Michigan Law Review

Volume 32 | Issue 8

1934

FEDERAL TRADE COMMISSION-RECENT TRENDS IN INTERPRETATION OF THE FEDERAL TRADE COMMISSION ACT

FEDERAL TRADE COMMISSION—RECENT TRENDS IN INTERPRETATION OF THE FEDERAL TRADE COMMISSION ACT—The Federal Trade Commission has never been a favored child of the courts. Beginning with the first case to which the Commission was a party, the attitude of the judiciary has clearly been unfriendly. The Commission gets its powers from the Clayton Act [1] and from the Federal Trade Commission Act.[2] The courts have interpreted the Clayton Act

[1] 38 Stat. 730 (1914); U. S. C. tit. 15, secs. 12-27 (1926).

[2] 38 Stat. 717 (1914); U. S. C. tit. 15, secs. 41-51 (1926). The new Securities Act, 48 Stat. 74; U. S. C. tit. 15, sec. 77a ff. (1933 Supp.), gives additional powers to the Commission, but they are beyond the range of this discussion. See James, "The Securities Act of 1933," 32 MICH. L. REV. 624 (1934).

strictly, and there is no sign of a change of heart by the majority of the Supreme Court in that respect;[3] it is believed, however, that a few of the recent cases under the Federal Trade Commission Act, both in the Supreme Court and in the lower federal courts, show a trend toward widening the scope of the Commission's activities. At least the courts seem a bit more sympathetic toward the work of that body.

The terms of the Clayton Act are unimportant for purposes of this discussion.[4] The Federal Trade Commission Act gives the Commission two functions to perform: (1) Section 5 empowers the Commission to initiate proceedings to prevent unfair methods of competition;[5] (2) sections 6-10 empower the Commission to investigate industrial conditions on its own motion, or upon the request of the executive or legislative branches of the government.[6] Both functions of the Commission have been, in the past, severely hampered by adverse decisions by the courts.

The unfavorable attitude originally taken by the courts may be explained in several ways. In the first place, the Supreme Court has always been somewhat wary of putting too much power into the hands of new governmental agencies.[7] So far as activities under Section 5 are concerned, the procedure set up by the Act was not likely to get much sympathy from a judicial tribunal. Under its terms, proceedings are to be started by a complaint issued by the Commission, which then sits to determine the merits of the complaint. The Commission thus acts both as prosecutor and judge, and the courts, naturally enough, have scrutinized the resulting decisions with perhaps more care than would otherwise be the case.[8] The procedure adopted by the Com-

[3] See Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission, 1 U. S. LAW WEEK, p. 16, index p. 600 (March 13, 1934).

[4] Briefly, section 2 of the Act prohibits price discrimination; section 3 prohibits tying contracts; section 7 prohibits stock acquisitions tending substantially to lessen competition; section 8 prohibits interlocking directorates.

[5] 38 Stat. 719 (1914); U. S. C. tit. 15, sec. 45 (1926).

[6] 38 Stat. 721-724 (1914); U. S. C. tit. 15, secs. 46-50 (1926).

[7] Hankin, "Validity and Constitutionality of the Federal Trade Commission Act," 19 ILL. L. REV. 17 at 34 (1924). A good example of this can be seen in the first cases coming before the Supreme Court under the original Act to Regulate Commerce. 24 Stat. 379 (1887). See Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. ed. 1110 (1892); Texas & Pac. Ry. v. I. C. C., 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940 (1896); Cincinnati, N. O. & T. P. Ry. v. I. C. C., 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935 (1896); I. C. C. v. Cincinnati, N. O. & T. P. Ry., 167 U. S. 479, 17 Sup. Ct. 896, 42 L. ed. 243 (1897). A particularly good discussion of these cases can be found in 1 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION, pp. 23-35 (1931). See also the ELEVENTH ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION, pp. 9-46 (1897).

[8] John Bene & Sons v. Federal Trade Commission, (C. C. A. 2d, 1924) 299 Fed. 468.

mission itself of making its findings in the form of formally phrased, numbered "findings of fact" has been subjected to much well-deserved criticism,[9] and the courts have probably been justified in feeling that such formal findings do not always present a realistic view of the facts of the case.[10] There has been a marked improvement in the recent decisions by the Commission in this respect.[11] In its investigations under Section 6, the Commission has constantly run afoul of the Fourth and Fifth Amendments to the Constitution. The Supreme Court, following a long line of prior decisions, has generally taken a strict view of those amendments.

