Address by Col. Charles H. March, Member of the
Federal Trade Commission, at the Opening of the
Trade Practice Conference for the Wholesale
Drug Industry at Chicago, Illinois,
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ORIGIN AND POWERS OF THE COMMISSION

Gentlemen of the Conference: It is with much pleasure that I greet you members of the wholesale drug trade. I am confident this will prove to be not only a happy occasion, but that the action which you take here will be of importance and of benefit to the entire industry which you represent, to yourselves in your individual business capacities, and more important than all else, that it will be in the public interest.

In opening this conference, it seems appropriate to discuss briefly the historical background of a trade practice conference. My purpose is to analyze the position this gathering holds in the chain of events which makes up the history of the relation between government and business.

The Federal Trade Commission has conducted a work not of a spectacular nature, except possibly in isolated instances. It may be worth while, therefore, to review briefly the history of the Commission, and to restate the purposes for which it was created and the manner in which those purposes have been carried out to the advantage of business and government.

As you undoubtedly know, the Commission functions under the Federal Trade Commission Act, which was approved September 26, 1914. The Commission was designed to fill a need, the existence of which all political parties had realized for some years. The methods proposed for meeting this need were in dispute, but many agreed that the continuation of the best American traditions of equal opportunity for individual effort required some authoritative body to guarantee such traditions. In 1914, the time seemed ripe for such legislation. However, there was still some conflict of opinion in Congress with regard to what form the new control should take. Moreover, the evidence of political power of big business had already made itself apparent, and the hostility which was later to complicate the Commission's work was evident even in the debates of Congress leading to the creation of the Commission.

The broad principle underlying the creation of the Federal Trade Commission was expressed by President Woodrow Wilson, following the passage of the Federal Trade Commission Act, when he said:

> "We have created, in the Federal Trade Commission, a means of inquiry and of accommodation in the field of commerce which ought to both coordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law. * * * The Trade Commission substitutes counsel and accommodation for the harsher processes of legal

restraint. * * * A Trade Commission has been created with powers of guidance and accommodation which have relieved business men of unfounded fears and set them upon the road of helpful and confident enterprise."

The Federal Trade Commission Act was passed in 1914 and the Commission was launched under a mandate requiring it to "prevent persons, partnerships, or corporations, except banks and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce." The Commission was directed, in cases where it believed it would be in the public interest, to take action against any person, partnership or corporation which it had reason to believe was using unfair methods of competition in commerce.

It may be of interest to note here how the Commission's attempt to carry out its mandate came to be restricted. The courts interpreted the provision in question to mean that the Commission might only take action in cases where competition existed which would injure a competitor, so that it became impossible to institute proceedings in numerous cases where unfair methods of competition were used which adversely affected the public interest, but which did not involve injury to a competitor. In other words, something of a limited protection to existing monopolies or near-monopolies was unintentionally read into the Act.

Less than a month after the passage of the Federal Trade Commission Act, the Clayton Act came into force. This enactment enumerated certain undesirable trade practices and made them unlawful where their effect was substantially to lessen competition or where they tended to create a monopoly in any line of commerce. The practices thus outlawed were -

(1) Discrimination in prices between different purchasers of commodities;

(2) The making of leases, sales or contracts for sale of goods, binding the lessee or purchaser not to use or deal in the goods of any competitor of the lessor or seller;

(3) The direct or indirect acquisition by a corporation of the stock or other share capital of another corporation (except for investment), or the acquisition of the whole or any part of the stock, etc., of two or more corporations engaged in commerce -- the well known limitation upon holding companies; and

(4) Interlocking directorates.

The Commission was given authority to enforce these provisions of the Clayton Act, except with reference to common carriers and banking institutions, which were placed respectively under the jurisdiction of the Interstate Commerce Commission, and the Federal Reserve Board and the Comptroller of the Currency.

