

# Washington Law Review

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Volume 17 | Number 2

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4-1-1942

## The Federal Trade Commission and the Courts [Part 2]

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### Recommended Citation

Vern Countryman, *The Federal Trade Commission and the Courts [Part 2]*, 17 Wash. L. Rev. & St. B.J. 83 (1942).

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# THE FEDERAL TRADE COMMISSION AND THE COURTS

VERN COUNTRYMAN

(continued)\*

## PROTECTION OF THE CONSUMER

The cases discussed in the preceding section dealt with adversary or cooperative methods of competitors *inter se*. The primary purpose of the business practices there considered was to decrease or eliminate competition, either by predatory methods calculated to weaken or destroy the competitor, or by mutual efforts designed to remove the emulative factor.

The business tactics considered in this section are of a different character. They have as their primary purpose the *promotion of sales* and their direct incidence is upon the consumer rather than upon the competitor. They are methods of competition only in the sense that they are used to increase the amount of business done, and thus to improve the relative position among competitors.

But it is as methods of competition that they were brought within the jurisdiction of the Commission under Section 5 of the F. T. C. Act. Although the Wheeler-Lea amendment<sup>1</sup> to Section 5 in 1938 added "unfair or deceptive acts or practices" to the business conduct within the Commission's jurisdiction, that amendment has not yet been construed to make any appreciable extension of the authority derived from the original terms of Section 5.

True, the case law relating to the Commission's power to prosecute for misrepresentation has been rendered obsolete to a great extent, insofar as advertising of "food, drugs, devices or cosmetics" is concerned, by another provision of the Wheeler-Lea Act expressly declaring false advertising (defined as advertising, other than labeling, "which is misleading in a material respect") to be an unfair or deceptive act or practice within the meaning of the amendment to Section 5.<sup>2</sup> And the law of a few other decisions under Section 5 has been replaced by the Wool Products Labeling Act of 1940,<sup>3</sup> which defines the misbranding of wool products or the removal or mutilation of a label to be both an unfair method of competition and an unfair and deceptive act or practice under Section 5. A wool product is misbranded, within the meaning of this Act, "if it is falsely or deceptively stamped, tagged, labeled or otherwise identified," or if certain information as

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\*The first installment of this article appears at 17 WASH. L. REV. 1.

<sup>1</sup> 52 STAT. 111 (1938), 15 U. S. C. § 45 (Supp. 1939).

<sup>2</sup> 52 STAT. 114 (1938), 15 U. S. C. §§ 52-58 (Supp. 1939). The statute also authorizes the Commission to secure a temporary injunction pending action under Section 5 of the F. T. C. Act. Such action may be taken even before a complaint has issued under Section 5. F. T. C. v. Thomsen-King & Co., 109 F. (2d) 514 (C. C. A. 7th, 1940).

<sup>3</sup> 54 STAT. 1128 (1940). This statute also provides for preliminary action by injunction, similar to that authorized in the false advertising cases.

to the product and the manufacturer thereof is not affixed to the product. But the first statute will not apply to misrepresentations on labels, brands, trademarks, etc.,<sup>4</sup> and the second statute covers too narrow a field to work any fundamental change in the principles herein discussed.

The practices here considered fall into three general classes: (1) inducing purchases by misrepresentation of various matters, (2) inducing purchases by the use of gaming methods, and (3) inducing purchases by commercial bribery. Some of them have been held to be unfair methods because of the injury to competitors, although the nature and extent of this injury has not been clearly defined. Others have been declared unfair methods—after some hesitation—because of the injury to the consumer. Certainly the principal effect of many of the cases is to afford protection to the consumer. But it is not suggested that this is any reason for concluding that the Commission or the courts have erred in determining that the practices condemned are unfair methods of competition—these cases merely involve a concept of unfair competitive methods which is different from that upon which the cases in the preceding section were based.

### *Misrepresentation of Nature or Ingredients*

The Supreme Court set the judicial approach for cases involving misrepresentation as to the nature or ingredients of the product in *F. T. C. v. Winsted Hosiery Co.*<sup>5</sup> There it was held to be an unfair method to brand part-wool underwear as "Merino," "Wool" or "Worsted" where the public understood these terms to mean that the product so branded was 100 per cent wool. This was an unfair method of competition, said Mr. Justice Brandeis, because when misbranded goods attract customers by fraud, trade is diverted from honest producers.

The Circuit Courts followed the rationale of this case, placing the emphasis on injury to competitors, in sustaining Commission orders against representations which carried a false connotation as to the nature or ingredients of the product,<sup>6</sup> and against express misrepresentation of nature or ingredients.<sup>7</sup>

<sup>4</sup> See M. Handler, *The Control of False Advertising Under the Wheeler-Lea Act* (1939) 6 LAW & CONTEMP. PROB. 91, wherein are indicated the less obvious defects of the statute.

<sup>5</sup> 258 U. S. 483 (1922).

<sup>6</sup> *F. T. C. v. Morissey*, 47 F. (2d) 101 (C. C. A. 7th, 1931); *F. T. C. v. Good-Grape Co.*, 45 F. (2d) 70 (C. C. A. 6th, 1930); *F. T. C. v. Cassoff*, 38 F. (2d) 790 (C. C. A. 2d, 1930); *N. Fluegelman & Co. v. F. T. C.*, 37 F. (2d) 59 (C. C. A. 2d, 1930); *Masland Durable Leather Co. v. F. T. C.*, 34 F. (2d) 733 (C. C. A. 3d, 1929); *Proctor & Gamble Co. v. F. T. C.*, 11 F. (2d) 47 (C. C. A. 6th, 1926), *cert. denied*, 273 U. S. 718 (1926). Cf. *Ostermooer & Co. v. F. T. C.*, 16 F. (2d) 962 (C. C. A. 2d, 1927), holding that a pictorial expansion of filler when a completed mattress is partially opened is not an unfair method.

<sup>7</sup> *F. T. C. v. Non-Plate Engraving Co.*, 49 F. (2d) 766 (C. C. A. 2d, 1931); *F. T. C. v. Kay*, 35 F. (2d) 160 (C. C. A. 7th, 1929), *cert. denied*, 281 U. S. 764 (1930); *Guaranty Veterinary Co. v. F. T. C.*, 285 Fed. 853 (C. C. A. 2d, 1922).