I.

Under the terms of Section 5 of the Federal Trade Commission Act, the Commission is given jurisdiction to prevent "unfair methods of competition" when it appears that proceedings will be "to the interest of the public." The Act further declares that "findings of the Commission as to facts, if supported by testimony, shall be conclusive." All three of these phrases have been the source of much controversy.

In *Federal Trade Commission v. Gratz*,[12] the first case to come before the Supreme Court under the Federal Trade Commission Act, the Court decided that the phrase "unfair methods of competition" was to be defined by the courts. Although that proposition might have been open to some doubt as an original question,[13] it is now firmly established. Both courts and legal commentators have differed as to the exact purpose of the phrase in question. A minority of the authorities have insisted from the beginning that the phrase was intended to give the Commission jurisdiction only over acts of the same general nature as those made illegal by the Sherman [14] and Clayton acts, i.e., trade methods tending to destroy competition and to create monopoly.[15]

[9] HENDERSON, THE FEDERAL TRADE COMMISSION (1924) contains an excellent criticism of the work of the Commission up to that time. For this aspect, see particularly pp. 106 ff. The book is an invaluable aid in any work in connection with the Commission.

[10] See HENDERSON, THE FEDERAL TRADE COMMISSION, pp. 127, 138 (1924), commenting on Federal Trade Commission v. Curtis Pub. Co., 260 U. S. 568, 43 Sup. Ct. 210, 67 L. ed. 408 (1923) and L. B. Silver & Co. v. Federal Trade Commission, (C. C. A. 6th, 1923) 289 Fed. 985.

[11] See the findings in volumes 15 and 16 of the Commission's decisions.

[12] 253 U. S. 421, 40 Sup. Ct. 572, 64 L. ed. 993 (1920).

[13] See Hankin, "Validity and Constitutionality of the Federal Trade Commission Act," 19 ILL. L. REV. 17 (1924).

[14] 26 Stat. 209 (1890); U. S. tit. 15, secs. 1-7 (1926).

[15] HARLAN & MCCANDLESS, THE FEDERAL TRADE COMMISSION, secs. 27, 28 (1916).

Some of the early cases bore this view out.[16] Most of the authorities, however, have agreed that the scope of the Commission's activities is much broader, and extends to any unfair trade method, whether or not competition is thereby destroyed.[17] Whatever may have been the purpose of Congress in writing the Act,[18] the Supreme Court has accepted the latter interpretation. This result is the negative inference from the oft-cited dictum in the *Gratz* case, where the Court said that the words under discussion "are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly,"[19] and the interpretation was definitely accepted in *Federal Trade Commission v. Winstead Hosiery Co.*,[20] where the Commission's jurisdiction was extended to cover false advertising and misbranding. The Commission's activities in that field have been constantly increased, despite the protest of several minority voices which have insisted that, despite the *Winstead* case, the Federal Trade Commission Act was not intended to establish censorship over advertising.[21] At present, the Commission's activities under Section 5 are devoted almost exclusively to supervision of advertising, the jurisdiction of the Commission to supplement the Sherman and Clayton acts having apparently been forgotten.[22] The courts have permitted the Commission to take steps to prevent offenses that were

[16] Mennen Co. v. Federal Trade Commission, (C. C. A. 2d, 1923) 288 Fed. 774; Winstead Hosiery Co. v. Federal Trade Commission, (C. C. A. 2d, 1921) 272 Fed. 957; New Jersey Asbestos Co. v. Federal Trade Commission, (C. C. A. 2d, 1920) 264 Fed. 509; Federal Trade Commission v. Gratz, (C. C. A. 2d, 1919) 258 Fed. 314.

[17] See especially Handler, "The Jurisdiction of the Federal Trade Commission over False Advertising," 31 COL. L. REV. 527 (1931). Also HENDERSON, THE FEDERAL TRADE COMMISSION, pp. 1-48 (1924); 20 MICH. L. REV. 781 (1922).