I should mention in passing that the Commission's power extended also to certain matters under the Sherman Antitrust Law of 1890. In particular, the Commission investigated the results of "consent" decrees which had been entered under the Sherman Law, and in cases where it believed that violations of such decrees had occurred, it recommended their modification.

INVESTIGATIONS BY THE COMMISSION

Investigations of greater importance have been carried out under the powers conferred upon the Commission by Section 6 of the Federal Trade Commission Act. It was difficult, of course, to maintain a continuous record, year after year, of the activities of whole industries, without the services of a larger staff and more funds than the Commission has had at its disposal. Nevertheless, the numerous investigations undertaken have had important long range results.

The very fact of the publicity attendant upon investigations of this nature has been a powerful corrective of economic abuses. The example of the present electric and gas utilities inquiry is current evidence thereof. The ultimate effect of this inquiry cannot, of course, yet be estimated, but there have already been reductions in service charges, construction fees, and other charges by holding companies, which have reduced costs to the operating companies many millions of dollars. Still greater savings have resulted to consumers from rate reductions put into effect by the utilities since the inquiry began.

Apart from the effect of publicity, these investigations have been important as the basis of major legislative and other action.

Thus, the Bureau of Corporations' attack upon the arbitrary system of fixed differences for future deliveries on the New York Cotton Exchange ultimately led to the passage of the Cotton Futures Act. Also the New York Cotton Exchange, after some delay, adopted recommendations of the Commission which tended substantially to narrow the buying spread upon which cotton is purchased from farmers, and thus saved the latter many millions. This result, along with other acts, indicates that the Commission has been able to help American agriculture very materially.

The serious condition of agriculture, and its significance, was well stated by Mr. Roosevelt in a speech at the Boston Arena on October 31st, 1932. He said:

> "****By permitting agriculture to fall into ruin millions of workers from the farms have crowded into our cities. These men have added to unemployment. They are here because agriculture is prostrated. A restored agriculture will check this migration from the farm. It will keep these farmers happily at home. It will leave more jobs for you. It will provide a market for your products. That is the key to national economic restoration."

These words are fully as important to the wholesale drug trade as to any other business. The restoration of our basic industry, agriculture, must precede the recovery of all businesses, including your own. Agriculture, the foundation of our economic structure, is undermined and it will do no good to repair other parts of the building until the foundation is strengthened.

The Commission's Meat Packing report concluded another investigation which had an important effect. It attacked the monopolistic activities of the packers in the food trade field and led directly to the Packer Consent decree. Again, the report on "Cooperation in American Export Trade" led to the passage of the Webb-Pomerene Act.

Other reports of the Commission led to action by the Department of Justice against price-fixing activities by a number of industries, and the undue raising of coal prices was prevented in 1917 and again in 1923 as the result of the Commission's coal reports. The publicity attendant on the chain store inquiry has had important results, and the report on the basing point system in the cement industry discloses how manufacturers were able to make identical prices for cement in different markets. I shall not take up your time by enumerating other reports of the Commission and their attendant results. I have referred to enough to show you the vitally important nature of this phase of the Commission's work.

The Commission is now engaged in much work of this nature. It may be of interest to refer, in this connection, to a decision of the Commission last spring to obtain reports on radio advertising, with a view to forestalling possible misrepresentation through this medium. The broadcasting companies have given us a remarkable degree of cooperation in this matter. This work fits logically into the campaign against all types of fraudulent advertising in which the Commission has been engaged for some years. It has proceeded against hundreds of fraudulent advertisers and publishers and the advertising agencies that handle such advertisements. The newspapers and magazines of the country have cooperated with the Commission by rejecting a large volume of advertising of this character, and the report by the National Better Business Bureau of the decrease in fraudulent advertising since the opening of the Commission's campaign is encouraging. Fraudulent advertisements as a whole, were judged to have decreased 50% between 1928 and 1930.

