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THE FEDERAL TRADE COMMISSION --
A CONSTRUCTIVE FORCE IN AMERICAN BUSINESS

Address by

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The decisions of the Supreme Court in the Standard Oil case and the American Tobacco Company case, and the decrees entered in pursuance of those decisions, gave rise to a controversy that played an important part in the presidential campaign in 1912.

The Supreme Court in effect read into the all-inclusive language of the Sherman Antitrust Act a familiar principle of the common law and held that the act applied only to those restraints of trade which were undue and unreasonable.

The decrees in those cases provided for the pro rata distribution of the stocks of the subsidiary companies to the stockholders of the parent companies, instead of providing for their immediate transfer to persons not interested in or connected with the parent companies, leaving it to the mutations of time to work out a complete segregation.

The Progressive platform in 1912 bore a marked resemblance to the special message of President Roosevelt on the subject of trust regulation dated March 25, 1908, and declared in favor of publicity as a cure-all for corporate excesses, and urged the creation of a "strong fundamental administrative commission" as a means of giving effect to that policy. To such commission business men could submit their proposed transactions; and if, after full publicity no objection was made and the commission did not forbid, such proposals could be carried out with security so far as the antitrust laws were concerned.

The Republican platform declared for legislation making criminal offenses those specific acts that uniformly mark attempts to restrain and monopolize trade, and for the creation of a federal trade commission to administer the laws regulating interstate trade and commerce.

The Democratic platform did not mention a trade commission, but the idea was soon adopted; and President Wilson, in urging the creation of such an agency, referred to the wishes of the business men as follows:

They desire the advice, the definite guidance, and information which can be supplied by an administrative body, an interstate trade commission.

The campaign had been conducted on familiar lines of crimination and recrimination, and it is doubtful whether anyone in Congress had given serious consideration to the character of legislation to be enacted. The trade commission bill as introduced in the House of Representatives provided merely a board of five members - a sort of enlarged Bureau of Corporations - with sweeping powers to investigate and report on the facts of business, but with no regulatory powers.

The absence of any provision for giving definite advice and guidance to business men concerning the legality of their proposed undertakings was explained by saying that it was not desirable to authorize the agency to be created to "make terms with monopoly" - a phrase that had been employed in the campaignⁱⁿ alluding to the Standard Oil and Tobacco decrees.

When the bill reached the Senate there was added a provision authorizing the Commission to prevent resort to "unfair competition" in interstate commerce. This amendment also set up a procedure whereby the Commission might order a complaint, hear and decide the cause, issue its order to cease and desist, and, if necessary, apply to the courts for an order of enforcement; thus becoming, successively, investigator, prosecutor, judge and litigant in the same proceeding.

The Senate in its consideration of the bill rejected an amendment to authorize the Commission to pass upon proposed contract and undertakings, thus making it clear that the body to be created should not have power to give that kind of "definite advice and guidance" which business men then groping in the mazes of judicial interpretation of the law hoped they might have.

When the bill reached conference it was feared that since the words "unfair competition" had a status in the common law, the Commission would be hampered in its administration of the statute by common law precedents, and the phrase "unfair methods of competition" was substituted to give the Commission greater latitude in deciding what competitive methods should be suppressed.

The adoption of Section 5 of the Trade Commission Act, making unlawful the use of unfair methods of competition in interstate commerce, was epochal in that it marked the recognition by Congress that not all competition was good; that competition, which had theretofore been a fetish of American policy, was itself a prolific source of monopoly when carried to unreasonable lengths.

Without abandoning competition as the foundation of our economic policy, Congress declared that the competition which the law would preserve is a fair, reasonable and enlightened competition, not an unfair, benighted and destructive competition.

Competition that fosters a rugged individualism and stimulates efficiency in business is to be preserved; competition that spells the elimination of part or the impoverishment of all of an industry is to be outlawed and condemned.

Unfair competition, whether it consists in the employment of oppressive tactics against a competitor, or in the palming off of inferior goods in imitation of the high grade products of a competitor, has for its purpose the involuntary elimination of such competitor and the monopolization of that part of trade and commerce which he controls.

The manufacturer who sells his goods at or below cost for no other purpose than to keep the business from a competitor, has the soul of a monopolist and ought to be suppressed in the interest of the public safety. He not only is committing business suicide in a majority of cases, which may not be a great loss to the community, but is actually committing industrial murder in dragging others down with him, and that is an economic crime.

The same is true in varying degrees of the manufacturer who seeks to gain an unfair competitive advantage by granting secret rebates and discriminations, bribing purchasing agents or practicing other forms of commercial bribery, giving premiums or performing unusual services not customary in the particular industry, or introducing other unusual and uneconomic practices tending to demoralize the industry and pave the way for its absorption by the survivor of this guerilla warfare.

