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CONSTITUTIONAL LAW — COMMERCE CLAUSE — FEDERAL TRADE COMMISSION — JURISDICTION OVER INTRASTATE COMMERCE AFFECTING INTERSTATE COMMERCE — Appellee, an Illinois corporation engaged in manufacturing and selling candy within the state of Illinois, used in marketing its product a method of "break and take" packages involving an element of chance. The Federal Trade Commission had found that this practice constituted "unfair competition" and had ordered one hundred twenty of appellee's competitors who were engaged in interstate commerce to cease using it. The commission issued a like order against appellee on the theory that its activities, although wholly intrastate, "affected" interstate commerce. Appellee appealed from the order, contending that the Federal Trade Commission Act did not authorize the commission to regulate wholly intrastate business. *Held*, order set aside. Congress in granting the commission authority to prevent unfair methods of competition "in commerce" did not extend such authority to methods which merely "affected" interstate commerce. *Federal Trade Commission v. Bunte Bros.*, (U. S. 1941) 61 S. Ct. 580.

In view of the recent decisions of the Supreme Court extending the power of Congress under the commerce clause to businesses merely affecting interstate

commerce,[1] it would seem entirely possible for the Court to interpret section 5 of the Federal Trade Commission Act[2] in the same liberal manner. However, the Federal Trade Commission has never been a tribunal favored by the courts,[3] and this may serve to explain the restrictive interpretation of the statute in this case. Certainly, if the Court had desired to reach the opposite conclusion, it would not have found authority lacking. It is true that some of the earlier decisions defining commerce as used in this act confined the term to its narrowest limits.[4] In addition, the lower federal courts have held that the jurisdiction of the Federal Trade Commission does not extend to intrastate commerce which merely affects interstate commerce.[5] But contrary argument by analogy is to be found in the doctrine of the *Minnesota Rate Cases* and the

[1] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615 (1937); National Labor Relations Board v. Fainblatt, 306 U. S. 601, 59 S. Ct. 668 (1939); Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379 (1939); United States v. F. W. Darby Lumber Co., (U. S. 1941) 61 S. Ct. 451.

[2] "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 38 Stat. L. 719 (1914), 15 U. S. C. (1934), § 45, as amended, 52 Stat. L. 111 (1938), 15 U. S. C. (Supp. 1939), § 45.

[3] From the beginning the courts placed definite limitations on the powers of the Federal Trade Commission, although the present tendency is to weaken the effect of these restrictive decisions. See Federal Trade Commission v. Raymond Bros.-Clark Co., 263 U. S. 565, 44 S. Ct. 162 (1924), affirming the dicta in Federal Trade Commission v. Gratz, 253 U. S. 421, 40 S. Ct. 572 (1920), to the effect that the jurisdiction of the commission extended only to restraints of trade, monopoly, and practices which prior to 1914 had been considered deceptive or fraudulent [but cf. Federal Trade Commission v. R. F. Keppel & Bro., 291 U. S. 304, 54 S. Ct. 423 (1934)]; Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568, 43 S. Ct. 210 (1923), allowing strict judicial review of the commission's findings of fact [but cf. Federal Trade Commission v. Algoma Lumber Co., 291 U. S. 67, 54 S. Ct. 315 (1934)]; Federal Trade Commission v. Klesner, 280 U. S. 19, 50 S. Ct. 1 (1929), requiring that proceedings be in the public interest; Federal Trade Commission v. Raladam Co., 283 U. S. 643, 51 S. Ct. 587 (1931), limiting the power to forbid false advertising to cases where injury is sustained by an honest competitor [but see: Wheeler-Lea Act, 52 Stat. L. 111 (1938), 15 U. S. C. (Supp. 1939), §§ 41 et seq.].

[4] Ward Baking Co. v. Federal Trade Commission, (C. C. A. 2d, 1920) 264 F. 330; Winslow v. Federal Trade Commission, (C. C. A. 4th, 1921) 277 F. 206; both criticized in Hankin, "The Jurisdiction of the Federal Trade Commission," 12 CAL. L. REV. 179 at 190 ff. (1924).