The lower courts have also spelled out certain limitations of the proposition. If the representation is not palpably false, but merely states as an established fact something which is actually a matter of honest dispute, there is no violation of Section 5.<sup>8</sup> And if the nature of the misrepresentation is not such that "the inherent tendency and opportunity" indicates that the public will be deceived, the Commission must introduce evidence to prove actual deception.<sup>9</sup>

And popular usage and understanding may afford a basis either for justifying or for condemning the practice. Thus, where the word "Castile" no longer has its original meaning as a soap containing 100 per cent pure olive oil as its oil base, it is not an unfair method to use the term to describe soap with a different oil base.<sup>10</sup> But where respondent has sold a high quality baking powder for 60 years, it cannot change to a lower grade and sell it under the same trade name and in the same container.<sup>11</sup>

The rule of the *Winsted* case has also been applied to condemn the practice of re-issuing old moving pictures under new titles.<sup>12</sup>

In 1934 the *Algoma* case<sup>13</sup> reached the Supreme Court and a new approach was suggested. The court held that it was a violation of Section 5 to sell a species of yellow pine as "California white pine" and Mr. Justice Cardozo announced that, regardless of the comparative value of respondents' product and genuine California white pine:

"The consumer is prejudiced if, upon giving an order for one thing, he is supplied with something else . . . . In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance."

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<sup>8</sup> L. B. Silver Co. v. F. T. C., 289 Fed. 985 (C. C. A. 6th, 1923). Respondent advertised that its "Ohio Improved Chester" hogs were a separate breed from "Chester White" hogs, although expert breeders disagreed on the point.

<sup>9</sup> Ohio Leather Co. v. F. T. C., 45 F. (2d) 39 (C. C. A. 6th, 1930) ("Kaffor-Kid" used as name of leather other than kid); Berkey & Gay Furniture Co. v. F. T. C., 42 F. (2d) 427 (C. C. A. 6th, 1930) (veneer furniture sold as "walnut" and "mahogany"). And see *Indiana Quartered Oak Co. v. F. T. C.*, 26 F. (2d) 340 (C. C. A. 2d, 1928), where the Commission consented to the setting aside of its order forbidding the use of the term "Philippine Mahogany" to describe a wood which was not mahogany. This case is criticized by former Commissioner A. F. Meyers in *FEDERAL ANTI-TRUST LAWS, A SYMPOSIUM AT COLUMBIA* (1932), 133.

With *Arnold Stone Co. v. F. T. C.*, 49 F. (2d) 1017 (C. C. A. 5th, 1931), holding that there was no deception of the public where architects, contractors and builders—the only customers of respondent—knew that his "pink marble" was actually artificial stone, compare *Marietta Mfg. Co. v. F. T. C.*, 50 F. (2d) 641 (C. C. A. 7th, 1931), where, on similar facts, the court went further and considered the possibility of deception of consumers employing the architects, contractors and builders.

<sup>10</sup> *James S. Kirk & Co. v. F. T. C.*, 59 F. (2d) 179 (C. C. A. 7th, 1932).

<sup>11</sup> *Royal Baking Powder Co. v. F. T. C.*, 281 Fed. 744 (C. C. A. 2d, 1922).

<sup>12</sup> *Fox Film Corp. v. F. T. C.* 296 Fed. 353 (C. C. A. 2d, 1924).

<sup>13</sup> *F. T. C. v. Algoma Lbr. Co.*, 291 U. S. 67, 78 (1934). The opinion relies upon *F. T. C. v. Royal Milling Co.*, 288 U. S. 212 (1933), discussed at p. 90, *infra*.

True, this decision does not amount to a holding that injury to the consumer, without more, is an unfair method of competition. Justice Cardozo added:

"Nor is the prejudice only to the consumer. Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightly named, are diverted to others whose methods are less scrupulous."

But, despite this deference to traditional rationale, it is submitted that the *Algoma* case evinces at least a new awareness of the scope of Section 5 in misrepresentation cases—an awareness which would seem conducive to a more liberal construction of the statute than would be likely if the inquiry were directed solely to the effect of a given trade practice upon competitors, without any regard to its effect upon consumers.

Subsequent decisions in the lower courts reflect, at least in their language, the broader approach of the *Algoma* case.<sup>14</sup> Thus, the Second Circuit has decided that the ignorance of the respondent as to the falsity of his representations is immaterial, because, "The purpose of the statute is protection of the public, not punishment of a wrongdoer."<sup>15</sup> But, unless his case indicates that the respondent will be held to a higher standard of conduct for the protection of the consuming public than would be imposed if the only concern were for the protection of competitors, the change in approach does not appear to have produced any change in results.

Nor is there any evidence in the cases that the Wheeler-Lea amendment has affected the situation. Of course, the amendment will have no application to cases which have already been defined as unfair methods of competition, but it may in the future be used to sustain prosecution of methods which could not have been condemned under the terms of the original act.

### *Misrepresentation of Performance*

Similar to the cases involving misrepresentation as to the nature and ingredients of the product are those concerning misrepresentations as to its performance. But in *F. T. C. v. Raladam Co.*,<sup>16</sup> the earliest of these cases to be subjected to judicial review, the Supreme Court set aside an order directing the respondent to cease advertising that its "obesity cure" could be used by the purchaser without harmful

<sup>14</sup> *Allen B. Wisley Co. v. F. T. C.*, 113 F. (2d) 437 (C. C. A. 7th, 1940); *Century Metalcraft Corp. v. F. T. C.*, 112 F. (2d) 443 (C. C. A. 7th, 1940); *H. N. Heusner & Son v. F. T. C.*, 106 F. (2d) 596 (C. C. A. 3d, 1939); *Elmoro Cigar Co. v. F. T. C.*, 107 F. (2d) 429 (C. C. A. 4th, 1939); *Sheffield Silver Co. v. F. T. C.*, 98 F. (2d) 676 (C. C. A. 2d, 1938); *National Silver Co. v. F. T. C.*, 88 F. (2d) 425 (C. C. A. 2d, 1937); *F. T. C. v. Hines Turner Glass Co.*, 81 F. (2d) 362 (C. C. A. 3d, 1935); *F. T. C. v. Artloom Corp.*, 69 F. (2d) 36 (C. C. A. 3d, 1934).

<sup>15</sup> *Gimbel Bros. v. F. T. C.*, 116 F. (2d) 578, 579 (C. C. A. 2d, 1941).

<sup>16</sup> 283 U. S. 643, 652, 653 (1931).

results, on the ground that there was no evidence of any competition which might be injured. As to other manufacturers of similar compounds, Mr. Justice Sutherland did not believe that Congress "would have set itself to the task . . . of preserving the business of one knave from the unfair competition of another." As to the medical profession, "medical practitioners . . . are not in competition with respondent. They follow a profession and not a trade . . ." <sup>17</sup> No significance was attached to the possible injury to the consumer.