[18] Both sides of the argument can be, and are, supported by copious quotations from the debates in Congress. Most of the quotations are collected in Montague, "Unfair Methods of Competition," 25 YALE L. J. 20 (1915).

[19] McReynolds, J., 253 U. S. 421 at 427, 40 Sup. Ct. 572 at 575, 64 L. ed. 993 at 996 (1920).

[20] 258 U. S. 483, 42 Sup. Ct. 384, 66 L. ed. 729 (1922). *Cf.* Sears, Roebuck & Co. v. Federal Trade Commission, (C. C. A. 7th, 1919) 258 Fed. 307.

[21] See especially the dissenting opinion in L. B. Silver & Co. v. Federal Trade Commission, (C. C. A. 6th, 1923) 289 Fed. 985 at 992, and the majority opinion in Raladam Co. v. Federal Trade Commission, (C. C. A. 6th, 1930) 42 F. (2d) 430, both opinions written by Judge Denison. Also see Levy, "A Decade of the Federal Trade Commission," 11 VA. L. REV. 21, 111, 196, 278, 372 (1924-25).

[22] In the year ending June 30, 1920 (the first full year of active operation by the Commission), 67 per cent of the Commission's decisions concerned false advertising and misbranding, while 19 per cent were actions taken under, or supplementary

already prohibited by the anti-trust laws, so that a new agency has been supplied for their enforcement,[23] but in few, if any, cases has the Commission been permitted to patch the gaps left by those laws.[24]

While the Supreme Court has thus permitted the Commission to act despite the absence of any lessening of competition, it has insisted

to, the anti-trust laws (2 F. T. C. D.). In the year ending June 30, 1932, 92 per cent of the decisions were on advertising and only 4½ per cent (3 decisions) had any connection with the anti-trust laws. (15, 16 F. T. C. D.)

[23] The Commission has been successful in stopping resale price maintenance schemes, using as a precedent Dr. Miles Medical Co. v. Park & Sons, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. ed. 502 (1911), a case coming under the Sherman Act. Federal Trade Commission v. Beech Nut Packing Co., 257 U. S. 441, 42 Sup. Ct. 150, 66 L. ed. 307 (1922); Shakespeare Co. v. Federal Trade Commission, (C. C. A. 6th, 1931) 50 F. (2d) 758; J. W. Kobi Co. v. Federal Trade Commission, (C.C.A. 2d, 1927) 23 F. (2d) 41; Cream of Wheat v. Federal Trade Commission, (C. C. A. 8th, 1926) 14 F. (2d) 40; Moir v. Federal Trade Commission, (C. C. A. 1st, 1926) 12 F. (2d) 22; Q. R. S. Music Co. v. Federal Trade Commission, (C. C. A. 7th, 1926) 12 F. (2d) 730; Toledo Pipe-Threading Machine Co. v. Federal Trade Commission, (C. C. A. 6th, 1926) 11 F. (2d) 337; Hills Bros. v. Federal Trade Commission, (C. C. A. 9th, 1926) 9 F. (2d) 481; Oppenheim, Oberndorf & Co. v. Federal Trade Commission, (C. C. A. 4th, 1925) 5 F. (2d) 574. *Cf.* Butterick Co. v. Federal Trade Commission, (C. C. A. 2d, 1925) 4 F. (2d) 910. Another group of cases used Eastern States Lumber Ass'n v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. ed. 1490 (1914), another Sherman Act case, as their principal precedent. Arkansas Wholesale Grocers' Ass'n v. Federal Trade Commission, (C. C. A. 8th, 1927) 18 F. (2d) 866; Wholesale Grocers' Ass'n of El Paso v. Federal Trade Commission, (C. C. A. 5th, 1922) 277 Fed. 657; Western Sugar Refining Co. v. Federal Trade Commission, (C. C. A. 9th, 1921) 275 Fed. 725; National Harness Mfrs.' Ass'n v. Federal Trade Commission, (C. C. A. 6th, 1920) 268 Fed. 705. Of all the cases in which the Commission has been successful in preventing practices "tending toward a monopoly," only Chamber of Commerce of Minneapolis v. Federal Trade Commission, (C. C. A. 8th, 1926) 13 F. (2d) 673, does not use Sherman Act precedents.

