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REMARKS OF

WILLIAM C. KERN, COMMISSIONER

FEDERAL TRADE COMMISSION

Before the

INDIANAPOLIS BAR ASSOCIATION

Indianapolis, Indiana

May 8, 1957

REMARKS BY COMMISSIONER WILLIAM C. KERN,
FEDERAL TRADE COMMISSION, BEFORE THE
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Mr. Chairman and Members of the Indianapolis Bar Association:

Thank you indeed, Mr. Chairman, for your warm words of welcome back to this bar of which I was a member for so many years. You stated in most polite, in most graceful, and in most euphemistic language the old adage that a bad penny always turns up. I find myself asking myself: "Is this the Lord Mayor riding in state to Mansion House, or is it the highwayman Dick marching between the javelin men on his last journey to Tyburn?"

"Put a red coat upon my back, and a gold chain around my neck, and a plum pudding before me, and I shall act the part of the Lord Mayor very well. .

"Pinch my belly with hunger and shrivel my fingers with cold, and put a purse before me on Hounslow Heath, and I shall take it."

I think what Thackeray was saying, if interpreted in terms of my own life, is that it is easier to find laudatory remarks to utter about a man when he has a red coat upon his back than when his belly was pinched with hunger as a struggling young attorney practicing law back here in Marion County about twenty years ago. But lest the analogy of the present position which I hold to a red coat upon my back creates the erroneous impression among my old friends here that I have been stricken with Potomac Fever - which is a particularly unbearable brand of egotism sometimes affecting those appointed to Federal office, let me at once dispel it by telling you a story about Mr. Robert Cutler, prominent Boston banker, who was appointed some time ago as the President's adviser at the White House on national security matters. Shortly after the appointment was made known two of his fellow club members in a Boston club were discussing the fact. One of them said: "You know Bobbie Cutler's making quite a name for himself these days." "Yes, I know," said the other, "but only nationally!"

In short, the most valued, the most treasured recognition is that which comes from the folks back home - who know you, who judge you, and who sometimes finally forgive you. So I am deeply grateful for this recognition of yours in asking me out here to speak before you tonight. I am indeed among

old friends. And friendship is a word not lightly used by Hoosiers. Nor is a Hoosier ever completely weaned away from his native soil. So this is a homecoming for me tonight in the happiest sense.

And now let me discuss for a few moments the Federal Trade Commission and its place as a part of the administrative process.

Following the Supreme Court decisions in 1911 in the Standard Oil and American Tobacco cases, the conviction became general that existing legislation was ineffective in curbing industrial combinations. There was a persistent public outcry for additional legislative curbs to stop combinations in restraint of trade in their incipiency and to outlaw unfair methods of competition which had been, and could be, used in the attainment of monopolistic positions in industries. There was a growing realization, as well, that the judicial system needed supplementation in the handling of trade abuses and was not adequate to cope with such problems in a rapidly developing industrial economy. In the 1912 political campaign all the major political parties by platform committals expressly or impliedly advocated a Trade Commission. After the election of that year Woodrow Wilson wasted no time in urging the establishment of such a law upon the Congress and the final outcome was the enactment of two statutes, one creating the Federal Trade Commission and investing it with power to prevent unfair methods of competition in commerce, and the other, the Clayton Act, supplementing the Sherman and Federal Trade Commission Acts and dealing with certain specific practices. It is a pleasant thing to tell you that one of Indiana's Senators at the time and a former member of this association, played no small part in securing the enactment of this legislation, and it is a source of pride for me to be able to say that that Senator was my father. So, believe me, there were no reservations in my mind when I took the oath of office of a Commissioner given to me by my brother, John, who is known to you as a former member of this association, on September 26, 1955 -- to uphold and enforce these laws as well as the other laws coming within the Commission's responsibilities.

Quantitatively speaking, the greatest portion of the Commission's work has been carried on under Section 5 of the F.T.C. Act. You can see that the words "unfair methods of competition in commerce", later broadened by the Wheeler-Lea Amendments to this Act in 1938 to include "unfair acts or

practices in commerce", are very broad terms. Although the ultimate determination of whether a particular practice is unfair in the light of the facts is for the courts, nevertheless there is a real necessity for continued study by trained experts in order to keep vitality in such broad terminology by constant redefinition to fit the needs of a rapidly changing economy. Here is a statute ideally fitted to the administrative process and, indeed, one which could not properly be enforced or interpreted by any other means. This the courts have specifically recognized. As the Supreme Court, speaking through Chief Justice Stone, said in Federal Trade Commission v. Keppel and Bro., Inc., 291 U.S. 304:

> "While this Court has declared that it is for the courts to determine what practices or methods of competition are to be deemed unfair * * * 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."