Notwithstanding this case, the Commission has prosecuted a vigorous campaign against false claims regarding the efficacy of various commodities,<sup>18</sup> but none of the subsequent cases reaching the Circuits have presented a fact situation wherein the competitors of the respondent could be classified as "knaves." Consequently, the lower courts have been able to apply the rule of the *Raladam* case requiring a showing of injury to competitors, but generally with different results—with one important exception, orders of the Commission have been upheld.<sup>19</sup>

The exception marks another successful attack on an F. T. C. order by the Raladam Company. After the Supreme Court had set aside the first order, the Commission filed an amended complaint based upon different misrepresentations as to the efficacy of "Marmola" and, after finding that the public was misled and that there were honest competitors selling meritorious products who were injured thereby, entered a new cease and desist order. This order the Sixth Circuit set aside. Although the finding that the public was misled and induced to buy by the Company's false representations was not questioned, the Court could find no evidence of injury to vendors of "ethical remedies which are advertised and otherwise made known to physicians" because:

"Marmola's sole connection with these distributees is through the slender thread that each has some relation to obesity reduction. These so-called 'competitors' are not engaged in the sale of an apparently standardized product as is the case of *Federal Trade Commission v. Winsted Co.* . . .

In the present case 'the competitors' approached the treatment

<sup>17</sup> "Professions are thus raised to a plane above competition, so exalted that charlatans and knaves can do them no injury!" M. N. WATKINS, PUBLIC REGULATION OF COMPETITIVE PRACTICES IN BUSINESS ENTERPRISE (1940), 144, n. 2.

<sup>18</sup> See M. Handler, *Jurisdiction of the Federal Trade Commission Over False Advertising* (1931) 31 COL. L. REV. 527; *ibid.*, *False and Misleading Advertising* (1929) 39 YALE L. J. 22.

<sup>19</sup> *Alberty v. F. T. C.*, 118 F. (2d) 669 (C. C. A. 9th, 1941), *cert. denied* 62 Sup. Ct. 62 (1941); *Neff v. F. T. C.*, 117 F. (2d) 495 (C. C. A. 4th, 1941); *Kidder Oil Co. v. F. T. C.*, 117 F. (2d) 892 (C. C. A. 7th, 1941); *Dr. N. B. Caldwell, Inc., v. F. T. C.*, 111 F. (2d) 889 (C. C. A. 7th, 1940); *Capon Water Co. v. F. T. C.*, 107 F. (2d) 516 (C. C. A. 3d, 1939); *Justin Haynes & Co. v. F. T. C.*, 105 F. (2d) 938 (C. C. A. 2d, 1939); *Fairyfoot Products Co. v. F. T. C.*, 94 F. (2d) 844 (C. C. A. 7th, 1935); *E. Griffith Hughes, Inc., v. F. T. C.*, 77 F. (2d) 886 (C. C. A. 2d, 1935), *cert. denied*, 296 U. S. 617 (1935).

of obesity from widely divergent viewpoints. We cannot say that the class who consult physicians about their ailments or 'who read up' thereon, were, or would be, drawn by this advertising into the class of those who have been deceived by nostrums held out to accomplish miracles of healing."<sup>20</sup>

This, then, is the current law as to the Raladam Company: It does not violate the F. T. C. Act by its misrepresentations because the Act does not protect competitors selling similar products, and those whom the Act does protect are not injured, either because they are members of a profession and not a trade, or because they do not sell a similar product.

Although the Wheeler-Lea Act specifically removes the requirement of a finding of injury to competitors, the courts seem loath to avail themselves of the terms of the new Act. Indeed, the more recent cases reveal a tendency to find that injury to actual and potential competitors will inevitably result from the practices condemned even though no evidence is presented on the point.<sup>21</sup> However, it may be that a third attempt by the F. T. C. to stop the practices of the Raladam Company would succeed under the terms of the new amendment.

While the Commission's action against this type of misrepresentation has been quite energetic, a nice exercise of discretion has also been required. The line between excessive claims as to the performance of a product and those legally innocuous claims known as "puffing" is difficult to draw. While there is comparatively little difficulty involved in deciding when a representation as to the physical nature or ingredients of a product will mislead the public, it is not quite as easy to measure the justifiable credulity of the buyer in the consideration of extravagant claims as to performance. However, the Commission appears to have discharged this task with the greatest circumspection.

### *Misrepresentation of Value or Price*

The first case decided under Section 5 of the F. T. C. Act upheld an order directing the respondent to cease representing to consumers that it gave a better price on sugar than did its competitors when, in fact, the prices were the same, the difference being made up in the prices of other commodities which the consumer was required to purchase in order to take advantage of the bargain on sugar.<sup>22</sup> However, the misrepresentations here used also involved a disparagement of competitors, and so the case does not constitute a clear holding that misrepresentations as to price are unfair methods of competition.

In the next case, *John C. Winston Co. v. F. T. C.*, the Commission

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<sup>20</sup> *Raladam Co. v. F. T. C.*, 123 F. (2d) 34, 38 (C. C. A. 6th, 1941).

<sup>21</sup> *Alberty v. F. T. C.*, 118 F. (2d) 669 (C. C. A. 9th, 1941), *cert. denied*, 62 Sup. Ct. 62 (1941); *Dr. N. B. Caldwell, Inc., v. F. T. C.*, 111 F. (2d) 889 (C. C. A. 7th, 1940); *Justin Haynes & Co. v. F. T. C.*, 105 F. (2d) 988 (C. C. A. 2d, 1939).

<sup>22</sup> *Sears, Roebuck and Co. v. F. T. C.*, 258 Fed. 307 (C. C. A. 7th, 1919).

was not as successful. Here, the respondent represented through its door-to-door agents that the prices of its encyclopedia and of its loose-leaf supplement services were \$55 and \$49, respectively, but that on a "special offer" the particular consumer could get both for the price of the latter. In fact, \$49 was the price at which the respondent contemplated selling both. The Circuit Court set aside the cease and desist order. "It is conceivable," said the court, "that a very stupid person might be misled by this method of selling books, yet, measured by ordinary standards of trade and by ordinary standards of the intelligence of traders, we cannot discover that it amounts to an unfair method of competition within the sense of the law."<sup>23</sup> The same result was reached in *Chicago Portrait Co. v. F. T. C.*,<sup>24</sup> where a portrait company appealed from an order directing cessation of a substantially similar method. The court said that such a method was not unfair where all competitors used similar methods, and where the product was reasonably worth the price paid.