The same considerations which induced Congress to enact Section five have influenced the courts to look with favor upon the legitimate cooperation of the members of an industry through properly conducted trade organizations. Preservation of fair competition should be the chief concern of every person opposed to the extremes of industrial organization. The monopolist and the socialist walk hand in hand, their immediate objective being the same. When all business has been gathered under unified private control, these strange comrades part company; the monopolist to fatten upon the fruits of his achievements, the socialist to embrace his opportunity for carrying into effect the tenets of his philosophy.

The problem of industry today is to so regulate competition that the competitive system may be preserved; and the competitive system must be preserved, for reasons just noted, and also because it is essential to efficiency and progress in industry. A frequent charge against the competitive system is that it promotes waste and inefficiency. Nothing could be farther from the truth. Efficiency is born of the stimulus and necessities of competition. Eliminate competition and ossification sets in. While combination in the foreign trade may be necessary to meet the comptoirs and cartels of Europe, it can not be tolerated in domestic commerce, unless business is willing to accept a degree of regulation which will completely destroy individual initiative and opportunity.

The evils of undue concentration are all the more evident in an industry where the manufacturing processes are comparatively simple, the plant investment relatively small, and the product bulky and widely used. In such an industry it is perhaps better that each manufacturing unit cultivate the near-by markets and endeavor to meet the peculiar needs of the localities it serves rather than multiply transportation costs and grades in seeking an over-wide distribution. Many will no doubt disagree with this view, but the natural trend of your industry appears to be in the direction of decentralization of plants rather than the reverse, and there seems to be no sound reason for checking that tendency.

The substance of these observations is that while competitors may not enter in price agreements or schemes for apportioning territory and controlling production, there is nothing in the law which says that they may not cooperate in the promotion of the industry as a whole. They may and should cooperate to the end that all may have the fundamental and essential facts of the industry and may severally conduct their respective businesses on sound lines. While reserving complete independence of thought and action they may and should be good neighbors. If they can not be as Damon and Pythias, at least they should not be Cain and Abel.

Cases under the cumbersome procedure of Section 5 have attracted more attention than all of the Commission's activities combined and the public has largely formed its impressions of the Commission, whether good or bad, from those proceedings. The principal criticisms made of the Commission are that it has publicly cited reputable business men for offenses that they never committed; that it has taken extreme positions that it could not sustain in the courts; and that it has persisted in prosecuting alleged violations of the law that were slight and where the respondents either had discontinued the offensive practices or were willing to do so without further expenditure of time or money.

It would be unprofitable to attempt to pass judgment on these strictures because under the present rules of the Commission the conditions out of which they were born can not recur. Upon completion of the preliminary investigation and before complaint is issued the Commission now affords to every proposed respondent an opportunity to appear before a board of attorneys and present any arguments he may have as to why complaint should not issue. This procedure protects both the Commission and the respondent and its value is demonstrated by the declining number of cases that are dismissed after final hearing for failure to sustain the charges of the complaint.

In cases where the business involved is not inherently fraudulent or the practices flagrantly illegal the Commission by its stipulation rule affords to persons charged with infractions of Section 5 an opportunity to settle the case by agreement in advance of the issuance of a complaint. Under this procedure the respondent signs a stipulation as to the facts and agrees to cease and desist from the practices complained of, and in consideration thereof the Commission enter an order dismissing the application for complaint. A summary of the stipulation, without identifying the respondent, is all that is made public; and law is vindicated and its infraction cured without placing in the hands of respondent's competitors a weapon to be used against him.

Valuable as the individual proceedings under Section 5 have been, I believe that the future worth of the Commission as a constructive force in business lies in the broad expansion of the trade practice conference procedure. Trade practice conferences, formerly called trade practice submittals, are held whenever the majority of an industry indicate their willingness to meet under the auspices of the Commission for the purpose of discussing, defining and condemning unfair methods of competition that have grown up in the industry. The resolutions of such a conference, when approved by the Commission, become the standard of fair practice for the industry, and the Commission will undertake to enforce the same by proceeding against a recalcitrant minority who may seek an unfair competitive advantage by continuing the proscribed practices.

It is the policy of the Federal Trade Commission to encourage self-government in industry, and to avoid superimposed governmental regulation whenever possible, because it realizes that those who are best acquainted with the peculiar problems of an industry are best equipped to govern it. To date the Commission has held twenty-five successful trade practice conferences which have resulted in the adoption of codes of fair practice in as many industries. The ethical standards so adopted are much better calculated to meet the needs of those industries than any that could have been prescribed by the Commission without the cooperation of the industries involved.

