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THE MISBRANDING BILL, 1925

DECEMBER 19, 1925.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. MERRITT, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

[To accompany H. R. 3904]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 3904) to protect the public against fraud by prohibiting the sale or shipment in interstate or foreign commerce of misbranded articles, and for other purposes, having considered the same, report thereon and recommend that it pass.

The bill reported by the committee is the same bill as H. R. 11723 reported by the committee in the Sixty-eighth Congress, and this bill resulted in consideration by the committee and hearings on the following bills, all of which were introduced in the Sixty-eighth Congress.

H. R. 16, introduced by Mr. Rogers, which is a general bill to protect against fraud by misbranding; the Barkley bill (H. R. 3225) similar to the Rogers bill; the French bill (H. R. 739) relating only to fabrics and especially to woolens, which is a compulsory branding bill; the Raker bill (H. R. 732) similar to the French bill; the Reece bill (H. R. 4141) which is a compulsory branding bill relating to specific articles; the Johnson bill (H. R. 65), also the Johnson bill (H. R. 742); the French bill (H. R. 738); the Haugen bill (H. R. 7758); the Greist bill (H. R. 7822); the Burtness bill (H. R. 7965); the Kindred bill (H. R. 7997), all of these latter bills relating to branding of some specific article or articles.

The fundamental contention by witnesses before the committee and by those sponsoring the bills has been as to the advisability of a compulsory branding of all or certain articles specified by the bills, such brands to specify with more or less accuracy the material of which the fabric is made and the proportion of each ingredient; and, on the other hand, a bill which would not make branding compulsory but which would prohibit any misrepresentation in any brand or label.

The general subject matter covered by these bills has been before Congress for more than 20 years, but no legislation has resulted from the various bills proposed, although they have several times been actively supported by important interests.

The principal interest which has put forward bills of this character has been the producers of wool. Their efforts have always been directed to legislation aimed toward compulsory branding of textiles, such branding to state in percentages all material comprising the fabric branded with particular reference to the amount or percentage of new or so-called virgin wool in the fabric and also of reworked or so-called shoddy wool or other materials in the fabric.

Proponents of these bills have of late given their bills the attractive name of "truth-in-fabrics" bills, and the arguments in their favor have in general been based on the broad ground that the purchaser is entitled to know what he is buying. We shall refer to these arguments later, but the testimony given before the committees of different Congresses shows that many of those favoring the legislation were primarily interested in the sheep industry and hoped that such legislation would result in greater demand for fabrics made entirely of new wool and therefore in greater demand for, and an increased price of, raw wool.

For example, the title of the present French bill (H. R. 739) is "A bill to prevent deceit and unfair prices that result from the unrevealed presence of substitutes for virgin wool in woven fabrics purporting to contain wool and in garments or articles of apparel made therefrom * * *."

It may be noted that this bill, which purports to prevent deceit and unfair prices, entirely omits any reference to a very large proportion and an increasing proportion of woolen and semi woolen goods in that it refers specifically to woven fabrics and not knitted fabrics, the testimony showing that the process of knitting has so improved that knitted cloths are now being used for practically all purposes for which woven cloths are used. But even if it were intended to produce better prices for the producer of wool, the bill should not on that account be condemned if it can be shown, first, that by practicable means it could and would prevent deceit being practiced on the purchaser or consumer of the goods; second, that the information to be stamped on the fabric would enable the buyer to judge of its value for his purpose; third, that the truth of the stamp or label could be accurately determined by test so that the law could be enforced; fourth, that under the terms of the law the fabric could not be legally and truthfully stamped and yet produce equal if not greater deceit and more unfair prices than exist at present, and finally, fifth, that to attempt to enforce such a law would not involve absolute bureaucratic control of a great industry at enormous expense to the Government and at an added expense to the industry, which would add to the cost of clothing to an extent out of all proportion to any possible benefit

Here should be noted present conditions of industry so that we may realize who is the consumer whom we are trying to protect against deceit.