When the Commission's order was affirmed in a case almost identical to the *Winston* case six years later,<sup>25</sup> the Supreme Court denied certiorari.<sup>26</sup> But a later reversal of an order prohibiting the same sales method by another of the persistent book-selling companies induced the Supreme Court to intervene and the F. T. C. order was sustained.<sup>27</sup> Mr. Justice Black, speaking for a unanimous court, observed that: "The fact that a false statement may be false to those who are trained and experienced, does not change its character, nor take away its power to deceive others less experienced."

This case has been criticised for disregarding the question of whether or not the books and services were what they were represented to be. If they were, says the critic,<sup>28</sup> then the purchaser has gotten just what he ordered and has suffered no injury. But it is apparent that the purchaser has not gotten what he expected. He was led to believe that he was getting a "bargain." That he did not get, and to the extent that he did not receive what he was led to anticipate, he was injured.

In any event, the Supreme Court case stands for the proposition that a misrepresentation of the price constitutes an unfair method of competition and upon the authority of this decision and without tracing

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<sup>23</sup> 3 F. (2d) 961, 962 (C. C. A. 3d, 1925).

<sup>24</sup> 4 F. (2d) 759 (C. C. A. 7th, 1925).

<sup>25</sup> *Consolidated Book Publishers v. F. T. C.*, 53 F. (2d) 942 (C. C. A. 7th, 1931).

<sup>26</sup> 286 U. S. 553 (1932).

<sup>27</sup> *F. T. C. v. Standard Education Society*, 302 U. S. 112, 116 (1937). A provision in the order prohibiting the society from advertising as contributors persons whose works were included in a former edition, but were not included in the revised edition of an encyclopedia, was also upheld. The order was enforced in *F. T. C. v. Standard Education Society*, 97 F. (2d) 513 (C. C. A. 2d, 1938), *cert. denied*, 305 U. S. 642 (1938).

<sup>28</sup> *M. N. WATKINS, op. cit.*, 153.



the injury beyond that to the consumer, later cases have sustained orders of the Commission prohibiting false representations that the consumer got a "special price" by picking the right certificate in a fictitious "draw,"<sup>29</sup> or that a financing plan cost the customer only 6 per cent when in fact it cost him 11½ per cent,<sup>30</sup> and orders prohibiting false representations that the vendor was selling to the consumer at his regular wholesale price,<sup>31</sup> or at one-half his regular price.<sup>32</sup>

In the last of these cases the court undertook to distinguish the *Winston* and *Chicago Portrait* cases, although their holdings would seem to be obsolete after the decision in the Supreme Court case, making it one basis for distinction that they were decided before the Wheeler-Lea amendment. Aside from this superfluous reference, the courts seem to have paid little attention to the amendment.

### *Misrepresentation of Trade Status*

Related to the cases involving misrepresentation as to price or value are those involving misrepresentation of trade status. In the latter cases, as in the former, the purpose of the misrepresentation is to persuade the buyer that he can save by buying from the particular trader. The only difference is in subtlety of method.

And that possible distinction has not proven sufficient. Although it was enough for the Sixth Circuit, in setting aside for want of public interest an order directing vendors of flour to cease using the words "mill" or "milling" in their trade names when in fact they did not mill their own flour,<sup>33</sup> the Circuit decision was reversed by the Supreme Court, Mr. Justice Sutherland saying:

". . . a large number of buyers . . . believe that the price or quality or both are affected to their advantage by the fact that the article is prepared by the original grinder of the grain. The result of respondent's acts is that such purchasers are deceived . . . The purchasing public is entitled to be protected against that species of deception, and . . . its interest in such protection is specific and substantial."<sup>34</sup>

Thereafter, a chastened Sixth Circuit upheld the Commission's decision that Section 5 was violated by false representations in mail order catalogues to the effect that the advertiser manufactured its own products,<sup>35</sup> the court explaining that:

"Whatever may have been our previous understanding of

<sup>29</sup> *International Art Co. v. F. T. C.*, 109 F. (2d) 393 (C. C. A. 7th, 1940), *cert. denied*, 310 U. S. 632 (1940).

<sup>30</sup> *Ford Motor Co. v. F. T. C.*, 120 F. (2d) 175 (C. C. A. 6th, 1941), *cert. denied*, 62 Sup. Ct. 130 (1941); *General Motors Corp. v. F. T. C.*, 114 F. (2d) 33 (C. C. A. 2d, 1940), *cert. denied*, 312 U. S. 682 (1941).

<sup>31</sup> *L. & C. Mayers Co. v. F. T. C.*, 97 F. (2d) 365 (C. C. A. 2d, 1938).

<sup>32</sup> *Thomas v. F. T. C.*, 116 F. (2d) 347 (C. C. A. 10th, 1940).

<sup>33</sup> *Royal Milling Co. v. F. T. C.*, 58 F. (2d) 581 (C. C. A. 6th, 1932).

<sup>34</sup> *F. T. C. v. Royal Milling Co.*, 288 U. S. 212, 216 (1933).

<sup>35</sup> *Brown Fence & Wire Co. v. F. T. C.*, 64 F. (2d) 934, 936 (C. C. A. 6th, 1933).

the line of demarcation between methods of trade which result in a private wrong and those in which there is specific and substantial public interest (which led to our decision in *Royal Milling Co. v. Federal Trade Commission . . .*), any misapprehension we may have entertained of the exclusive character of the tests to be applied thereto enumerated in *Federal Trade Commission v. Klesner . . .* has now been dispelled by the decision in *Federal Trade Commission v. Royal Milling Co. . . .*"

Other orders of the Commission directed against the use of trade name calculated to mislead the purchaser into believing that he is buying directly from the manufacturer, have also been upheld.<sup>86</sup>

A very late case in this field upheld an order directing a book-selling company to cease using the name "Educators Association," since it gave the false impression that respondent was a non-profit educator's society.<sup>87</sup>

### *Misrepresentation of Origin*

The cases here dealt with involve the use of misrepresentations as to the origin of the products or their ingredients in an attempt to trade upon the fact that the purchasing public identifies a source, rightly or wrongly, with a certain standard of quality or value.