[24] Thus the Commission has been unsuccessful in stopping the gap left in the Clayton Act by Swift & Co. v. Federal Trade Commission, 272 U. S. 554, 47 Sup. Ct. 175, 71 L. ed. 405 (1926); Federal Trade Commission v. Eastman Kodak Co., 274 U. S. 619, 47 Sup. Ct. 688, 71 L. ed. 1238 (1928). Likewise United States v. Colgate & Co., 250 U. S. 300, 39 Sup. Ct. 465, 63 L. ed. 992 (1919), apparently applies to Section 5 of the Federal Trade Commission Act as well as to the Sherman Act. See Federal Trade Commission v. Beech-Nut Packing Co., 257 U. S. 441, 42 Sup. Ct. 150; 66 L. ed. 307 (1922); Shakespeare Co. v. Federal Trade Commission, (C. C. A. 6th, 1931) 50 F. (2d) 758. Other cases in which the Commission has failed in its efforts to supplement the Sherman and Clayton Acts are: Federal Trade Commission v. Gratz, 253 U. S. 421, 40 Sup. Ct. 572, 64 L. ed. 993 (1920); Federal Trade Commission v. Curtis Pub. Co., 260 U. S. 568, 43 Sup. Ct. 210, 67 L. ed. 408 (1923); Federal Trade Commission v. Raymond Bros.-Clark Co., 263 U. S. 565, 44 Sup. Ct. 162, 68 L. ed. 448 (1924); Mennen Co. v. Federal Trade Commission, (C. C. A. 2d, 1923) 288 Fed. 774; National Biscuit Co. v. Federal Trade Commission, (C. C. A. 2d, 1924) 299 Fed. 733; Federal Trade Commission v. Paramount Famous-Lasky Corp., (C. C. A. 2d, 1932) 57 F. (2d) 152.

that, unless there is some injury to competitors, a trade method, no matter how unfair, cannot be a method of competition, and the Commission therefore has no jurisdiction. Thus, in *Federal Trade Commission v. Raladam Co.*,[25] the Court refused to support the Commission in its efforts to suppress misleading and possibly harmful advertising of an "obesity cure," because there was no substantial showing of injury to competitors.[26] The case has been much criticized, but apparently stands as the law today.[27]

In addition to the false advertising and misbranding cases, the Commission, until recently, has been active in preventing commercial bribery. Although the Commission has handed down many orders to restrain that practice, only three cases have reached the lower federal courts. In two of these the court found no evidence of fraud, and therefore overruled the Commission.[28] In the third case the Commission's order was affirmed without opinion.[29] In the past few years the Commission has handed down few orders to prevent commercial bribery.[30]

A recent decision by the Supreme Court in *Federal Trade Commission v. Keppel & Bros.*[31] would seem clearly to indicate that the Court will take a more favorable attitude toward the work of the Commission in the future. In that case the Court upheld the Commission's decree to prevent respondent from selling candy containing prizes and premiums (so-called "break-and-take" packages), Mr. Justice Stone pointing out that school children were induced to purchase inferior candy in the hope, usually vain, of winning a penny prize. Such merchandising, which took advantage of children incapable of exercising better judgment, was held to be within the statutory phrase.

[25] 283 U. S. 643, 51 Sup. Ct. 587, 75 L. ed. 1324 (1931).

[26] The decision by the Court that there was no showing of substantial injury to competitors might be open to some question. The Court disposed of the contention that there was injury to competing physicians by declaring that they were not entitled to protection because "They follow a profession and not a trade. . . . " Sutherland, J., 283 U. S. 643 at 653, 51 Sup. Ct. 587 at 592, 75 L. ed. 1324 at 1332 (1931). *Cf.* Federal Trade Commission v. Kay, (C. C. A. 7th, 1929) 35 F. (2d) 160, where the Court reaches an opposite conclusion on identical facts.

[27] Handler, "The Jurisdiction of the Federal Trade Commission over False Advertising," 31 COL. L. REV. 527 (1931), where the writer denies the necessity of any competition.

[28] Kinney-Rome Co. v. Federal Trade Commission, (C. C. A. 7th, 1921) 275 Fed. 665; N. J. Asbestos Co. v. Federal Trade Commission, (C. C. A. 2d, 1920) 264 Fed. 509.