The testimony shows that 85 per cent of textile fabrics are now sold in manufactured form—that is, as articles of clothing—and that a heavy percentage of such clothing is sold under an absolute guaranty of satisfaction or your money back. It is evident that under this custom of the trade it will be very difficult for the retailer who sells the garment, made often of several kinds of cloth, to be sure his descriptive tags are accurate, and still more difficult for any customer

or Government inspector to show that they violate the law. And it is so probable, that any committee or court might almost take judicial notice of the fact, that the average customer buying a garment will select one which suits his taste for the purpose for which he intends to use it and rely on the reputation of the seller or on the absolute guaranty of the manufacturer that the garment will give good wear and satisfaction.

If this is true, where is the benefit or justification in hampering a staple industry with an army of inspectors and the consuming public and the United States Government with a tremendous and useless expense?

Before considering the practicability and the probable operations of the French bill and other bills of its type, we may point out that the testimony shows that during the 20 years or more in which this type of legislation has been urged there has been marked improvement both in the state of the law and in trade ethics. The Federal Trade Commission, under existing law, has partly by its own rulings and partly by appeals to the courts made a vast improvement in restraint of misbranding. Perhaps the most noted case was the so-called Winsted hosiery case, where it was decided that a practice which had been followed not only by the defendant in this case but by other reputable manufacturers, of labeling as merino many goods which were not entirely merino, and sometimes had no merino in them at all was illegal and must cease.

Mr. Irving Crane, executive secretary of the Associated Clothing Manufacturers of New York, page 236, testifies, after stating his objection to compulsory branding:

* * * But the main point is that for the last 30 or 40 years the ready-made clothing industry has been policing itself, without any legislation compelling it to do business fairly. In other words, it has been creating dealer confidence. That is the main significance that I have put into this history. * * *

The reputable manufacturer or retailer stands absolutely back of his merchandise. His label is the one adequate guaranty and is the customer's best insurance policy. * * *

Mr. Todd, page 244, testifies as follows:

* * * Since the retailer and the consumer are not wool experts, they must depend upon the probity of the garment manufacturer and textile manufacturer to provide and make up materials which they are willing to stand back of. This is what we mean by saying that the manufacturers have already taken upon themelves the duty of policing their industry; that they have already voluntarily reached a level of honest merchandising which is far sounder and healthier than any situation which might be prescribed by proposed legislation. Is the consumer, after all, not better protected by a manufacturer's guaranty which will back up merchandise for content of fabric, cutting, tailoring, and accessories than if he were simply protected by a mere label indicating that the content of the fabric was virgin wool which might range in value from 2 cents to $1.50 a pound? * * *

But perhaps it may still be said that the customer is entitled to know just the materials of which a particular fabric is made. The difficulty is that neither the bill itself nor has any witness pointed out how any practicable label could give the purchaser or even the average retailer knowledge of the character of the cloth which would be of value to him.

Mr. John P. Wood, of Philadelphia, representing the National Association of Wool Manufacturers, states, on page 60, as follows:

* * * The French bill does not even include all kinds of textiles and clothing. Silk goods, linen goods, boots, shoes, and other leather goods, articles of rubber, and many other of the common necessities of everyday wear are omitted from its provisions. Although purporting to deal with manufacturers of wool, it excludes from its provisions a very large portion of all the woolen garments and fabrics of retail commerce, for it takes no account of the enormous quantity and great variety of knitted products, all of which stand in precisely the same relation to the purpose of the bill as those products to which it does relate. Knitted goods are made from the same raw materials as woven goods, and many knitted fabrics can only be distinguished from woven ones by a technical expert. * * *

Even in the very narrow field to which Mr. French's bill is restricted it relates only to the raw fiber. That is very much the same as though a building code should be adopted which took nothing into account but cement and lime, made no distinction between poor and good cement or between good and poor lime, and applied no standards of construction, no requirements as to durability of foundations, nor strength of walls, nor any of the many things which go to make a safe structure.

In the production of woolen goods the quality of the raw material is important, but is of less consequence than the characteristics of structure and finish.

Even with regard to the one thing to which the bill does partially and superficially relate it follows no standards of goodness. Its only discrimination being in terms of popular misinformation. * * *

Mr. Wood then points out the fact of fundamental importance in this connection—that certain elemental substances like lead, copper, silver, and gold are uniform in their characteristics under all conditions. You can specify a pound of pure silver and always get the same result. You can specify a pound of virgin wool and such a specification might be filled by wool which was worth all the way from 20 cents to $2 a pound.