Speaking of the Commission's power under Section 5 of the Federal Trade Commission Act, Judge Learned Hand once said, "Its [Commission's] duty ... is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop." (F.T.C. v. Standard Education Society, 86 F. 2d 692.)

Generally speaking, complaints charging false advertising and mislabeling are based on this section, as are proceedings charging price conspiracy (which I will deal with in more detail later), division of trade territory, maintenance of uniform terms and conditions of sale, and other trade restraints.

When you consider that in the field of false and deceptive advertising alone the Commission, with an annual appropriation of approximately 6 million dollars and some 700 employees, is called upon to police a 400-billion-dollar gross national product economy wherein over 9 billion dollars was spent last year for advertising products in the United States, you must admit that we are confronted with a monumental task. The fight for the consumer's dollar is not only intense but is carried forward through progressively new and different media. Radio and television have enlarged the problem and this area has become a matter of considerable public interest. The Commission recently has set up a special group in the Bureau of Investigation to check and monitor this type of advertising. Moreover, the ingenuity of certain highly competitive sellers is almost unbelievable. I recall one story of a salmon broker on the West Coast who found himself with a large consignment of extremely poor quality salmon, white in color: he had new labels placed on the cans which prominently stated "first quality white salmon -- guaranteed not to turn red". Another classic of this type was an advertiser against whom we had secured an order to cease and desist. He neatly turned this to his advantage by advertising that his company had been cited by the Federal Trade Commission.

Turning now to the Clayton Act as amended by the Robinson-Patman Act of 1936, we see that Section 2 thereof strikes at various discriminatory practices in the distribution of goods in commerce. It not only prohibits price discrimination and related discriminatory methods, but proscribes the payment of certain brokerages and commissions except for services rendered, and prevents the payment by manufacturers or sellers for, or the furnishing of services or facilities to, dealers unless payments or services or facilities furnished be made available to all competing customers on proportionately equal terms. Likewise, Section 2(f) of this Act makes illegal the knowing inducement or receipt of any illegal price discrimination. This section, which is the part of the Clayton Act amended by the Robinson-Patman Act, is complicated in its terms and has created a wealth of litigation for lawyers in the antitrust field. From the time the amendment became effective until January 1 of this year, the Commission had decided over 400 cases involving charges of violation of one or more sections of this Act. In about 70% of these cases cease-and-desist orders have issued. The late Mr. Justice Jackson made the following comment about it in the Ruberoid case[1]:

1/ Ruberoid Co. v. United States, 343 U.S. 470, 483-4 (1952).

"This Section of the Act admittedly is complicated and vague in itself and even more so in its context. Indeed, the Court of Appeals seems to have thought it almost beyond understanding. By the Act, nothing is commanded to be done or omitted unconditionally, and no conduct or omission is per se punishable. The commercial discriminations which it forbids are those only which meet three statutory conditions and survive the test of five statutory provisos. To determine which of its overlapping and conflicting policies shall govern a particular case involves inquiry into grades and qualities of goods, discriminations and their economic effects on interstate commerce, competition between customers, the economic effect of price differentials to lessen competition or tend to create a monopoly, allowance for differences in cost of manufacturing, sale or delivery, and good faith in meeting of the prices, services or facilities of competitors."

The interpretation of the good faith defense of meeting competition contained in Section 2(b) of the Act is now before the Supreme Court for a second time in the celebrated Standard Oil of Indiana case[2/] and will be argued shortly. Clarifying and strengthening legislation which the majority of the Commission favors is presently being considered by the Congress.