[29] Federal Trade Commission v. Grand Rapids Varnish Co., (C. C. A. 6th, 1929) 41 F. (2d) 996.

[30] There is not a single decision on commercial bribery in the last four volumes of the Commission's decisions. See 14-17 F. T. C. D.

[31] 291 U. S. 304, 54 Sup. Ct. 423, 78 L. ed. 497 (1934).

The decision seems to have a double significance. In the first place, the dictum of the *Gratz* case, requiring "deception, bad faith, fraud or oppression" or a "tendency unduly to hinder competition," which has plagued the Commission since that opinion was written,[32] was impliedly rejected by the Court. It was specifically pointed out that there was here no fraud, and certainly there was no tendency to create a monopoly. Thus a much wider scope of activity seems to be opened to the Commission, which apparently may exercise jurisdiction over any method of competition which might be characterized as unfair, whether or not it is likewise fraudulent or tending to create monopoly.

Even more important was the language used by the Court. The proposition that "unfair methods of competition" was to be defined by the courts was repeated, but Mr. Justice Stone went on to say:[33]

> ". . . in passing on that question the determination of the Commission is of weight. It was created with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected,' and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would 'give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.' . . . If the point were more doubtful than we think it, we should hesitate to reject the conclusion of the Commission, based as it is upon clear, specific and comprehensive findings supported by evidence."

This seems to be the first time that the Court has expressly recognized that the Commission is a body of experts, much better qualified to pass upon the unfairness of methods of competition than a judicial body. Certainly the courts have, in the past, shown no hesitancy to reject the conclusions of the Commission. The language of the Court here points to a far more liberal recognition of the work of the Commission than has ever been accorded in the past.

In the first cases that came before the courts the judges had no trouble at all with the phrase "to the interest of the public." Thus the court in *National Harness Mfrs.' Ass'n v. Federal Trade Commis-*

[32] See, for example, Federal Trade Commission v. Raymond Bros.-Clark Co., 263 U. S. 565, 44 Sup. Ct. 162, 68 L. ed. 448 (1924); Northam Warren Corp. v. Federal Trade Commission, (C. C. A. 2d, 1932) 59 F. (2d) 196; National Biscuit Co. v. Federal Trade Commission, (C. C. A. 2d, 1924) 299 Fed. 733.

[33] 291 U. S. 304 at 314, 54 Sup. Ct. 423 at 427, 78 L. ed. 497 at 501 (1934).

sion[34] disposed of the objection that no public injury had been shown by declaring that public injury was not necessary because " . . . the remedy afforded by the statute is preventive, not compensatory." [35] A better explanation may be found in *Toledo Pipe-Threading Machine Co. v. Federal Trade Commission*,[36] where the Court declared that "To destroy competition and to compete unfairly, are not [necessarily] equivalent. . . . " [37] Public interest need not be specifically found when competition is being destroyed, since that fact alone is sufficient to establish such interest. But there must be a finding of public interest where the case is merely one of "competing unfairly." Cases of misbranding and false advertising are of this latter nature.

Whether or not this distinction is sound, it is true that only in the advertising cases have the courts heeded the objection that there is no public interest. The first case to reverse the Commission's order because of lack of sufficient public interest was *L. B. Silver Co. v. Federal Trade Commission*,[38] where the Court held, probably correctly, that the alleged false advertising was a controversy between rival hog breeders, and that the public was not interested in any way. In 1929 the Supreme Court, in *Federal Trade Commission v. Klesner*, said,[39] "This requirement [public interest] is not satisfied by proof that there has been misapprehension and confusion on the part of purchasers, or even that they have been deceived. . . . " There must be not only deception, but damage. This decision was followed by the Circuit Court of Appeals in 1930 in *Berkey & Gay Furniture Co. v. Federal Trade Commission*.[40] It is difficult to see how these cases can stand beside more recent decisions by the Supreme Court, though they have never been expressly overruled. In *Federal Trade Commission v. Royal Milling Co.*,[41] in 1933, the Court cited the *Klesner* case, but said,[42] "If consumers or dealers prefer to purchase a given

[34] (C. C. A. 6th, 1920) 268 Fed. 705.