The courts have uniformly sustained the Commission's interpretation of Section 5 as applicable to this practice. Thus, it is an unfair method to use the term "Army and Navy" in a trade-name, where the quantity of genuine army and navy goods in stock has diminished to about 10 per cent of the total stock,<sup>38</sup> or to state on the label of perfume bottles that the perfume was made abroad, when the concentrates are blended with alcohol in the United States,<sup>39</sup> or to use the word "Havana" in the name of a cigar made entirely of domestic tobacco where the public associates that name with a product made at least in part of Cuban tobacco,<sup>40</sup> or to describe as "English Tub Soap" a product manufactured in the United States.<sup>41</sup>

Section 5 has also been held to be violated where a manufacturer of automobile accessories used the trade name "Champion," thus inducing the public to believe that his products were made by the Cham-

<sup>38</sup> *Bear Mill Mfg. Co. v. F. T. C.*, 98 F. (2d) 67 (C. C. A. 2d, 1938); *F. T. C. v. Mid-West Mills*, 90 F. (2d) 723 (C. C. A. 7th, 1937). Cf. *F. T. C. v. Pure Silk Hosiery Mills*, 3 F. (2d) 105 (C. C. A. 7th, 1925), holding that respondent has not complied with an order directing it to cease using the word "Mill" in its trade name until it actually acquired a mill, by acquiring less than one-sixth of the stock in a hosiery mill and by placing one of its officers as one of the seven directors of the mill.

<sup>39</sup> *Educators Ass'n. v. F. T. C.*, 108 F. (2d) 470 (C. C. A. 2d, 1939).

<sup>38</sup> *F. T. C. v. Army and Navy Trading Co.*, 88 F. (2d) 776 (App. D. C., 1937).

<sup>39</sup> *Fioret Sales Co. v. F. T. C.*, 100 F. (2d) 358 (C. C. A. 2d, 1938).

<sup>40</sup> *Elmoro Cigar Co. v. F. T. C.*, 107 F. (2d) 429 (C. C. A. 4th, 1939); *H. N. Heusner & Co. v. F. T. C.*, 106 F. (2d) 596 (C. C. A. 3d, 1939).

<sup>41</sup> *F. T. C. v. Bradley*, 31 F. (2d) 569 (C. C. A. 2d, 1929).

pion Spark Plug Company,<sup>42</sup> and where radios were marketed under the name "Remington," which is part of the trade-name of a number of other manufacturers who have a widely established and favorable business reputation.<sup>43</sup> These were not cases of "passing off," as that term is used previously herein. The manufacturers whose names were appropriated were not competitors.

But antiquity may give the practice legality. Where the term "Sheffield" has been so long used in describing an electro-plated product that the public no longer associates it with the welded silver-plate product originating in Sheffield, England, continued use of the term is not an unfair method.<sup>44</sup>

A case not generically different from those above considered sustained the Commission's order directed against the use of the terms "Indian" or "Indian Made" in the description of jewelry, where the Indians making it used modern machines, since the terms were found to indicate that the jewelry was made by hand or with primitive tools.<sup>45</sup>

And in another related case, it was decided that Section 5 was violated when a rug manufacturer used the word "Lighthouse" in his trade name, the deception lying in the fact that the public would believe that the rugs were made by the Lighthouse Schools for the Blind.<sup>46</sup>

### *Gaming Methods*

A recent Supreme Court case has placed the judicial stamp of approval on an entirely different exercise of the Commission's jurisdiction. In *F. T. C. v. R. F. Keppel & Bro., Inc.*,<sup>47</sup> the Commission was sustained in its determination that a manufacturer of candy which packed its product so that coins were concealed in some packages, the price of others was determined by the figure on a slip inside the wrapper, and prizes were given to the recipients of pieces with colored centers, was guilty of an unfair method of competition. Mr. Justice Stone spoke for a unanimous court:

"A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal . . . involve[s] the kind of unfairness at which the statute was aimed. . . . It is true that the statute does not authorize regu-

<sup>42</sup> *F. T. C. v. Real Products Corp.*, 90 F. (2d) 617 (C. C. A. 2d, 1937).

<sup>43</sup> *Pep Boys—Manny, Moe & Jack, Inc., v. F. T. C.*, 122 F. (2d) 158 (C. C. A. 3d, 1941).

<sup>44</sup> *Sheffield Silver Co. v. F. T. C.*, 98 F. (2d) 676 (C. C. A. 2d, 1938). It is not clear whether the deception alleged by the Commission was supposed to have been due to the public's associating the term with the original product or with its place of origin.

<sup>45</sup> *F. T. C. v. Maisel Trading Post*, 77 F. (2d) 246 (C. C. A. 10th, 1935).

<sup>46</sup> *Lighthouse Rug Co. v. F. T. C.*, 35 F. (2d) 163 (C. C. A. 7th, 1929).

<sup>47</sup> 291 U. S. 304, 313 (1934). Previous orders directing cessation of such practices had not reached the courts. *In re A. L. Douglas & Co.*, 16 F. T. C. 353 (1932); *In re Reinhart & Newton Co.*, 10 F. T. C. 110 (1926).

lation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of business men. But here the competitive method is shown to exploit consumers, children, who are unable to protect themselves."

This language might well be taken to limit the rule of the case to situations where the "break and take" method is employed to exploit children, but it has not been so construed. In the first subsequent Circuit Court decision in which the rule was applied, the consumers exploited were children, so there was no occasion to explore ramifications,<sup>48</sup> but when a case reached the Seventh Circuit in which the sales were not confined to children, and it was contended that the rule of the *Keppel* case was therefore inapplicable, the court admitted that "the persuasive argument in the *Keppel* case was based on the fact that the consumers of the candy were, in the main, children," but declared that "where a competitive method employs a device whereby the amount of return is made to depend upon chance, such method is condemned as being contrary to public policy."<sup>49</sup> Subsequent cases have sustained orders directed against such methods without regard to the character of the consumers affected.<sup>50</sup>

Nor is the range of practices which constitute unfair methods limited to the facts of the *Keppel* case. The Supreme Court said in that case, "We can perceive no reason for distinguishing between the element of chance as employed here and the element of deception,"<sup>51</sup> and the lower court decisions indicate that it is the element of chance involved in any practice, independently of any other feature of the practice, which constitutes the violation of Section 5.<sup>52</sup> And it makes no differ-

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<sup>48</sup> *Walter H. Johnson Candy Co. v. F. T. C.*, 78 F. (2d) 717 (C. C. A. 7th, 1935). This case also sustained the F. T. C. in excluding testimony of parents and educators that the "break and take" packages were purchased extensively by religious schools for resale to children and had a wholesome rather than deleterious effect on children, and testimony of candy manufacturers that they had no moral or other objections to manufacturing and selling such candy.

<sup>49</sup> *Hofeller v. F. T. C.*, 82 F. (2d) 647, 649 (C. C. A. 7th, 1936). And see *F. T. C. v. F. A. Mortoccio Co.*, 87 F. (2d) 561 (C. C. A. 8th, 1937): "Undoubtedly the exploitation of children was a consideration in the *Keppel* case opinion, but we think the Supreme Court did not regard such consideration as essential to the result reached by it."