Section 3 of the Clayton Act prohibits under certain circumstances the use of full requirements or exclusive dealing contracts and so-called tying contracts by which the buyer is required to purchase certain goods in connection with the purchase of other merchandise or in connection with the leasing of machinery. After the landmark decision of the Standards Stations case[3/] the Commission became quite active in this area of enforcement. As a trial attorney I spent several years trying the Commission's more important cases in this field, including those against Harley-Davidson Motor Co., Revlon Products Co., Dictograph Products, Inc., and Anchor Serum Co. The latter two cases were affirmed by the 2d and 7th Circuit Courts of Appeal respectively and are considered landmark decisions in this area of antitrust law.[4/]

2/ F.T.C. Docket 4389

3/ Standard Oil Co. v. United States, 337 U.S. 293 (1949).

4/ Dictograph Products, Inc. v. FTC, 217 F. 2d 821, cert. denied 350 U.S. 856; Anchor Serum Co. v. FTC, 217 F. 2d 867.

Section 7 of the Clayton Act presents one of the Commission's most important responsibilities, the so-called antimerger section of the Act. This section was strengthened by amendment in 1950 and the 84th Congress substantially increased the Commission's appropriation for increased activity in this area. The Commission has issued 18 complaints in the antimerger field since 1950, three of which have been concluded by orders to cease and desist, the others being in various stages of litigation. These are all very formidable and complex antitrust cases to try -- each one is "The Big Case ". They involve complex factual and legal considerations. The Commission admittedly is ploughing much new ground in connection with its Section 7 work. We believe and have advised the Congress that the present Section 7 has certain weaknesses. For example, it does not require any prior notification of intention to effect a merger, leaving the Commission with only a divestiture remedy after an unlawful acquisition has been consummated. This remedy may prove to be impractical, when, for example, assets have been so scrambled that they cannot be effectively separated. Furthermore, the Commission has no power to apply to the court for a preliminary restraining order, a remedy presently available to the Department of Justice. The Commission has recommended further strengthening legislation, which is now under consideration by Congress.

Time will permit only a brief discussion of other acts administered by the Commission. The Webb-Pomerene Export Trade Act confers jurisdiction over associations engaged in foreign commerce and provides a limited exemption from the antitrust laws of corporations so engaged, although such organizations are required to file with the Commission certain data and are subject to the Commission's supervision.

The Lanham Trade-Mark Act empowers the Commission to apply for cancellation of certain trade-marks registered with the Patent Office where same are improperly used in competition.

The Oleomargarine Act broadens the scope of the basic Federal Trade Commission Act by making illegal the deceptive description of oleomargarine in terms normally applied to butter or other dairy products.

The Wool Products Labeling Act and the Fur Products Labeling Act empower the Commission to require informative labeling to reveal the true composition of products which

contain wool or fur. Failure to label such products properly, or to make certain disclosures as required by rules promulgated by the Commission, is declared to violate the Federal Trade Commission Act, violators being thereby subjected to the regular processes of the Commission. Vigorous policing of the channels of distribution to secure compliance with these Acts has been of vast benefit to the purchasing public. For example, before the Commission's entrance into this field, there were 96 different furs sold under many names but all derived from the rabbit. (Indeed one especially interesting rabbit fur was being sold as "Baltic Lion".) Fur advertising now must comply with a name guide for fur products promulgated by the Commission. This Act has been most helpful in cleaning up former unsavory practices in the fur industry.

The last act entrusted to the Commission's jurisdiction is the Flammable Fabrics Act, passed in 1953, designed to protect the public against the dangers of flammable fabrics and wearing apparel; it makes the manufacture, transportation or sale of such fabrics a violation of the Federal Trade Commission Act.

The unthinking may gather the impression that the monetary savings to consumers from the Commission's policing the channels of commerce through the enforcement of these various acts are insignificant, but that notion is quickly dispelled by examination of the hundreds of Commission orders directed against misrepresentation, quackery and false advertising in all lines of trade and commerce. It has been conservatively estimated that millions of dollars annually have been saved to consumers through the outlawry of such unsavory practices.

