. 679, 63 S.Ct. 158, 87 L.Ed. 544 (1942).

Hynes & Company v. Federal Trade Commission.[42] The order was unanimously affirmed in the principal case.

Claims of therapeutic value of mineral waters received the attention of the Commission and the court in *Carbon Water Company v. Federal Trade Commission.*[43] Mineral water was advertised as effecting a therapeutic cure for fifty-two named diseases, ranging from neuritis to chronic pneumonia and from poison ivy to sterility. Not content with these modest claims, the advertiser insinuated that the potentialities of the nostrum remained yet to be discovered. The only requirement of the Commission's order was that the petitioners confine their statements to the claims of their own physician experts—that the water would, when used internally and externally, cure these fifty-two diseases. These physicians appeared to have gained some of their clinical experience with Carbon Springs water by administering it to their dogs and wives. The court pointed out that according to their testimony, a therapeutic dose of lithium (the mineral for which it was advertised) would require the drinking of from one hundred and fifty to two hundred and twenty-five thousand gallons of the advertised nostrum within a period of twenty-four hours. It pointed out that Potomac River water contains five times as much lithium per gallon as the miracle water of Carbon Springs.

The cease and desist order issued in *Philip R. Park, Incorporated v. Federal Trade Commission*[44] was directed against the advertising of "Parkelp Tablets" as possessing sufficient quantities of enumerated minerals to be of therapeutic value. This order was directed against advertisements disseminated four years before the investigation and five years before the order, and approximately two years before the law defining false advertising became effective, March 21, 1938. The court unanimously affirmed the order.

In *Aronberg v. Federal Trade Commission*[45] the objectionable advertising practice related to medical preparations for relief of delayed menstruation known as "Triple-X Compound," "Perio Pills," and "Perio Relief Compound." These were advertised as being effective, harmless remedies for "delay," and it was claimed that they would bring immediate "relief" painlessly. Literally construed the advertisements stated that the prepara-

42. 105 F.(2d) 988, 989 (C.C.A. 2d, 1939), cert. denied 308 U.S. 616, 60 S.Ct. 261, 84 L.Ed. 515 (1939).
43. 15 U.S.C.A. § 45(d) (1914).
44. 136 F.(2d) 428 (C.C.A. 9th, 1943).
45. 132 F.(2d) 165 (C.C.A. 7th, 1942).

tions were for "functional delays" and "unnaturally suppressed periods." The implication to be gained from the statements, however, was that the preparations could be safely used to produce abortions. Such statements as the following were used: "A new discovery—Triple-X Relief compound is the fastest acting, safest aid to married women."[46]

The Commission found that to the purchasing public "relief" meant a remedy or cure; that in reality there was no one cure for all the difficulties for which the compounds were recommended. The Commission also found that the medicine contained chemicals which were dangerous and that no notice of this was afforded by the advertisements used. Furthermore there was an implied assurance that no limitation of dosage need be observed. The substance advertised was particularly dangerous when taken during pregnancy, and produced abortive tendencies. The order directed the petitioner to desist from advertising his preparations so as to state, directly or by implication, that they were an effective remedy, or that they were harmless or safe to use. It also required that the advertiser give affirmative notice that his product might produce gastric or intestinal disturbance, and, during pregnancy, violent poisonous effects. In affirming the order the court correctly concluded that the world "relief" as used in the entire context of the advertisement would imply that a remedy or cure was offered and hence that the advertisement was untruthful. It pointed out that the ultimate impression upon the reader arises from the sum total of not only what is said but also of all that is reasonably implied, and that advertisements must be read in their entirety and as they would be understood by those to whom they appeal. The court relied upon an axiom set forth in *Florence Manufacturing Company v. J. C. Dowd & Company.*[47]

However, the term, relief, was accorded a slightly different interpretation in the case of *D.D.D. Corporation v. Federal Trade Commission.*[48] The petitioner's patent medicine was advertised for quick "relief" from itching which results from eczema, blotches, pimples, athletes' foot, scales, rashes, and other externally caused skin eruptions. The Commission found that the preparation had no therapeutic value, and hence could not cure internally caused itching; that the advertisement of a remedy implied that it would relieve the condition from which the itching was caused; and that the addition of the clause "or other ex-