There is uncontradicted testimony at great length to show that the defects arising from the nature of the fiber content of woolen clothing are infrequent, but that defects due to unsuitable construction, to improper finishing, or to poor dyes or poor dyeing are not uncommon. (See pp. 64, 296, 452.)

The testimony is also overwhelming to show that it is practically impossible to enforce a compulsory branding bill, and especially the provisions that call for a percentage statement of the contents of a fabric so far as the use of virgin or reworked wool is concerned. The proponents of compulsory branding admit this difficulty. Mr. Wood, on pages 65 and 66, shows the widest differences in findings of analyses of precisely the same cloth by different chemists. Doctor Skinner, Assistant Chief of the Bureau of Chemistry, while claiming more for a chemical analysis than other technical witnesses, nevertheless says, on pages 404, 405, and 414, that there is great difficulty by examination of cloth to distinguish between virgin wool and reworked wool. While Mr. McGowan, who is the chief of the textile section of the Bureau of Standards, states on page 442 that to distinguish between shoddy or reworked wool and virgin wool is a very difficult task. On page 444 he says that if he were given the "job of telling virgin wool from shoddy, I would refuse it in the beginning." Mr. McGowan further says that if you use labels and do not tell everything, there is no use having a label; that the most difficult thing the board of specifications has to do is describe a material; and

that finally, in his opinion, page 452, the value of a cloth depends more on the way the materials are worked than on the materials themselves.

A member of the committee, who gave careful attention to the testimony, makes the following statement:

> Let me say that I approached these hearings with your line of thought and thoroughly in favor of "truth in fabric," but the witnesses have shown me to my satisfaction at least what I did not understand before, that "virgin wool" really means nothing and is of no particular consequence to the consumer.

It appears, therefore, that for practical purposes the argument that a garment should be labeled in accordance with the provisions of the French bill because the customer is entitled to know what he is buying only furnishes him, as Mr. Wood says, with some varied misinformation.

Many witnesses testified to what we think is within the knowledge of all members of the House, that if a garment should be labeled "all virgin wool" and what might be a better garment labeled "50 per cent virgin wool and 50 per cent shoddy" the customer would be apt to be willing to pay a higher price for the inferior garment.

Testimony to this effect is to be found in a quotation from a well-known clothing firm in Washington given in the statement of Mr. Albert L. Gifford, president of the American Association of Woolen and Worsted Manufacturers, New York City, page 144, as follows:

> * * * Just to assure myself of that fact, when I was down here the other day I stopped at a large clothing establishment on Pennsylvania Avenue; I believe Parker-Bridget was the firm. I asked for the proprietor and I put that question up to him.
>
> He said, "Mr. Gifford, if two suits of clothes were shown me, one labeled 'containing small percentage of shoddy' and another 'new wool,' although I from my experience would feel confident that the one with the shoddy in it was decidedly the better garment, I would not dare to buy it, if the French-Capper bill were passed, for fear the consumer would think that the shoddy label on there meant that it was an inferior product."

Mr. Gifford goes on to say:

> If the French-Capper bill became a law, it is my belief the most noteworthy result would be a prompt increase in the production of fabrics made from grades of new wool inferior to much of the reworked wool which is employed at present.
>
> By the provisions of the French-Capper bill these very inferior goods and garments made from them would carry the same label as the goods of unsurpassed quality made by the mill which I represent, although the actual difference in value between those goods—you may be a little surprised to know it—would be as much as from $2 to $5 a yard; and those goods under the French-Capper bill would require the same identical label.

On page 206 is the testimony of a blanket manufacturer, Mr. Given, as follows:

> A blanket of, let us say, 50 per cent virgin wool of a good grade, combined with the same amount of garnetted stock of equal or better quality, may be manufactured at a given cost—a blanket which is in every way serviceable, warm, and which represents as nearly as it is possible to manufacture the best quality of merchandise at that given price.
>
> On the other hand, a blanket of 100 per cent low-grade virgin wool, foreign or domestic, can be produced at a much less cost, but the resulting product gives neither the service, warmth, nor comfort represented by the blanket marked 50 per cent reworked stock Now, what is the result of the application of a bill like the one under consideration in such a case? The consumer who is uneducated in textile values is instantly prejudiced against the superior article because it is marked 50 per cent reworked wool. Is truth in its real sense championed or perverted? * * *.