The Commission's activities in proceeding against trade restraints arising from unlawful price-fixing agreements likewise constitute an important element of consumer protection, for it can readily be seen that the result of artificial enhancements of prices by price-fixing arrangements nullifying the effects of fair and free competitive infulences in an open market adversely affects consumer welfare. I have reserved for the last a discussion of what is one of the Commission's most important functions and responsibilities -- that of proceeding against price-fixing combinations and conspiracies under Section 5 of the Federal Trade Commission

Act. One would at first blush think of such cases as quite simple, as the law relating thereto is crystal clear and makes price-fixing arrangements illegal per se. As the court, speaking through Judge Learned Hand, said in United States v. Aluminum Company of America:5/

> "It is settled, at least as to #1, that there are some contracts restricting competition which are unlawful, no matter how beneficient they may be; no industrial exigency will justify them; they are absolutely forbidden ... The Supreme Court unconditionally condemned all contracts fixing prices in United States v. Trenton Potteries Co., 273 U.S. 392, 397, 398, 47 S. Ct. 377, 71 L. Ed. 700, 50 A.L.R. 989; and whatever doubts may have arisen as to that decision from Appalachian Coals Inc. v. United States, 288 U.S. 344, 53 S. Ct. 471, 77 L. Ed. 825, they were laid by United States v. Socony-Vaccum Co., 310 U.S. 150, 220-224, 60 S. Ct. 811, 84 L. Ed. 1129 * * *" (Underscoring supplied)

Indeed it is not even necessary that there be evidence of a meeting of the parties to a conspiracy to restrain trade; as the court said in William Goldman Theatres v. Loew's, Inc.6/:

> "The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age."

Yet, as well settled as the law is, the Commission since July 1954, has instituted eleven proceedings charging a price-fixing conspiracy. This seemingly compelling urge illegally to tamper with price structures was commented upon many years ago by Adam Smith in his "Wealth of Nations":

> "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."

5/ 148 F. 2d 416, 427 (2d Cir. 1945).

6/ 150 F. 2d 738, 743 (3d Cir. 1945).

Indeed you here in Indiana have even named one of your thriving industrial cities, Gary, after a man whose dinners while Chairman of the United States Steel Corporation served as the medium for phenomenal price rigidity in the steel industry. I am referring, of course, to the famous Gary dinners. After the steel tycoons dined with Judge Gary, and agreement reached over the brandy and coffee, the steel prices either remained the same uniformly or went up uniformly, and with a single basing-point system of pricing based on Pittsburgh, establishment and maintenance of uniform prices was simple. By coincidence the trial attorney with whom I officed when I first went with the Commission was Karl Steinhauer, who won the Commission's celebrated case against the steel trust which outlawed the Pittsburgh-plus method of pricing. But just as man is ingenious in the advertising field, so is he ingenious in the price-fixing field. Conspirators in this area have become increasingly adroit in such matters as the stripping of records, the skeletonizing of minutes, etc. Very few tracks are left on the price-fixing sands by skilled modern conspirators. And thus it has been increasingly difficult to prove a price-fixing conspiracy. Yet occasionally one runs across a refreshingly frank witness in the course of a price-fixing trial. The most famous one to my knowledge -- and this is such a delightful description of what happens at some trade association meetings that I must let you in on it -- was an official for one of the respondents in the Commission's case against The Chain Institute, Inc. His testimony is a gem and appears in the Commission's brief filed with the Eighth Circuit Court of Appeals. I will read you a portion of it now:

> "Q. Well, what would be said? Can you describe the type of conversations that were had?

* * * *

> "A. Well, frankly, you know how you do at these meetings. You hear a lot of tripe and a lot of crap and red tape which they put through, and they put on a lot of rigamarole and put you on these committees doing a lot of different things. A lot of it, too, has been very constructive, and I have been very active, and I spent a lot of time doing things I thought beneficial not only to my company but to the industry as a whole and of benefit ultimately for the good of the country as a whole.

"But, after we get rid of a lot of this stuff, maybe while we are at lunch or adjourning for a drink or something, then we start talking. Maybe somebody will say to you, 'You so-and-so Son of a B., what did you do down at Bill Jones'?' And you will say, 'What did I do?' Well, he'd say, 'You give them some extras.' And then somebody calls somebody a liar and so forth, and then maybe he would say, 'Well, I have got the evidence that you did, and you are a liar,' and then you would get into a fight with this fellow, and first thing you know, somebody else would come up and listen to the conversation, and then there would be six of them there, and they would be picking on you -- I don't mean picking on me, but picking on these price cutters, you understand.