46. Id. at 166.
47. 178 Fed. 73, 75 (C.C.A. 2d, 1910).
48. 125 F.(2d) 679 (C.C.A. 7th, 1942).

ternally caused skin eruptions" implied that those diseases previously enumerated were of external origin. The order prohibited the respondent from advertising its product so as to convey the meaning that the preparation would either permanently or temporarily eliminate the disease or the condition which gave rise to the itching or that it had any therapeutic value other than as affording temporary alleviation. The court directed that the word "temporary" be deleted from the order. It stated that the phrase "relief from itching" would not tend to induce the public to believe that the preparation was a cure for either the disease or the symptoms. The distinction drawn between this and the *Aronberg* case was entirely justifiable. In the principal case the immediate concern of the patient would be the annoying symptoms, whereas the basic disorder would doubtless be the immediate concern of the patient under the facts of the *Aronberg* case. In the latter case the court alluded to testimonials received by the petitioner which thoroughly demonstrated that the purchasers of their product so regarded the preparation in question.

Misleading advertisements may produce harmful results for the general public even though such advertisements are not directed toward the ultimate user. Untruthful claims made to physicians and other medical practitioners will be suppressed in appropriate cases. Although the licensed physician will likely be more skeptical than the untutored public of extravagant claims, yet his capacity to judge is not unlimited. Furthermore, many licensed healers and practitioners lay no claim to superior knowledge of medical therapy. Hence untruthful advertising directed through this channel may properly be the object of a cease and desist order.[49]

Use of Deceptive Brands and Names

The deceptive branding of products has been condemned with little hesitation by the Federal Trade Commission. With respect to this practice the orders of the Commission have received extensive judicial support. The fact that the offending brand name has been allowed registration as a trade mark does not sanction its use as an instrument of deception.[50] The test of the petitioners' conduct is not whether a trade mark may have been registered, but whether the method whereby it is used falls within the pro-

49. Irwin v. Federal Trade Commission, 143 F.(2d) 316 (C.C.A. 8th, 1944).
50. N. Fluegelman & Co. v. Federal Trade Commission, 37 F.(2d) 59, 61 (C.C.A. 2d, 1930).

hibition of the Federal Trade Commission Act which forbids the use of misleading trade marks.

The Stanley Laboratories had used the letters "M.D." in advertising douche powder. The letters were employed in conjunction with photographs of doctors and also preceding the trade name of the product. Other advertising devices regularly used by them were portrayals of uniformed nurses or the medical cross symbol. All these were associated with statements to the effect that the product was a recent development of scientific research endorsed by leading physicians and surgeons. In addition, the petitioner used terms such as "dependable safeguard." The Commission found that these methods of advertising tended to deceive the public into believing that the powder had been endorsed by the medical profession or the American Red Cross as a contraceptive or a germicide which would combat all forms of germ life. The order, which was comprehensive in scope, was affirmed in *Stanton v. Federal Trade Commission.*[51]

The freedom with which the Commission proceeds against the more subtle deceptive practices of advertisers is illustrated by the case of *Charles of the Ritz Distributors Corporation v. Federal Trade Commission.*[52] A cosmetic preparation commonly known to the trade as a powder base for make-up was labeled and advertised as "Charles of the Ritz Rejuvenescence Cream." An extensive advertising campaign placed emphasis upon the rejuvenating qualities of the product. A typical reference was to "a vital organic ingredient" which the product allegedly contained. The makers claimed that the product "brings to the user's skin quickly the clear radiance. . . the petal like quality and texture of youth, that it restores natural moisture necessary for a live, healthy skin . . . that it gives the skin a bloom which is wonderfully rejuvenating and constantly active in keeping your skin clear, radiant, and young looking."[53]