<sup>50</sup> *Sweets Co. of America v. F. T. C.*, 109 F. (2d) 296 (C. C. A. 2d, 1940); *Minter v. F. T. C.*, 102 F. (2d) 69 (C. C. A. 3d, 1939); *Ostler Candy Co. v. F. T. C.*, 106 F. (2d) 962 (C. C. A. 10th, 1939), *cert. denied*, 309 U. S. 675 (1940); *National Candy Co. v. F. T. C.*, 104 F. (2d) 999 (C. C. A. 7th, 1939), *cert. denied*, 309 U. S. 657 (1940); *Bunte Bros. v. F. T. C.*, 104 F. (2d) 996 (C. C. A. 7th, 1939), *rev'd on other grounds*, 312 U. S. 349 (1941); *Helen Ardelle, Inc., v. F. T. C.*, 101 F. (2d) 718 (C. C. A. 9th, 1939); *F. T. C. v. Charles Miller Co.*, 97 F. (2d) 563 (C. C. A. 1st, 1938); *Chicago Silk Co. v. F. T. C.*, 90 F. (2d) 689 (C. C. A. 7th, 1937); *F. T. C. v. McLean & Son*, 84 F. (2d) 910 (C. C. A. 7th, 1936), *cert. denied*, 299 U. S. 590 (1936).

<sup>51</sup> For an argument that deception is also involved in all these cases, see *M. N. WATKINS, op. cit.*, 178.

<sup>52</sup> *Helen Ardelle, Inc., v. F. T. C.*, 101 F. (2d) 718 (C. C. A. 9th, 1939),

ence that the purchaser gets his money's worth in any event, and has a chance of getting more. "It does not change the character of the game as one of chance merely to remove the possibility of loss."<sup>53</sup>

As in most of the other cases considered in this section, the decisions pay no attention to the Wheeler-Lea amendment. "Break and take" sales tactics are "unfair methods of competition."

### *Commercial Bribery*

The Commission started out on an ambitious attempt to stamp out commercial bribery,<sup>54</sup> but was early restrained in its efforts by the courts. In *New Jersey Asbestos Co. v. F. T. C.*,<sup>55</sup> it was held that the fact that the vendor had given employees of the buyer liquor, cigars, meals and theater tickets to induce them to buy from it was a "matter between individuals" and did not so affect the public as to be within the jurisdiction of the Commission.

In *Kinney-Rome Co. v. F. T. C.*,<sup>56</sup> no unfair method was found in the fact that a manufacturer, with the knowledge of a retailer, offered premiums to a salesman of the retailer to induce him to push the manufacturer's brand, although the retailer dealt also in other brands. The situation, as seen by the court, was not different from one in which the retailer instructed his salesman to push one brand because of the greater margin of profit therein, and that clearly would not be an unfair method of competition. And, in order to justify the analogy, the court declared that the participation of the manufacturer in the practice did not alter the situation because his competition ended when he sold the goods to the retailer!

Although the court in the *New Jersey Asbestos* case had made a dictum to the effect that no form of commercial bribery would constitute a violation of Section 5,<sup>57</sup> the Commission has declined to accept this *obiter* construction of its powers, but it has accorded deference to the

*F. T. C. v. F. A. Mortoccio Co.*, 87 F. (2d) 561 (C. C. A. 8th, 1937), and *Chicago Silk Co. v. F. T. C.*, 90 F. (2d) 689 (C. C. A. 7th, 1937), involved sales by punchboard. The last cited case, concerning the sale of hosiery, is the only case thus far to deal with the use of gaming methods in the sale of anything other than candy.

<sup>53</sup> *F. T. C. v. F. A. Mortoccio Co.*, 87 F. (2d) 561 (C. C. A. 8th, 1937).

<sup>54</sup> G. C. HENDERSON, *THE FEDERAL TRADE COMMISSION* (1924), 217; Note (1928) 28 COL. L. REV. 799.

<sup>55</sup> 264 Fed. 509 (C. C. A. 2d, 1920). And see *Winslow v. F. T. C.*, 277 Fed.

206 (C. C. A. 4th, 1921), *cert. denied*, 258 U. S. 618 (1922), holding that bribery by a ship chandler in the course of sales to a foreign ship was not within the jurisdiction of the Commission because the transactions were purely intrastate.

<sup>56</sup> 275 Fed. 665 (C. C. A. 7th, 1921)

<sup>57</sup> "The payment of money or the giving of valuable presents to an employee to induce him to influence his employer to make a contract of purchase is a fraud justifying the discharge of the employee, and perhaps the recovery by the purchaser of the amount or value of such inducement from the seller, upon the theory that it must have been included in the price. But even in such a case we think it would be a matter between individuals, and not one so affecting the public interest as to be within the jurisdiction of the Commission. . . ."

decision to the extent of distinguishing between cases of "treating" and cases wherein actual money bribes are given,<sup>58</sup> entering cease and desist orders only in the latter situation.<sup>59</sup>

In regard to the practice of subsidizing salesmen of retail distributors, the Commission appears to have defied the decision in the *Kinney-Rome* case by subsequently forbidding the type of practice there upheld.<sup>60</sup>

The courts have not again had opportunity to review the Commission's orders, but even if commercial bribery cannot be condemned as an "unfair method of competition," it now might be held to constitute "unfair or deceptive acts or practices" within the meaning of the Wheeler-Lea Act.

#### SUGGESTIONS AND CONCLUSIONS

From the time the Commission had gotten far enough into its work to afford a record for appraisal and until as recently as five years ago, the consensus seems to have been that it was a total failure, or at least that it had not accomplished enough to justify its existence,<sup>61</sup> but today the Commission is generally recognized as an institution which will play an important part in the future business and economic life of the country.<sup>62</sup>

What is the reason for this change of attitude? Congress has not enacted any new legislation which may fairly be said to have revitalized the Commission. The effect of the Robinson-Patman Act is, in the main, uncertain because of the absence of judicial interpretation, and the Wheeler-Lea Act has not yet materially affected the work of the Commission.

The answer obviously is that the courts have changed their attitude toward the Commission. The feeling of futility engendered by the

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<sup>58</sup> See *M. N. WATKINS, op. cit.*, 180.

<sup>59</sup> *In re Finishing Products Co.*, 22 F. T. C. 858 (1936); *In re Johnson Process Glue Co.*, 8 F. T. C. 518 (1925); *In re Reliance Varnish Co.*, 8 F. T. C. 264 (1924). And see *F. T. C. v. Grand Rapids Varnish Co.*, 41 F. (2d) 996 (C. C. A. 6th, 1929), granting an order of enforcement, with respondent's consent.