"So, well, maybe by that time they had three or four drinks and the thing begins to get a little tougher, and the drinks loosen up some tongues -- of course, I don't drink, you understand now, gentlemen, therefore I was always in perfect control of my vocal cords, and I have a marvelous vocabulary, I can assure you, when it comes to calling names, and it has been tested by every member of the Institute, and when I call a guy a dirty, low kind of a so-and-so price cutter, he knows he has been called a price cutter.

* * * *

"I will be frank, and if you want to crucify me I will add this: I would tell him further that if he didn't stop these damn price cuttings I would show him how to cut prices, and many times I did cut them, and when I cut a price, and if it was your price I was cutting, take it from me, brother, you knew your price had been cut.

"I could go on and on and on -- but I want to say that when any two businessmen get together, whether it is a Chain Institute meeting or a Bible Class meeting, if they happen to belong to the same industry, just as soon as the prayers have been said they start talking about the conditions in the industry, and it is bound definitely to gravitate, that talk, to the price structure in the industry. What else is

> there to talk about? And a guy like me, that doesn't drink or get high and go to the bar, why, of course, I had to defend myself in some other fashion than getting drunk and forgetting it -- is there anything else you want me to tell you now?"

So from this you will see that some of our work is not without interest. There are fascinating compensations for many drab hours.

The review of the objectives of these major acts administered by the Commission and my knowledge of the results obtained in their enforcement, leads me to conclude that the public interest has been faithfully guarded by the Commission during the 43 years of its existence. You may say that I am naturally biased and prejudiced, yet I am willing to concede that the administrative process has had growing pains and failings just as is true of the courts. However, I am confident that there has been throughout the years a vast improvement in character and in responsibility. When I was sworn into office as Commissioner I made the statement that it was my hope that I might be able to make some important and worthwhile contributions to the improvement of the administrative process and I again state that I shall bend all my efforts towards that goal. The increased efficiency by which the Commission has handled its increasing statutory responsibilities during the last few years in spite of a vastly increased case load, is a most heartening evidence of the success of the administrative process in the field of trade regulation. I believe that these statistics may demonstrate to you rather convincingly that ours is not an irresponsible agency administering the acts under its supervision with a blind disregard to due process, the public interest or judicial precedents. I am proud to state that the last eight times our orders were reviewed by the Supreme Court they were in each instance affirmed. Moreover, the record is almost equally dramatic in connection with reviews by the Circuit Courts of Appeal; out of the last 60 cases in which our orders were appealed to the Circuit Courts, they were affirmed in 54 cases. This record is attributable in part to other basic statistical factors. For example, during the calendar year 1956 the Commission entered 185 orders; of such 185 orders 132 or 71% were based upon the Commission's consent order procedure. In other words, the Commission was issuing complaints in such "hard core" areas of violation that the respondents in 71% of the cases came in without contest and took an order, thereby saving both the Government and themselves considerable effort and expense.

But what is even a more interesting statistic with respect to contested cases heard by the Commission, 32% resulted in orders of dismissal. This percentage hardly lends support to the oft repeated charge that the Commission must have prejudgment or bias because it initiates the complaint and then later decides the matter. If the Commission in issuing a complaint were expressing a belief in the veracity of its allegations, there would be some support for such a charge and the statistics I have just given you would be far different. But in reality in looking at a complaint and deciding its issuance the Commission merely signifies belief that a probability of law violation exists and that a fact-finding proceeding is in the public interest. It fully recognizes the fact as do the Commission examiners that the charges must be supported by the greater weight of the evidence in the record, and that evidence must be reliable, probative and substantial evidence as required by the Administrative Procedure Act. It is full recognition of these safeguards to due process that has resulted in our enviable record of court affirmances. It is, as I say, a proud record and one attributable in no small measure to our very able present General Counsel, Mr. Earl Kintner, a Hoosier born in Gibson County, a graduate of DePauw University, a former Gibson County Prosecutor, and now President of the Federal Bar Association.

I think it fitting that I conclude these remarks by quoting from an address Mr. Kintner recently made before the Spring Meeting of the American Bar Association:

> "Administrative law will grow in wisdom, will be finally purged of its inadequacies only if the organized bar directs toward the problems of administrative law the same attention and devotion which it has heretofore directed toward courtroom practice. In a branch of law which today affects more persons and more rights than all the courtrooms of our land, the bar can do no less."