As an example of important investigative work which may well be done in the future, let me call your attention to the need for comprehensive data on cost of production, especially the labor costs, in relation to investments and profits of manufacturers. The requirements for furnishing labor and open-price data under the NRA codes, and the difficulties involved in enforcing such requirements, emphasize the importance of obtaining full and accurate information on this question.

ENFORCEMENT OF THE ANTITRUST LAWS

You have noticed that the fundamental purpose of the Federal Trade Commission Act and the Clayton Act was to eliminate practices which tended substantially to lessen competition or which tended to create monopolies.

The intention of the framers of the Act would seem to be that the Commission should have a considerable degree of discretion in determining what practices manifested these tendencies, and under what conditions. Although the practices deemed unlawful under the Clayton Act were enumerated, it was apparently intended to impose the duty upon the Commission to determine when a given set of facts constituted the acts in question. The findings of the Commission as to the facts, if supported by testimony, were expressly stated to be conclusive. Under the Federal Trade Commission Act the same provision as to the Commission's findings of fact is in effect. This would lead, one would believe, to the conclusion that the Commission's determination of what constituted "unfair methods of competition in commerce" should be, if not conclusive, at least entitled to preponderant weight.

However, there would seem to be a gradual tendency away from public demand for enforcement of these laws. This tendency, in my opinion, has been fostered on the one hand by the interests against whose practices those laws were directed, and on the other by a growing belief that the preservation of competition was an economic fallacy. It must, I believe, be admitted that this attitude has been artificially encouraged. It is all too easy to reason that since great enterprises exist in considerable numbers, and since they are frequently able to operate at exceedingly low cost, the public benefits more by their encouragement than by their regulation. This argument ignores the attendant results to the public which may follow the concentration of enterprise almost exclusively in large units. Experience has shown that the capacity some large businesses may have to give the public the benefit of low prices is often exercised at great cost to themselves, but at a cost which they are in a position to afford temporarily. It is as true now as it was twenty years ago, once success has attended the efforts of these large enterprises to drive out their small competitors who cannot meet these prices without fatal loss to themselves, that such organizations are then in a position to raise prices to even higher levels. Nor is there indication that they are hesitant to use their power when necessary.

In my opinion, the economic depression is traceable in no small degree to this and similar practices of large businesses, many of them unsoundly and excessively capitalized. These practices were not sufficiently controlled, because the whole country was so blinded by prosperity that the growth of monopolies seemed beneficial rather than dangerous.

Enterprises of a monopolistic character charged more than the traffic would bear. They exploited their position without sufficient regard for the consequences. In reducing competition they seemed to be on the way to greater success. Actually, however, fewer people were able to buy the products of those who had concentrated output in their own hands, for such concentration had deprived many of their livelihood. The result, though often called overproduction, might equally well be termed underconsumption, for many of those who should have been consumers lost their purchasing power when they were no longer able to fight against the methods used by their larger competitors.

It is my conviction that to allow large businesses a free hand in oppressing competitors is not only disadvantageous to the purchasing and consuming public in the long run, but is directly contrary to the principle to which I

referred, on which our government was founded. I may state this principle again as that of equal opportunity for all who are fitted to improve their position by reason of their energy and initiative. I do not mean that it was intended to protect the lazy and the incompetent; but I do mean that individual effort -- the effort of every man to use his brain and his energies to the full, and to reap a fair reward from this use - should be preserved if there is still to be anything distinctive about our national character -- anything which we may still point to as truly American.

When I say this I am not merely bandying empty phrases. I am expressing a thought which is none the less true, even though often considered. I fear we have taken the sturdiness of our American individualism too much for granted of late. It is time we examined this American characteristic again to see whether or not we are losing it, and to decide whether or not we wish to lose it and to replace it with reliance on the Government, or on others.

It used to be an axiom that the protection of the individual and the resultant freedom to develop individual capacity, should be protected by the antitrust laws in the economic field. It is difficult to understand how individual capacity and individual achievement can develop in a society which permits the concentration of economic opportunity in a few hands. Individual capacity must have a fair chance to assert itself. If there is no field for it, before long it will seem desirable, because it is easy, to let the few who have seized their opportunity and preempted that of other people dominate the situation.