[35] (C. C. A. 6th, 1920) 268 Fed. 705 at 712.

[36] (C. C. A. 6th, 1926) 11 F. (2d) 337.

[37] Denison, J., (C. C. A. 6th, 1926) 11 F. (2d) 337 at 343.

[38] (C. C. A. 6th, 1923) 289 Fed. 985.

[39] 280 U. S. 19 at 27, 50 Sup. Ct. 1 at 3, 74 L. ed. 138 at 145 (1929), per Brandeis, J. At least two earlier cases in the lower courts had accepted a doctrine *contra* to this. In Federal Trade Commission v. Balme, (C. C. A. 2d, 1928) 23 F. (2d) 615 at 620, Manton, J., said: "The purchasing public should be protected from deception, if that deception results in their securing an article or product which they did not intend to purchase, as well as where an article is misbranded." Also see Federal Trade Commission v. Bradley, (C. C. A. 2d, 1929) 31 F. (2d) 569.

[40] (C. C. A. 6th, 1930) 42 F. (2d) 427. See Malone, "Meaning of the Term 'Public Interest' in Federal Trade Commission Act," 17 VA. L. REV. 676 (1931).

[41] 288 U. S. 212, 53 Sup. Ct. 335, 77 L. ed. 706 (1933).

[42] Sutherland, J., 288 U. S. 212 at 216, 53 Sup. Ct. 335 at 336, 77 L. ed. 706

article because it was made by a particular manufacturer or class of manufacturers, they have the right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good, but having a different origin." The language fits the facts of the *Klesner* case, but points to the opposite conclusion. In *Federal Trade Commission v. Algoma Lumber Co.*,[43] early this year, where the facts are similar to those in the *Berkey & Gay Co.* case, the Court likewise reached the opposite result and upheld the Commission, saying,[44] "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." The Court cited neither the *Klesner* nor the *Berkey & Gay Co.* cases.

The provision of the Federal Trade Commission Act that the "findings of the Commission as to facts, if supported by testimony, shall be conclusive" has been honored as much in the breach as in the observance. Although some cases have given full effect to the provision,[45] others have had little difficulty in evading it when they felt that desirable. Several methods of thus avoiding the effect of the statute have been used:

1. Some courts have declared that in fact there was no testimony to support the findings. This procedure was followed by the Circuit Court of Appeals in *Algoma Lumber Co. v. Federal Trade Commission*,[46] where the court weighed the evidence and then declared that there was none to support the conclusions reached. The Supreme Court, in reversing the decision, reprimanded the lower court for merely paying "lip-service" to the words of the statute.[47]

at 709 (1933). See Brown Fence and Wire Co. v. Federal Trade Commission, (C. C. A. 6th, 1933) 64 F. (2d) 934.

[43] 291 U. S. 67, 54 Sup. Ct. 315, 78 L. ed. 299 (1934).

[44] Cardozo, J., 291 U. S. 67 at 78, 54 Sup. Ct. 315 at 320, 78 L. ed. 299 at 304 (1934).

[45] See Federal Trade Commission v. Algoma Lumber Co., 291 U. S. 67, 54 Sup. Ct. 315, 78 L. ed. 299 (1934); Juvenile Shoe Co. v. Federal Trade Commission, (C. C. A. 9th, 1923) 289 Fed. 57; Wholesale Grocers' Ass'n v. Federal Trade Commission, (C. C. A. 5th, 1922) 277 Fed. 657; Guarantee Veterinary Co. v. Federal Trade Commission, (C. C. A. 2d, 1922) 285 Fed. 853; Royal Baking Powder Co. v. Federal Trade Commission, (C. C. A. 2d, 1922) 281 Fed. 744. See Hankin, "Conclusiveness of the Federal Trade Commission's Findings as to Facts," 23 MICH. L. REV. 233 (1925).

[46] (C. C. A. 9th, 1933) 64 F. (2d) 618. See also Federal Trade Commission v. American Snuff Co., (C. C. A. 3d, 1930) 38 F. (2d) 547; Ohio Leather Co. v. Federal Trade Commission, (C. C. A. 6th, 1930) 45 F. (2d) 39; John Bene & Sons v. Federal Trade Commission, (C. C. A. 2d, 1924) 299 Fed. 468.