Not only have the results been good from the standpoint of the peculiar needs of those industries, but much litigation, annoyance and expense has been saved the industries and the Commission. As the result of the recent trade practice conference of the correspondence school industry the Commission has been enabled to dismiss fifty proceedings in one stage or another, the concerns involved having squared the account by subscribing to a code of fair practice which they helped to create.

I believe all thoughtful persons will agree that this procedure is infinitely more desirable than the plan for obtaining the "definite guidance and advice" of the Commission through the approval of proposed contracts and undertakings. The Commission does not consider a paper plan upon an ex parte presentation and make itself responsible therefor by approving it as legal. Such procedure would be fraught with great danger and subject to grave abuse. The Commission merely enlists or accepts the aid of all or a majority of an industry in discharging its statutory duty to define unfair methods of competition. The meetings are open to all interested persons and usually to the public, all sides of every question are fully discussed, and the Commission before approving any resolution gives it such further consideration or makes such further research in respect of it as may be necessary to establish the propriety of the measure as a standard of fair practice.

The Commission believes that in expanding the trade practice procedure it is doing a constructive work. The Chamber of Commerce of the United States at its meeting last May voiced its approval of this work and adopted a resolution favoring the creation of trade groups in every industry to cooperate with the Commission in this way. Many of the practices which may be eliminated are not only unfair but wasteful as well. The increasing pressure

of foreign competition can not be met either by lowering American standards of living or by the "trustification" of American industry, and can only be met by increased efficiency of production through elimination of waste. It may well be, therefore, that this procedure will play an important part in enabling American industry to withstand the increasing competition of foreign producers.

The provisions conferring broad inquisitorial powers on the Commission which made up the Trade Commission bill as originally introduced, were retained, and are found in Section 6 and succeeding sections of the Act. The work of the Commission under those sections has suffered from an oft repeated charge of "politics", with the truth or falsity of which I have no concern. The Act, in addition to authorizing the Commission to make investigations on its own initiative, provides that it shall be its duty, upon the direction of the President or either House of Congress, to investigate and report the facts "relating to any alleged violations of the antitrust acts".

If the provision read "to investigate and report the facts for the information of Congress in framing legislation" it would be more in harmony with the division of powers among the three coordinate branches of the Government. In other words, it would be more appropriate to report the facts concerning violations of the law (which must necessarily be the existing law) to the Department of Justice or to a Grand Jury. Consequently the charge is regularly encountered that these inquiries are not made in the discharge of any legitimate function of Government, but are conducted solely in the interest of politics and at the behest of some one member who has a political axe to grind.

Whatever the motives that inspired the resolutions, some of the economic inquiries have been of a constructive character and have proved of inestimable benefit to the industries affected. It is greatly to be regretted that the Commission, until within the last six months, has rarely exerted its power to make economic investigations on its own initiative. In this the Commission has been shortsighted, for through the medium of constructive, scientific investigations of industrial problems of broad public interest, it can aid mightily in the adoption and observance of sound business principles.

As you know, I gained some knowledge of your industry while connected with the Department of Justice, and am familiar with the vicissitudes through which it has passed. The events of history, the nature of your industry, its dependence upon the well-being of agriculture, and a lack of self-restraint that has caused you to fluctuate between the extremes of industrial anarchy and attempted price-fixing, have served to demoralize the industry.

Prosperity depends mainly upon the creation of new wealth and the economists have a happy way of saying that Americans do not ride in automobiles because they are prosperous, but are prosperous because they ride in automobiles. It is unfortunate that the farmer has not shared directly in the development of such great wealth-producers as the electric power plant, the motor car, the motion picture, and the radio. But it is inevitable that the farmer will be rescued from his present plight for the compelling reason that the country is dependent upon him for its sustenance.

Whether it be by provision for disposing of surplus crops, or by improved methods of marketing, or the development of inland waterways, or by all of these expedients, the agriculture of the country will be rehabilitated and your markets will be restored.

Despite the skittish tendencies of the fertilizer trade you must have observed the forces of stabilization that are at work in the commerce of the country today. Stabilization of the money market through wise banking legislation; gradual stabilization of production through the dissemination of statistics and other lawful activities of trade organizations; the simplification and standardization of production and products; the introduction of new wealth-producing activities faster than the old ones are depleted or reach the saturation point - these considerations and many more point clearly to the indefinite prolongation, with only minor and temporary recessions, of the unprecedented prosperity which we now enjoy. The indications are that the business cycle will soon be as antiquated as the bicycle - if not, indeed, as extinct as the dodo.

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