[5] Canfield Oil Co. v. Federal Trade Commission, (C. C. A. 6th, 1921) 274 F. 571; Utah-Idaho Sugar Co. v. Federal Trade Commission, (C. C. A. 8th, 1927) 22 F. (2d) 122; California Rice Industry v. Federal Trade Commission, (C. C. A. 9th, 1939) 102 F. (2d) 716. However, it is interesting to note that in the Canfield Oil case the court in refusing to apply the doctrine of the Minnesota Rate Cases (see note 6, infra) approaches the question whether commerce affecting interstate commerce is within the commission's jurisdiction as one of degree. This suggests that on the proper facts the court would have allowed jurisdiction to the commission.

Shreveport case, which held that the Interstate Commerce Commission might regulate intrastate carrier rates where they affected interstate rates fixed by the commission.[6] Furthermore, the decisions which have held the terms of the Sherman Act applicable to intrastate activities affecting interstate commerce [7] would seem to indicate that the jurisdiction of the Federal Trade Commission might be at least as broad, since one of the duties of the commission is to administer portions of the Sherman Act.[8] Moreover, it has been held that the Federal Trade Commission does have such jurisdiction when administering the Sherman Act.[9] In the principal case, however, the Court, by confining the commission to the narrow limits of the statutory language, is seeking to effect a public policy by restraining a federal agency from exercising a "pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law." [10] That there is such a public policy cannot be doubted, but at the same time the very practical problem raised by the facts of the instant case is not readily settled by reliance upon local law. If the Court had granted jurisdiction in this case, it would have raised a difficult question of degree as to the kinds of acts that affect interstate commerce. At the same time, however, cases involving gross discrimination against interstate commerce would have been brought within the pale of regulation.

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[6] Minnesota Rate Cases, 230 U. S. 352, 33 S. Ct. 729 (1912); Houston, E. & W. T. Ry. v. United States, 234 U. S. 342, 34 S. Ct. 833 (1913). In view of the Court's reliance in the principal case upon the absence of express statutory language granting jurisdiction over activities affecting interstate commerce, it is to be noted that the act creating the Interstate Commerce Commission contained an express proviso to the effect that the commission should not have jurisdiction over carriers engaged in carrying wholly within one state. 24 Stat. L. 379 (1887) and amendment of 1906, 34 Stat. L. 584. Yet, the Court in the Minnesota Rate and Shreveport cases interpreted this proviso so as to allow the commission to take jurisdiction over intrastate rates affecting interstate rates. It was not until 1920 that the act was amended so as expressly to authorize this jurisdiction. 41 Stat. L. 484 (1920), 49 U. S. C. (1934), § 13 (4).

[7] Swift & Co. v. United States, 196 U. S. 375, 25 S. Ct. 276 (1905); United States v. Patten, 226 U. S. 525, 33 S. Ct. 141 (1913); United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344, 42 S. Ct. 570 (1922); Standard Oil Co. v. United States, 283 U. S. 163, 51 S. Ct. 421 (1931); Local 167, International Brotherhood of Teamsters v. United States, 291 U. S. 293, 54 S. Ct. 396 (1934); C. E. Stevens Co. v. Foster & Kleiser Co., 311 U. S. 255, 61 S. Ct. 210 (1940).

[8] Because of the fact that the Federal Trade Commission was given power to enforce certain provisions of the Sherman Act, and because the policy of the Sherman Act has determined what constitutes "unfair methods of competition" within the meaning of the Federal Trade Commission Act, it was urged in the dissenting opinion that for the purposes of the present case the two statutes should be construed together as parts of an "integrated statutory scheme." In United States v. Hutcheson, (U. S. 1941) 61 S. Ct. 463, the Court had done just this with the Sherman Act, Clayton Act, and Norris-LaGuardia Act in order to deny statutory grounds for criminal prosecution under the Sherman Act in a labor dispute. It is interesting to note that Justice Frankfurter wrote the majority opinion in both cases.

[9] Chamber of Commerce of Minneapolis v. Federal Trade Commission, (C. C. A. 8th, 1926) 13 F. (2d) 673.

[10] Principal case, 61 S. Ct. 580 at 583.