[47] 291 U. S. 67 at 73, 54 Sup. Ct. 315 at 318, 78 L. ed. 299 at 302 (1934).

2. Another method of evading the statute has been to declare that the alleged fact findings are really findings of opinion, and hence not conclusive. Perhaps the most noteworthy example may be found in the Circuit Court of Appeals opinion in *Raladam Co. v. Federal Trade Commission*,[48] where the court held that the Commission's finding that Marmola was "unsafe and unscientific" was merely a statement of opinion. The Supreme Court, in upholding the Circuit Court of Appeals, did so on other grounds.[49]

3. In *Federal Trade Commission v. Curtis Publishing Co.*,[50] the Supreme Court, over the protest of Justices Taft and Brandeis, declared that while the findings of the Commission were conclusive, the Court could find "additional facts." The justification for that case lies in the fact that the facts as found, while literally correct, presented a distorted view of the actual situation.[51] The doctrine there enunciated has been repeated elsewhere, where the same justification did not exist.[52] It is submitted that such procedure is a complete disregard of the statute.

4. In the *Gasoline Pump Cases*,[53] the Court completely ignored the statute and declared that the Commission's findings were wrong.

The result of the cases has been that this provision of the Federal Trade Commission Act has been frequently nullified in practice, and much of the Commission's usefulness has thereby been destroyed. It is to be hoped that courts in the future will give more than lip-service to the statutory formula.

2.

So far as operations by the Commission under sections 6-10 of the Act are concerned, the courts have hampered effective investigation by a number of decisions, some of which can be traced back to precedents established many years before the Commission was formed. The courts early decided that the Commission had no authority to conduct an

[48] (C. C. A. 6th, 1930) 42 F. (2d) 430 at 432-435.

[49] That there was no showing of injury to competitors. See n. 26, supra.

[50] 260 U. S. 568, 43 Sup. Ct. 210, 67 L. ed. 408 (1923).

[51] See HENDERSON, THE FEDERAL TRADE COMMISSION 138 (1924). See n. 9, supra.

[52] James S. Kirk & Co. v. Federal Trade Commission, (C. C. A. 7th, 1932) 59 F. (2d) 179; Federal Trade Commission v. Paramount Famous-Lasky Corp., (C. C. A. 2d, 1932) 57 F. (2d) 152.

[53] Federal Trade Commission v. Sinclair Refining Co., 261 U. S. 463, 43 Sup. Ct. 450, 67 L. ed. 746 (1923). See also Standard Oil Co. v. Federal Trade Commission, (C. C. A. 3d, 1922) 282 Fed. 81; Standard Oil Co. of N. Y. v. Federal Trade Commission, (C. C. A. 2d, 1921) 273 Fed. 478. The oil cases were prosecuted under the Clayton Act, but that Act contains an identical provision with the one here under discussion. 38 Stat. 734 (1914); U. S. C. tit. 15., sec. 21 (1926).

investigation into a business that was intrastate only.[54] This defect in the Commission's authority arises from constitutional, not statutory, limitations. Manufacture has been held not to be interstate commerce even if the goods produced are shipped across state lines.[55] A recent decision by Judge Knox in the District Court in New York shows a possible tendency to take a more liberal attitude on that matter, the court there declaring that a utilities holding company was engaged in interstate commerce.[56]

Though the Act appears to give the Commission the power to investigate industrial conditions without a prior complaint or allegation of violation of the anti-trust laws, the Supreme Court has refused to recognize this power. In the *Tobacco Co. Cases*[57] the Court, in a decision by Mr. Justice Holmes, cast serious doubts on the constitutionality of the power of the Commission to issue a sweeping *subpoena duces tecum* in the absence of any alleged violation of the law, on the grounds that the industry under investigation was a private, not a public, industry, and that the subpoena was therefore an unreasonable search and seizure, and a violation of the Fourth Amendment. The Court based its decision, however, on the fact that the power which the Commission was there seeking to exercise had not been specifically granted by the Act,[58] and it is possible that a sympathetic court might still declare the power to investigate in the absence of a complaint to be constitutional. The New York District Court, in *Federal Trade Commission v. Smith*,[59] indicates that all that is needed to give the Commission such power is additional legislation.