If, however, we are to regard the process of concentration of business in a few hands as uncontrollable, I submit that it is time to admit that our foremost national aim, namely, individual opportunity, is a failure, and that what we had believed was out primary national trait, individual initiative, is either lost or no longer worth preserving.

In any event, the Federal Trade Commission began its career dedicated, to put it in simple language, to the preservation of a fair business opportunity for all. It soon met a certain effort to have its functions limited, in my opinion to a greater extent than was intended by Congress at the time of the enactment of the law. The Commission did restrict and eradicate many unlawful practices. But it developed that the courts felt it encumbent on them to keep in their own hands the determination of what constituted unfair methods of competition in commerce. Moreover, the Commission was not given any considerable latitude in determining, under the Clayton Act, whether certain practices tended to create a monopoly.

The various grants of power to the Commission which I enumerated earlier are closely connected. The Commission's authority and potential activities must be looked upon as a whole, since any given fact situation may involve the use of any or all of the enabling clauses of the Commission's statute. For example, the same complaint may deal with both unfair methods of competition and price discrimination tending to create a monopoly. I emphasize this because it is particularly significant in the light of current careless statements that the antitrust laws are meaningless, not only because they represent an economic fallacy but because they are too vague and general in their terms

to be enforceable. I have only touched upon the economic question here involved, but it does not concern us at this time to go more deeply into the province of economics. Other criticisms of the antitrust laws, however, deserve further attention.

UNFAIR METHODS OF COMPETITION

When the Federal Trade Commission Act was under consideration with regard to the meaning of the phrase "unfair methods of competition", it was a subject of considerable debate in Congress. It was advisedly determined at that time not to attempt any statutory definition of the phrase, but there was a clear intention disclosed that the interpretation of "unfair methods of competition" should rest with the Commission. In this connection it is of interest to recall the words of the report of the Senate Committee on Interstate Commerce on the Federal Trade Commission bill:

> "The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better ....."

A majority of the Supreme Court of the United States, however, decided that the determination of what constituted "unfair methods of competition" rested with the courts and not with the Commission. The court also concluded that this phrase is applicable only to practices theretofore "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". (Federal Trade Commission vs. Gratz (1920), 253 U. S. 421).

The Commission was in a position to chart the criteria of unfair competition and gradually to bring a degree of definiteness into the law on this subject. In 1916, in a memorandum prepared for office use, the Commission succeeded in grouping many of the acts which had been classed by the courts as unlawful, unfair, or illegitimate competition, under some sixteen headings, as follows:

1. Inducing breach of competitor's contracts.
2. Enticing employees from the services of competitors.
3. Betrayal of trade secrets.
4. Betrayal of confidential information.
5. Appropriation of values created by a competitors expenditures.
6. Defamation of competitors and disparagement of competitor's goods.
7. Misrepresentation by means other than words.
8. Misuse of testimonials.
9. Intimidation of competitor's customers by threats of infringement suits.
10. Combinations to cut off competitor's supplies or to destroy his market.

11. Intimidation, obstruction, and molestation of a competitor or his customers.
12. Exclusive dealing.
13. Bribery of employees.
14. Competing with the purchaser after the sale of business and goodwill.
15. Passing off the goods of one manufacturer or dealer as those of another.
16. Conspiracies to injure competitors.

These groups represented practices which had been found to violate the common standards of fairness at common law. The Commission has had notable success in enforcing these old standards. Approximately one-half of the cease and desist orders issued in the first fourteen years of the Commission's life were based on misrepresentation, the seventh group in the list I have just given. Also, successful proceedings have been taken against boycotts, conspiracies to injure competitors, and commercial bribery.

The Commission, however, was also in a position to give a much needed flexibility to this law of unfair competition and to do this without the sacrifice of definiteness. This possibility, however, was limited by the opinion of the Supreme Court in the Gratz case.