After a hearing the Commission found that such claims were false, and that no treatment which will restore youth or the appearance of youth to the skin regardless of the age of the user is known to medical science. It therefore ordered that the petitioner cease (1) disseminating in any advertisement of its product the word "Rejuvenescence" or any other word of similar import; (2) representing directly or by inference that the product will rejuvenate the skin. The petitioner claimed that there was

51. 131 F.(2d) 105 (C.C.A. 10th, 1942).
52. 143 F.(2d) 676 (C.C.A. 2d, 1944).
53. Id. at 678.

not sufficient evidence to sustain the finding of the Commission that the cream does not rejuvenate the skin. In support of this it maintained that the formula of the preparation was secret and not known to the Commission's experts. It further urged that use of the term "Rejuvenescence" did not amount to a representation that the product would restore the appearance of youth ot the skin. "Rejuvenescence," it stated, was a nondescriptive "boastful and fanciful word," utilized solely for its attractiveness as a trade mark.

There was ample precedent for the court's rejection of the petitioner's first contention. Since the decision in *Coca-Cola Company v. Wirthman Drug Company*,[54] it has been settled that an advertiser is not privileged to stand upon its refusal to disclose the true formula for its preparation as a trade secret. Furthermore the court had previously held that failure by the producer to reveal facts within its immediate knowledge is a circumstance which tends to confirm the Commission's charges.[55]

Dictionary definitions of "rejuvenescence" were resorted to by the court to sustain the Commission's findings that the connotation of the brand name was untruthful and that the term impliedly promises a restoration of youth. There was no positive testimony that either tradesmen or purchasers had attached any narrower significance to the word.

Had the term, rejuvenescence, been applied to a lotion or some other remedy for skin treatment there could scarcely be any doubt as to the correctness of the decision. However its use in connection with a powder base raises some doubt as to whether the public would likely be deceived as claimed. As to the entire tenor of the condemned advertising scheme, there were doubtless false and misleading practices.

An interesting feature of this same case was the allusion to unfair advertising practices by persons other than the petitioner and the effect to be given the prevalency of these practices. It

54. 48 F.(2d) 743 (C.C.A. 8th, 1931), where a manufacturer charged a dealer with unfair competition in diluting the former's product and selling it as genuine; the manufacturer was held to have the burden of proof and could not avoid producing evidence showing dilution of the product solely because to do so would reveal its trade secret.

55. Mammoth Oil Co. v. United States, 275 U.S. 13, 48 S.Ct. 1, 72 L.Ed. 137 (1927). This was a suit by the United States against the Mammoth Oil Company of which Harry F. Sinclair was president (in connection with the Tea Pot Dome Oil scandal) for the cancellation of leases on government property illegally obtained. The government having made out a prima facie case, the failure of Sinclair to testify when he could have offered all the facts surrounding the transaction tended to support the contention of illegality.

is common knowledge that the thinking of the average American woman is conditioned by commentaries in magazines and over the radio on vitamins, hormones, and similar miracles from the cauldron of modern science. Hence the purchaser is peculiarly susceptible to extravagant claims to renewable youth which purport to rest on some newly discovered basis.

In this connection the court remarked:

> "And, while the wise and worldly may well realize the falsity of any representations that the present product can roll back the years, there remains 'that vast multitude' of others who, like Ponce de Leon, still seek a perpetual fountain of youth."[56]

In *Dr. W. B. Caldwell, Incorporated v. Federal Trade Commission*,[57] the Commission prohibited the use of the word "pepsin" in the brand name "Dr. Caldwell's Syrup of Pepsin" where the product did not contain pepsin in a sufficient quantity to serve as a substantial therapeutic agent. The product's principal ingredients were senna and cascara sagrada. The respondent was ordered to cease using any term or name which concealed or minimized the presence of these two drugs as the active ingredients. Unanimous confirmation of the order was given by the court.