We think we have shown that a practicable label or tag could not be attached to a cloth or garment which would really give valuable information to the purchaser or the consumer; that the truth or falsity of a label could not be accurately determined by test; and that, on the other hand, it would be possible still to comply exactly with the terms of the French bill and yet mislead the public and customers, certainly as much as they are likely to be misled under existing conditions.

Many of these things have been admitted, but it has been claimed that the public could be safeguarded in the directions desired by proper inspection.

On that we need only quote the testimony of Mr. Joseph E. Davies, of Washington, who is counsel for the American Fair Trade League and who was at one time chairman of the Federal Trade Commission, page 433:

> * * * Now, similarly, if you had a law requiring every piece of fabric to be marked, in order to sustain that law you would have an army of inspectors that would simply avalanche the public service; and it appears to me offhand—I have not given it much thought—but it appears to me that there would be opportunities for dishonesty, for graft, similar to some of the intimations and insinuations and charges that have been made in the Prohibition Unit during the last three or four years, that would induce a much more difficult situation than the present. * * *

While, for the reasons above stated, the committee could not see its way to report a bill providing for compulsory branding, it is in full accord with the desire of all members and all interests who wish to protect honest producers and all consumers against misrepresentation either by false or misleading labels or false or misleading advertising.

Practically all the witnesses who represented the various associations of manufacturers of silk goods, such as Mr. Cheney, page 26, and the wool manufacturers, like Mr. Wood, page 69, and those who represented the consumer directly, such as Mrs. Woolman, who represented the American Home Economics Association and who said that she was speaking for the women consumers of the United States and claimed that they bought 96 per cent of the dry goods sold in the United States, showed that they favored legislation against misbranding.

On page 307 of the testimony Mrs. Woolman sums up the wishes of those she represents, as follows:

> * * * Now, does the consumer want a law on misbranding? They want all the help they can get. They desire to have it, but they do not want unnecessary expense, nor do they want the kind of brand which has been spoken of. The Rogers bill is satisfactory in its method. They also want very much to have it apply to other merchandise, other commodities, besides the wool, because they are the purchasers and they need to have it. The help that has been given them by the Federal Trade Commission and also by the better business commission has been very great. * * *

The committee, therefore, has to consider what form a bill to prevent misbranding and false advertising should take and what agencies should be selected for enforcing its provisions. Having in mind the desirability of unifying the work of the executive branch of the Government and the disadvantage of creating new commissions or new bureaus, the committee concluded, in view of the great and valuable work which the Federal Trade Commission has

done in preventing fraud and misrepresentation in labels and advertising, and in view of its trained personnel and its familiarity with all legal precedents, that it is clear that the Federal Trade Commission is the proper agency to enforce whatever legislation Congress thinks it wise to enact.

In considering this question the chairman of the committee communicated with the Federal Trade Commission and in reply the chairman of the Federal Trade Commission gave the following brief résumé of its work in this direction:

* * * Early in its history the commission commenced the institution of proceedings to correct misbranding as a method of unfair competition. The first cases were brought against companies branding as "silk" material containing little, if any, of the product of the silkworm. The result of these proceedings was that the members of the principal associations of silk manufacturers took prompt steps themselves to create an internal organization for the correction of misbranding in that industry. By the cooperation of the commission with this organization in the industry, the questioned practice has been very markedly checked and is well on its way to disappearance.

The commission's jurisdiction in the premises was determined by the United States Supreme Court in the case of Federal Trade Commission *v.* Winsted Hosiery Co. (258 U. S. 483).

A similar result has followed the commission's action against misbranding in other lines. This was noticeably true in the paint and varnish industry, in which that industry followed the example of the silk associations and in the knit goods and underwear associations, which adopted a standard system of nomenclature in which it consulted with the commission in order that there might be no conflict between the decisions and the code adopted by the association.