The point is that the antitrust laws need not have been vague and uncertain, as I have suggested that they are often considered. If the logical process of development which Congress intended had been allowed to go on, through the addition by the Commission, from time to time, to the list of "unfair methods of competition", of those practices which new ingenuity or new conditions rendered "unfair", the laws against unfair methods of competition might have been applied more effectively. However, the Commission has accomplished what might be termed a piece-meal codification of the law of fair trade practices by devoting some of its best energies to a cooperative movement to eliminate abuses in individual industries.

TRADE PRACTICE CONFERENCES

The purpose of the Federal Trade Commission Act and Clayton Act, as well as of the Sherman Act, was not the maintenance of competition as an end in itself, but only as a means to the greater goal which I have referred to - the preservation of a fair opportunity for all. It is with this ultimate purpose in mind alone that we can legitimately regard the preservation of competition as a desirable end. It therefore became apparent to the Commission that a certain amount of controlled cooperation was by no means inconsistent with the ideals of the antitrust laws and was, moreover, highly beneficial to all units of industry, both large and small. With this idea in mind the Commission instituted what has been called a system of "cooperative competition", through trade practice conferences, originally started in 1919 and called "trade practice submittals". The number of individual complaints which have been, and may be, avoided by the means of trade practice conferences has run into the thousands.

These conferences have covered an extraordinarily wide range of industries. A selection of the names of those for which they have been held will indicate this breadth of subject-matter:

All-cotton wash goods
Crushed stone industry
Cut stone industry (building stone)
Anti-hog cholera serum and virus
Commercial cold storage
Electrical wholesalers
Electrical contracting
Fur industry
Jewelry industry
Live poultry industry in New York City
Waxed paper industry
Periodical publishers
Scrap iron and steel industry
Reinforcing steel fabricating and distributing industry
Golf ball industry
Subscription book publishers
Embroidery industry
Grocery industry
Paper bag industry
Petroleum and petroleum products
Plumbing and heating
School supply distributors
Correspondence schools
Bituminous coal in the Southwest and in Utah.
Steel office furniture industry
Structural clay tile industry
Wall paper industry
Insecticide and disinfectant industry
Castile soap industry
Fertilizer industry
Face brick industry
Common brick industry
Direct selling companies

This list might easily be extended, for the total number of conferences held has been approximately 150, and the total number of rules adopted by these conferences and approved by the Commission and, in the main, well observed by the industries, has been between 1,500 and 2,000.

Many of these rules, needless to say, are more or less technical, and of interest primarily to the particular industry concerned. On the other hand, many rules are, at least in principle, common to nearly all industries. These more general rules have been phrased for the individual industry in terms making them applicable to it. To take but one pertinent example, misrepresentation of various sorts has been condemned in many of the different rules, but in each

case the misrepresentation dealt with is related to the conditions in the particular industry which required correction.

The Commission has no desire to badger industry, nor does it wish to spend the public funds in legal proceedings where this can be avoided without sacrifice of the fundamental purpose of the laws against unfair methods of competition. It is fair to say that a single trade practice conference may obviate the necessity of issuing literally hundreds of complaints. Of course, the Commission cannot abdicate its authority in a situation where the desires of an industry or a part of an industry are not consonant with the purposes of the law. But if legal proceedings can be reduced even to an appreciable degree, it is easy to see that greater efficiency can attend the disposal of such proceedings as may have to be instituted. Experience has shown that trade practice conferences can reduce the necessity for litigation in a very considerable measure.

I will not take your time to go into detail with regard to the mechanics of a trade practice conference, for you are about to gain this information first hand by your own experience. That is certainly the most appropriate way of acquiring any knowledge. I want to say a word of prophecy, however, about the general function of the trade practice conference. In spite of the considerable number of conferences held and notwithstanding the favorable opinions of the results of these conferences expressed by members of the industries which participated in them, it is my belief that the potential value of this institution has not yet been realized.