Under Section 5 of the Federal Trade Commission Act the Commission may proceed against "unfair methods of competition" occurring in interstate commerce, provided such proceedings are "in the public interest." For some time it was doubtful whether or not the existence of "public interest" was a jurisdictional limitation or a mere statutory permit to enable the Commission to ignore trivial complaints. *Federal Trade Commission v. Klesner*[58] was the first case definitely to treat this problem. It was there held that the existence of public interest was a matter to be determined by the court in each instance and which therefore affected the jurisdiction of the Commission. Since the *Klesner* case, there has been considerable speculation as to the extent of public interest which must exist in order that the requisite jurisdiction be conferred upon the Commission. In that same case the court stated by way of dictum that misrepresentation, confusion, or deception of the purchaser was not enough, particularly if the confusion was of the type commonly known as "passing-off." The court appeared to regard such a matter as a private contro-

56. Charles of the Ritz Distributors Corp. v. Federal Trade Commission, 143 F.(2d) 676, 680 (C.C.A. 2d, 1944).
57. 111 F.(2d) 889 (C.C.A. 7th, 1940).
58. 280 U.S. 19, 50 S.Ct. 1, 74 L.Ed. 138 (1929).

versy between the offender and the person whose trade mark or trade name had been simulated. The recent case of *Pep Boys—Manny, Moe, and Jack, Inc. v. Federal Trade Commission*[59] indicates a much more liberal attitude on the part of the courts than was manifested in the *Klesner* case. The petitioners were distributors of radio apparatus, who, for the purpose of promoting sales, adopted the popular name "Remington," which is in common use by manufacturers of guns and typewriters. The cease and desist order of the Commission directed against the use of this confusing term was affirmed by the circuit court of appeal. Although the court did not repudiate the *Klesner* case nor assert that the public interest question was not a jurisdictional matter, it nevertheless indicated that an extensive unauthorized use of a well-known trade name is properly within the cognizance of the Commission. Thus the shackles of the *Klesner* case are being gradually removed.

In *Bockensette v. Federal Trade Commission*[60] petitioners advertised that their chicks were "R.O.P. Stock." This is an abbreviation of United States Record of Performance and represents a nation-wide plan for the improvement of poultry produced in hatcheries. Members are called R.O.P. Operators, and chickens brooded by them under its rules and regulations are called R.O.P. Stock. Since the petitioner was not a participating member, his advertising practice was regarded by the Commission as misbranding, and this order was affirmed by the court.

Another obesity case is *Stanton v. Federal Trade Commission*.[61] Petitioner's product was advertised as "Anti-Fat Tablets." Finding that the tablets had no therapeutic value in the treatment of obesity, the Commission ordered the petitioner to cease using this brand or in any other manner indicating that her product was a remedy or cure for obesity. This order was affirmed.

Fictitious Price Reductions and Related Devices

Various advertising and merchandising schemes are currently employed to create the false impression that the prospective purchaser is being offered an opportunity to make a purchase under unusually favorable conditions. The most prevalent of these, perhaps, is the lottery device, which appeals to the urge to get something for nothing.

Since the decision in the well known case, *Federal Trade*

59. 122 F.(2d) 158 (C.C.A. 3d, 1941).
60. 134 F.(2d) 369 (C.C.A. 10th, 1943).
61. 131 F.(2d) 105 (C.C.A. 10th, 1942).

Commission v. R. F. Keppel & Brother[62] the jurisdiction of the Commission to prohibit merchandising through lottery devices has been unquestioned. Recent cases deal chiefly with the question as to how close must be the relationship between the defendant's activities and the outlawed lottery practices. Most of the controversies involve confectionaries. The sale of candy which is so manufactured or packaged as to be peculiarly adapted to disposition by lottery at retail has been recognized as an unfair practice.[63] Of course the order must be so framed as not to prohibit the sale of "straight candy"[64] or candy which, although susceptible to chance sale, shows no peculiar adaptability to that purpose.[65] The practices which have been condemned include the preparation and packaging of candies so that an occasional piece has a center different in color from the rest,[66] or in the sale of punch boards, either in conjunction with the sale of candy or separately.[67] In such instances it is no defense that the active conduct of the lottery is not carried on by the defendant.[68] Neither can it successfully be claimed that candy sold on a chance basis is not in active competition with similar products which are not so sold, despite the fact that the purchasers of "chance" candy are not necessarily the same group who regularly purchase straight goods.[69]