Early cases in which governmental agencies had attempted to

[54] United States v. Basic Products Co., (D. C. W. D. Pa. 1919) 260 Fed. 472.

[55] The first case on the subject was United States v. Basic Products Co., (D. C. W. D. Pa. 1919) 260 Fed. 472. This was followed by Federal Trade Commission v. P. Lorillard Co., 264 U. S. 298, 44 Sup. Ct. 336, 68 L. ed. 696 (1924); Federal Trade Commission v. Baltimore Grain Co., (D. C. Md. 1922) 284 Fed. 886, aff'd 267 U. S. 586, 45 Sup. Ct. 461, 69 L. ed. 800 (1925); Federal Trade Commission v. Claire Furnace Co., (App. D. C. 1923) 285 Fed. 936. The courts were here following a long line of prior decisions to the same effect. See Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. ed. 346 (1888); Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. ed. 715 (1886); United States v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. ed. 325 (1895). *Cf.* Utah-Idaho Sugar Co. v. Federal Trade Commission, (C. C. A. 8th, 1927) 22 F. (2d) 122.

[56] Federal Trade Commission v. Smith, (D. C. S. D. N. Y. 1932) 1 F. Supp. 247.

[57] Federal Trade Commission v. P. Lorillard Co., 264 U. S. 298, 44 Sup. Ct. 336, 68 L. ed. 696 (1924).

[58] It is difficult to see how the Act could have given the power more specifically. See Hankin, "Validity and Constitutionality of the Federal Trade Commission Act," 19 ILL. L. REV. 17 at 41 (1924).

[59] (D. C. S. D. N. Y. 1929) 34 F. (2d) 323.

question witnesses had run against the objection that a person could not be compelled to be a witness against himself without violation of the Fifth Amendment.[60] Congress met the objection by the passage of immunity statutes,[61] and the Federal Trade Commission Act has such a provision.[62] The Court of Appeals of the District of Columbia nevertheless indicated, in *Federal Trade Commission v. Millers' National Federation*,[63] that witnesses could not be subpoenaed by the Commission to answer questions relating to the management of a private business. That question was not directly before the court in that case, and the dictum was disregarded in *Federal Trade Commission v. Smith*,[64] where the District Court gave effect to the personal subpoena of the Commission and ordered the witness to answer the questions. The matter has not yet come before the Supreme Court, and there seem to be no controlling precedents.[65]

As the law stands at present, the visitorial powers of the Commission are effective only when the industry is willing to be investigated. If the Commission meets with determined opposition on the part of the industry (and such opposition is inevitable when the industry has something important to hide), its power to call for the books and files is at present negligible; its power to call personal witnesses will remain in doubt until the Supreme Court has passed on the question. In view of the present temper of the Court, and in view of the increase in governmental supervision over businesses that have hitherto been regarded as private, it is not unlikely that an amendment to the Federal Trade Commission Act meeting the objections set up by Mr. Justice Holmes in the *Tobacco Co. Cases* would be upheld as constitutional.[66]

The Federal Trade Commission has never been able to function properly. Some of the difficulties have been due to the personnel and procedure of the Commission itself, some to the unfortunate approach taken by the courts, and some to defects in the legislation

[60] Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. ed. 1110 (1892).

[61] See Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. ed. 819 (1896).

[62] Sec. 9 of the Federal Trade Commission Act, 38 Stat. 722 (1914); U. S. C. tit. 15, sec. 49 (1926).

[63] (App. D. C. 1927) 23 F. (2d) 968.

[64] (D. C. S. D. N. Y. 1929) 34 F. (2d) 323.

[65] It is unlikely that Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. ed. 819 (1896), will be considered as controlling, as the industry under consideration there was public, not private.

[66] Watkins, "An Appraisal of the Work of the Federal Trade Commission," 32 COL. L. REV. 272 at 280 (1932), is *contra*.

creating the Commission. The Commission is rapidly becoming more efficient, and the courts are likely to take a much more sympathetic view of its work in the future. Defects in the Act are not particularly important, except as to the investigatory powers under Section 6. It is to be hoped, therefore, that the Commission will be permitted to take its place as an effective part of the administrative machinery of the government.

V. R.