FUTURE OF "COOPERATIVE COMPETITION"

Many good results, we know have been attained by the NRA through its efforts to increase employment and improve working conditions. In the course of the NRA's operation, moreover, it has gradually become patent that the antitrust laws still contain real wisdom even for the problems of today. The realization that the fixing of fair prices is not only dangerous but virtually impossible is nothing but a return to an earlier judgment -- one, in fact, centuries old. Price fixing and other features of exaggerated economic regulation have been familiar to men of all ages, from ancient China and Egypt, through the days of European mercantilism, to the present. And men of all ages have observed the failure of their attempts to that end.

I should like to quote in this connection some remarks of Mr. Donald R. Richberg in an address given in New York on November 21st. After stating concisely the fundamental purpose of the antitrust laws and the desirability of cooperation between business men within the bounds of those laws (the idea at the root of trade practice conferences), he said:

> "*** If we are to develop an economic law and order and provide the basis of a democratic method of planning industrial programs, clearly we must change one misconception of the purpose of the antitrust laws. Those laws were passed to preserve competition - even by the difficult method of compelling men to compete. They were not intended as restraints upon agreements to compete fairly; and yet in their enforcement they have served frequently, not only to prevent agreements to compete fairly, but also as a means of preventing efforts to compete intelligently.

"It is a preposterous idea that in the present industrial world men of common interest should not be permitted freely to exchange information, to discuss policies and generally to improve their abilities to operate their enterprises in the way most effective to serve public needs.

"It is also a mistake to think that any law can prevent such natural activities. But in such associations there is always present the temptation to which business men have yielded far too often for their own good - the temptation to seek agreements to limit a fair competition, under the misguided notion that in that way profits may be made more certain. Business men have looked upon the cartel method of business regulation as providing in some mysterious way for having the cake and eating it - that is, preserving a competitive system and eliminating the risks of competition.

"This effort cannot succeed and I do not believe that it should succeed - because if it succeeded it would lead eventually to state control of industry. A democratic people will not tolerate the idea of price fixing by private agreement. They will insist on either stopping the system or placing it under public control."

Let me point out, incidentally, that the type of enforcement of the anti-trust laws to which Mr. Richberg refers -- namely, preventing efforts to compete fairly and intelligently -- is just the type of enforcement against which the Federal Trade Commission set its face when it evolved the trade practice conference.

The settlement of the ancient conflict between the idea of free competition and the concept of combination in the interests of economy, has, I believe, always lain in the trade practice conference idea, "cooperative competition". For fifteen years the Federal Trade Commission has been applying this solution to the problem, and industry has been lending a helping hand.

Why has the problem not been solved? Because the realization that in this institution of the trade practice conference lay the germ of a general answer to the problem of competition versus monopoly (the problem of the preservation of individual opportunity) has not permeated the minds either of all the great industrialists or of officialdom in general. The experience of the NRA, however, exemplified by the remarks which I have quoted from the lips of Mr. Richberg, indicates that this realization is at last becoming widespread. The successful trade practice conferences show that the American individualistic philosophy, tempered and therefore strengthened by cooperation, with a watchful regulatory body in the background to check those who evidence bad faith, may yet be victorious.

Not only is this conference which you are opening highly significant from this fundamental point of view, but it bids fair to be one of the most successful conferences of this type yet held. This should be so because you come here with the advantage of months of study and consideration by your own experts of the problems of your industry.

If this experience can be successfully applied to the working out of a satisfactory set of fair principles for the conduct of your trade, it will benefit not only this industry but, by example, all other industries which have serious problems to solve. And, needless to say, the solution of these problems by industry with the advice which the Federal Trade Commission staff is fitted by experience to give, will be beneficial not only to industry, but to the public as a whole -- and the public is after all the ultimate beneficiary of all fair trade practices and the ultimate party injured by those which are not fair.

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