In 1935 Bunte Brothers, Incorporated, an Illinois manufacturer sold to dealers in that state an assortment of candy adapted to the lottery sale device. The Federal Trade Commission issued a cease and desist order despite the absence of any showing of interstate sales. Its theory was that the practice enabled Bunte Brothers to compete unfairly with the manufacturers outside the state, who were subject to orders of the Commission prohibiting lottery sales. This theory was rejected by the circuit court,[70]

62. 291 U.S. 304, 54 S.Ct. 423, 78 L.Ed. 814 (1934).

63. National Candy Co. v. Federal Trade Commission, 104 F.(2d) 999 (C.C.A. 7th, 1939); Hill v. Federal Trade Commission, 124 F.(2d) 104 (C.C.A. 5th, 1941).

64. Ostler Candy Co. v. Federal Trade Commission, 106 F.(2d) 962 (C.C.A. 10th, 1939).

65. Sweets Co. of America, Inc. v. Federal Trade Commission, 109 F.(2d) 296 (C.C.A. 2d, 1940).

66. National Candy Co. v. Federal Trade Commission, 104 F.(2d) 999 (C.C.A. 7th, 1939).

67. Ostler Candy Co. v. Federal Trade Commission, 106 F.(2d) 962 (C.C.A. 10th, 1939); Hill v. Federal Trade Commission, 124 F.(2d) 104 (C.C.A. 5th 1941).

68. Hill v. Federal Trade Commission, 124 F.(2d) 104 (C.C.A. 5th, 1941).

69. Ostler Candy Co. v. Federal Trade Commission, 106 F.(2d) 962 (C.C.A. 10th, 1939).

70. Bunte Bros. v. Federal Trade Commission, 110 F.(2d) 412 (C.C.A. 7th, 1940).

which ruled that the act does not authorize a proceeding against an intrastate practice on the ground that interstate trade would thereby be affected. The Supreme Court affirmed this ruling, although Justices Black, Douglas, and Jackson filed a vigorous dissent.

Had the theory of the Commission prevailed, virtually all trade practices everywhere would be subject to the jurisdiction of the Commission, since it is difficult to conceive of a market where many of the competitors are not engaged in interstate commerce. The area and scope of activities to be affected would thus be broadened immensely, and it is doubtful that the Commission is equipped to cope with the enlarged duties which would be imposed upon it. In this respect the situation differs materially from the picture presented in the *Shreveport* case[71] which was heavily relied upon by the minority. The majority opinion made clear the fact that the Court would sustain the power of Congress to enlarge the activities of the Commission to the extent contended for, but that it would await clear legislative action and would not act upon implication alone.

Another frequently used fictitious price reduction device is the use of "free goods" to create the false impression that something is being thrown in without charge, when, as a matter of fact, the cost of the so-called gratuity is fully covered by the amount exacted in the transaction as a whole. In *International Art Company v. Federal Trade Commission*,[72] the court sustained an order of the Commission directed against the practice of representing that purchasers would receive hand-painted pictures at a greatly reduced price, and the use of a drawing system through which the purchaser was misled into believing that he received a *free* picture with each purchase. Actually the products were simply enlarged photographs which were disposed of at an exorbitant price. A discount company, ostensibly operated to refinance the unpaid balance of the purchase price, but amply shown by the facts to be a part of the same concern operated to forestall any claim made by a customer who had been a victim of the fraudulent sales plan by pleading itself an innocent purchaser of the account for value, was included under the terms of the order.

An order was issued in *Thomas Quilt Factory v. Federal Trade Commission*[73] against the petitioner's falsely advertising

71. Houston E. & W. Texas Ry. v. United States, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914).
72. 116 F.(2d) 347 (C.C.A. 10th, 1940).
73. 109 F.(2d) 393 (C.C.A. 7th, 1940).

that his feather quilts were being sold at one-half the usual price, whereas the price quoted in the advertisement was the customary price charged. The so-called "sales price" in the plan constituted the means by which virtually all the petitioner's quilts were sold.