<sup>60</sup> *In re Twinplex Sales Co.*, 11 F. T. C. 57 (1927).

<sup>61</sup> See *G. C. HENDERSON, op. cit.*, Chap. VI; *T. C. BLAISDELL, THE FEDERAL TRADE COMMISSION (1932)*; *N. B. GASKILL, THE REGULATION OF COMPETITION (1936)*, subtitled "A Study of Futility as Exemplified by the Federal Trade Commission and National Industrial Recovery Acts With Proposals for Its Remedy."

<sup>62</sup> *S. C. Oppenheim*, in a foreword to a symposium, (1940) 8 *Geo. Wash. L. Rev.* 249: "The year 1940 finds the Commission securely established in the structure of public administrative tribunals. Today its critics do not challenge its existence or the necessity for such an agency of inquiry and regulation. . . ." *H. Thompson, Highlights in the Evolution of the Federal Trade Commission*, (1940) 8 *Geo. Wash. L. Rev.* 257: "The Commission is now settled on a firm foundation and has been doing splendid work." President Roosevelt, in an address of July 12, 1937: "But the dangers to the country growing out of monopoly and out of unfair methods still exist and still call for action. They make the work of the Federal Trade Commission of vital importance in our economic life."

Commission's record in earlier years was not due to dissatisfaction with the policy embodied in the statutes defining its functions, nor to the manner in which the Commission had undertaken to perform those functions. Rather was it due to the treatment which the courts had given the Commission's attempts to enforce the statutes. The judicial emasculation of important sections of the Clayton Act, and decisions such as were rendered in the *Gratz*,<sup>63</sup> *Curtis*,<sup>64</sup> *Klesner*,<sup>65</sup> and *Raladam*<sup>66</sup> cases under the F. T. C. Act, did not forecast a very active future for the Commission.<sup>67</sup>

But the more recent increase in administrative bodies and the gradual, albeit reluctant, adaptation of judicial doctrine and technique to this new phenomenon, together with the changes in personnel in the federal judiciary under the Roosevelt administration, have engendered a more generous judicial attitude toward the Commission. The effect of this judicial renaissance has been not only to undermine the significance of former restrictive decisions, but also to arouse new interest in the Commission on the part of Congress and the general public.

The course and significance of the decisions is well summarized by Judge Walker, speaking for the Third Circuit:

"Unfair methods of competition in commerce . . . are hereby declared unlawful.' This expression, new in the law, was intended to have a broader meaning than 'unfair competition' and it was to be determined in particular instances upon evidence in the light of particular competitive conditions and of what is found to be specific and substantial public interest. When the Supreme Court was required to pass thereon in *Federal Trade Commission v. Raladam Co.*, it emphasized competition and minimized public interest, by holding that there must be a finding or evidence from which the conclusion legitimately can be drawn that the unfair methods of competition substantially injure or tend to injure the business of a competitor or competitors generally, whether legitimate or not. It is said that the decision provoked serious criticism in many quarters because it left the consumer virtually unprotected by weakening if not actually nullifying the powers expressly delegated to the Commission for the protection of the public and the consumer. Whether or not the criticism was justified is now immaterial because *Federal Trade Commission v. Royal Milling Co. et al* and *Federal Trade Commission v. Algoma Lumber Co.* paved the way for *Federal Trade Commission v. R. F. Keppel & Bros., Inc.*, wherein the court recognized the Commission's jurisdiction in cases of unfair trad-

<sup>63</sup> F. T. C. v. Gratz, 253 U. S. 421 (1920), discussed at p. 26, *supra*.

<sup>64</sup> F. T. C. v. Curtis Publishing Co., 260 U. S. 568 (1923), discussed at pp. 16, 27, *supra*.

<sup>65</sup> F. T. C. v. Klesner, 280 U. S. 19 (1929), discussed at pp. 9, 34, *supra*.

<sup>66</sup> F. T. C. v. Raladam Co., 283 U. S. 643 (1931), discussed at p. 87 *supra*.

<sup>67</sup> J. A. McLAUGHLIN, CASES ON THE FEDERAL ANTI-TRUST LAWS (1933), 692: "But insofar as the Commission is a failure, courts have overlooked few reasonable opportunities to contribute to that result."

ing, regardless of whether or not it is the public in general or a particular class of competitors whose interest demands the suppression of the practices complained of. This recognition of public interest was approved by Congress in 1938 with the enactment of the Wheeler-Lea Act, the pertinent part of which reads: 'Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce are hereby declared unlawful.' The failure to mention competition in the later phrase shows a legislative intent to remove the procedural requirement set up in the *Raladam* case and the Commission can now center its attention on the direct *protection of the consumer* where formerly it could protect him only indirectly through the protection of the competitor."<sup>68</sup>

All this seems as it should be. The expertise, the specialization, and the broad powers of inquiry unhampered by a traditionally formalized procedure, which characterize administrative bodies generally, commend the vesting of such powers of consumer protection, now recognized as a necessary and desirable function of government, in an agency such as the Federal Trade Commission.

The view has been expressed by Mr. Thurman Arnold that the Commission cannot "act as the spearhead of a drive to maintain a free market for consumers" because of "a traditional deep seated attitude against trusting administrative tribunals with power except in very narrow fields." And the formula of the Sherman Act is like the formula of due process—it covers every field. Only courts are qualified to work with such formulae.<sup>69</sup>

True, the above-mentioned "deep-seated attitude" still seems to prevail with many business men as well as many members of the legal profession. But, insofar as this attitude has hampered the Commission in the past, the recent change of judicial temper indicates a minimizing of this difficulty. This same change, moreover, is both a symptom and a contributing cause of increasing public confidence in the administrative process.

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<sup>68</sup> *Pep Boys—Manny, Moe & Jack, Inc., v. F. T. C.*, 122 F. (2d) 158, 160 (C. C. A. 3d, 1941). To the cases herein mentioned should be added the recent decisions in *Fashion Originators' Guild v. F. T. C.*, 313 U. S. 457, 668 (1941), and *Millinery Creators' Guild v. F. T. C.*, 312 U. S. 469 (1941), sustaining the Commission's determination that Section 5 of the F. T. C. Act is violated when manufacturers combine to boycott all retailers dealing with any manufacturer who has copied the styles of the respondents. While the respondents occupied a strong position in the market, they fell far short of having a monopoly—in the *Fashion Originators'* case, at least, they did considerably less than 50 per cent of the business in the field. But the Supreme Court based its decisions on the ground that the conduct condemned was violative of the policy of the Sherman Act and the tying clause provisions in Section 3 of the Clayton Act. These decisions seem necessarily to repudiate the approach of the *Gratz* case, discussed at p. 26, *supra*, and to clear the way for renewed action against tying clause practices.

<sup>69</sup> THURMAN N. ARNOLD, *THE BOTTLENECKS OF BUSINESS* (1940), 99 *et seq.*



The Federal Trade Commission was not designed to enforce, except in a narrow sense, the "broad fundamental principles" of the Sherman Act. Its function is to prevent various specific trade practices which are contrary to those principles; it is not the sole, or even the chief agency for the enforcement of the Act. That it is capable of operating on this narrower plane, Mr. Arnold admits.<sup>70</sup> And the Commission may well act as the "spearhead" of protection of competition and the consumer in the more immediate sense, even though it may not be able to penetrate every existing defect at one thrust.

Nor is Mr. Arnold's case for the superior qualifications of the courts entirely convincing. The essence of the argument is that enforcement of law through the courts is better than enforcement through administrative bodies because the former command "overwhelming prestige and respect" and that this attitude is due to our use of the court "to symbolize an ideal of impersonal justice." But attitudes are changing in the direction of according more favorable recognition to the administrative process rather than in the direction of increasing judicial prestige. Furthermore, the existence of any compelling feeling of respect for the courts as symbols of impersonal justice in the minds of actual or potential violators of the anti-trust laws can hardly be taken for granted.

Now that the judicial obstacles to the Commission's work seem to be vanishing, or at least decreasing, it becomes particularly pertinent to consider other difficulties that should be removed. The time is ripe for the remedying of defects in the administrative process of the Commission and in the statutes upon which the power of the Commission is based.

There appears to be no fundamental fault in the Commission's procedure. It was recently examined by a learned body of administrative lawyers and their criticisms and suggestions were few.<sup>71</sup> The Commission was criticized for insisting that it give its personal consideration to every recommendation for disposition of cases, to every settlement by stipulation, to every stipulation of facts, to every request by the respondent for subpoenas *duces tecum*, to interlocutory appeals from the trial examiner's rulings on questions of evidence, and to every uncontested case. It was suggested that these functions could all be delegated to subordinates and that the Commission could use the time so saved to prepare its own findings and conclusions of law (instead of having them prepared and submitted to the Commission by the trial examiner, who has not heard the oral arguments and usually has

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<sup>70</sup> *Ibid.*, 100: "On narrower lines the Federal Trade Commission has been able to work effectively. Its positive action on trade practices has been effective."

<sup>71</sup> Attorney-General's Committee on Administrative Procedure, monograph No. 6, *The Federal Trade Commission*.

not participated in the Commission's deliberations) and to give more attention to the form and content of its written decisions.<sup>72</sup> These are primarily matters to be remedied by the Commission itself, though it might be encouraged to make the suggested delegations of authority by the enactment of an enabling statute and could be required by statute to make its own findings and conclusions.

On the score of appellate procedure, the provisions of the Wheeler-Lea Act should be extended to cover cases arising under the Clayton Act.

Statutory correction of the judicial usurpation of determination of public interest in the issuance of a complaint seems unnecessary since the passage of the Wheeler-Lea Act. That Act having established a policy of consumer protection, there should be no repetition of decisions like those in the *Klesner* and *Raladam* cases, even though the courts continue to review the question of public interest in prosecutions under the F. T. C. Act.

But there is room for statutory improvement in the substantive law in other respects. A clearer definition of the elements of competition to be protected by subdivision (a) of the Robinson-Patman Act, or perhaps the elimination of any reference to competition, would not be amiss. The meaning of the "services rendered" qualification in the brokerage provision also might well be clarified, and subdivisions (d) and (e) of the Act should be amended to exempt the type of transaction involved in the *Golf Ball Mfr's* case.<sup>73</sup>

The tying clause prohibition of Section 3 of the Clayton Act should be amended to eliminate the present restriction of its application to tying clauses connected with leases, sales or establishment of price, with a view particularly to bring patent license agreements within its reach. The tests of effect on competition, if not wholly omitted in analogy to the brokerage clause of the Robinson-Patman Act, should be made at least as broad as those laid down under the general price discrimination provisions of that Act.

The Commission has recommended to Congress that Section 7 of the Clayton Act be amended to apply alike to acquisition of stock and acquisition of assets of a competing corporation, without any more specific reference to competition, except that if the corporations involved control less than 10 per cent of any industry, or of the sale of the commodity as to which the corporations are in competition, the effect of the acquisition must be to restrain competition or tend to

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<sup>72</sup> For an extended criticism of the form and content of these decisions, see G. C. HENDERSON, *op. cit.*, Chap. III.

<sup>73</sup> *In re Golf Ball Mfr's Ass'n*, 26 F. T. C. 824 (1938), discussed at p. 24, *supra*.

create monopoly.<sup>74</sup> While a similar proposal<sup>75</sup> has been criticized as an attempt to make Section 7 cover what the Sherman Act covers already, and therefore to involve the risk of the courts making a Rule of Reason out of the Clayton Act,<sup>76</sup> it would seem that this result could be avoided by a proper wording of the amendment. And, in the interest of putting some teeth into Section 8 of the Clayton Act, as well as for the purpose of giving a broader scope to Section 7, it is suggested that the prohibition of Section 7 be made to apply to individuals and to all forms of business organizations, rather than merely to corporations.

No further amendment to Section 5 of the F. T. C. Act seems necessary. The Wheeler-Lea Act appears to give the Commission ample authority to deal with trade practices in commerce, both for the protection of competition and for the immediate protection of the consumer.

All of these suggestions for new legislation reveal, of course, that the writer is in sympathy with the general purposes and policies manifested in the existing statutes. They are clearly calculated to protect the consuming public against trade practices motivated solely by the desire for gain, and to preserve competition which, again, operates ultimately to protect the public. That the public needs protection against predatory tactics of industry will be denied by few. The existence of a better method than that of government supervision and regulation has not yet been established.

And it is no answer to say that absolute "free competition" is a myth, any more than it is an answer to say that the regulatory scheme adopted for the protection of the consumer against direct injury or exploitation is not 100 per cent efficient. Any steps in the direction of protecting society against undesirable features of our capitalistic system are worth while, except indeed in the eyes of those who are prepared to abandon the system itself. Whether many or few, some steps in that direction are being taken by the Federal Trade Commission.

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<sup>74</sup> F. T. C., ANNUAL REPORT (1938), 10.

<sup>75</sup> See REP. ATT'Y GEN. (1926), 33.

<sup>76</sup> J. A. McLAUGHLIN, *op. cit.*, 301 n. 94.