Misrepresentation of Competitor's Product

In *Moretrench v. Federal Trade Commission*[74] the order included a prohibition against advertised claims that the petitioner's drilling equipment prevented backwash of jetted water forced through the wellpoint, whereas competing products failed to contain such a device. That portion of the order which required the exclusion of this statement was modified by the court so as to permit the petitioner to claim this merit for its own product; but the requirement of the order excluding claims that competing machines were not similarly equipped was affirmed.

An order was issued against a manufacturer of stainless steel cooking utensils ordering it to cease disparaging competitors' products by falsely representing that food cooked in aluminum utensils was dangerous to health and would cause ulcers, cancers, and other diseases. This order was affirmed.[75] The petitioner sought a dismissal of the order by alleging that it had made efforts to stop the defamation in question. It was pointed out by the court, however, that these efforts began after the petition was filed, and that there was no showing that they had met with success. Even assuming that they had been successful, this would not render the controversy moot, for there could be no assurance that the slander would not be subsequently resumed. The court said: "The order in no wise injures the petitioner and will be an effective aid to it in its efforts to put a stop to the unfair practices."[76]

E. B. Muller & Company v. Federal Trade Commission[77] was a case in which the order of the Commission forbade the disparagement of a competitor's product by false statements that the latter contained molasses, sugar beet, and other foreign substances. The order also included a prohibition against represen-

74. 127 F.(2d) 792 (C.C.A. 2d, 1942).

75. Perma-Maid Co., Inc. v. Federal Trade Commission, 121 F.(2d) 282 (C.C.A. 6th, 1941).

76. Id. at 285. A similar procedure is followed by courts with reference to the issuance of injunctions against unfair competition where the defendant alleges cessation after notice or institution of suit. Cf. Bass, Ratcliff & Gretton, Ltd. v. Guggenheimer, 69 Fed. 271 (C.C.A. Md. 1895).

77. 142 F.(2d) 511 (C.C.A. 6th, 1944).

tations that the desirable and uniform coloring contained in petitioners' products was the result of superior methods of roasting, painstaking process of selection, and sorting, when in reality the coloration was produced artificially by iron oxide. Unanimous approval of the order was given by the court.

Another disparagement situation is raised in *International Parts Corporation v. Federal Trade Commission.*[78] A manufacturer of mufflers was ordered to desist from stating that competing mufflers with stop-welded seams were inferior to its own product or that the use of such competing devices results in danger of carbon monoxide poisoning. This order was set aside by the court on the ground that there was no evidence to support the Commission's finding of untruthfulness. The testimony of the only witness produced was contrary to the finding of the Commission.

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NECESSITY FOR A BILL OF EXCEPTIONS TO THE OVERRULING OF A MOTION FOR A NEW TRIAL

In criminal practice there is a generally accepted rule that a bill of exceptions must be taken to every adverse ruling of the trial judge, a rule which has been carried to the extent of requiring a bill of exceptions to the overruling of a motion for a new trial. It is the purpose of this article to point out that such an extension carries the rule further than is warranted by the relevant articles of the Louisiana Code of Criminal Procedure. It is the further purpose of this article to indicate a possible solution to what now constitutes a rather perplexing dilemma.

For a proper understanding of the problem, a brief study of the history of bills of exception is in order. "Bills of exception in criminal cases in this state are not of statutory origin. As they were unknown at common law, which did not allow an appeal in criminal cases, they were not adopted into our system by the act of 1805, which adopted the body of common-law procedure in criminal cases. . . . They are the growth of jurisprudence, and prior to the adoption of Act No. 113 of 1896, p. 162, were wholly dependent upon jurisprudence . . . ."[1] Reference to the earlier

78. 133 F.(2d) 883 (C.C.A. 7th, 1943).
1. State v. Stockett, 115 La. 743, 744, 39 So. 1000 (1905).