The commission's jurisdiction to prevent false and misleading advertising has been sustained in Sears, Roebuck & Co. *v.* Federal Trade Commission (258 Fed. 307), followed by a number of other cases in the second, fifth, and sixth circuits, until now it is well settled that the prohibition against the use of unfair methods of competition includes both misbranding and false advertising. In this field the commission has cooperated extensively with the advertising clubs of the world, comprised of the better business bureaus established in the various cities of the United States. A great part of the effective work of the commission is very quietly accomplished through its cooperation with these organizations in the ndustry itself.

Many of the bills which were considered by the committee provided criminal remedies. And while it is perhaps a natural tendency to provide direct punishment for violations of Federal statutes, the object which this legislation seeks will, in the opinion of the committee, be better attained by the same methods which the Federal Trade Commission has already used in the successful prosecution of its work under existing law.

The letter above rererred to from the chairman of the Federal Trade Commission comments on this phase of the subject as follows:

In this connection it should be noted that the jurisdiction of the Federal Trade commission is preventive and anticipatory of any injury reasonably to be apprehended. The legislation under consideration reverses this attitude and awaits the happening of an injury because each of these bills makes the offense a criminal act. While the jurisdiction now existing in the Federal Trade Commission is intended to and does protect the purchaser from harm the criminal law awaits the actual happening of the injury before it becomes applicable.

If either of these two bills becomes a law the effect probably will be to deprive the Federal Trade Commission of the jurisdiction in cases of misbranding and false advertising and to change the process from one of prevention to one of dealing with the completed act.

If, on the other hand, the result of the passage of either bill should be that the commission's jurisdiction were left unimpaired, one offender misbranding or falsely advertising might be dealt with under the Federal Trade Commission act which results in a simple order to cease and desist. A similar offender in

another State engaged in the same mispractice might be convicted and punished for a misdemeanor. This divergence of proceedings is inherent in H. R. 16 and would result, in any event from the adoption of this bill. You will note that under section 11 of this act the Secretary of Commerce, upon being satisfied of the violation of the act, may certify the facts to a United States district attorney for prosecution or may refrain from so doing and dismiss the criminal charge upon the execution of a stipulation to cease and desist. But, if under Paragraph 12, the offense is reported to a district attorney by a State officer the district attorney then has no power to compound the offense by accepting a stipulation nor may he report the case to the Secretary of Commerce, but he must prosecute for the enforcement of the penalties provided.

The provision authorizing the Secretary of Commerce to compound the offense is not found in H. R. 3225 but the same divergence between the principle of this act and the existing jurisdiction of the Federal Trade Commission still remains.

It should be noted that under the Federal Trade Commission act a respondent may deny the facts or the application of the law and make a test of his rights in a civil proceeding. But under either of these bills he must submit to the ruling or stand indictment and trial on a criminal charge as the only method of testing his civil rights.

Whereas misbranding or misrepresenting under H. R. 16 is an offense in any territory of the United States or in the District of Columbia, the effect of the operation of the act upon interstate commerce between States is limited to the actual movement of commodities. This is also true of H. R. 3225. While such a provision would probably reach cases of misbranding, the commission has found that a very large part of the harmful false advertising is not directly connected with the shipment of goods but lies in the preliminary field of advertisement. And the preliminary advertising is quite as harmful as that which is connected with a sale or shipment.

The experience of the commission has shown that in most phases of its work the field is covered as to intrastate commerce, by State statutes, criminal in character, which have become wholly ineffective through lack of prosecution. To apply the same process of criminal remedy to the field of interstate commerce is, in the opinion of this commission, to invite exactly the same result, namely, an intermittent, sporadic, and unequal application of the law. The result would be that one of two competitors may, in his own State, be subjected by the district attorney and a succession of grand and petit juries to a strict interpretation and application of the law. His opposing competitor, in another State, might find either a district attorney of a different mind or grand or petit juries not impressed by the statutes or the facts. Fair competition must be uniform in the application of the principles involved and this result can not be expected particularly in this class of cases, from local and separate enforcement.

It should be remembered in this connection that the courts of the United States are surcharged at the present time with the burden of business already devolved upon them by existing statutes. This law will be one of many others which these courts are required to enforce. Probably but few cases will be prosecuted by a particular district attorney in a substantial period of time, and the cases will go to many district courts, frequently without familiarity with the law and without the background of the principles of economics and business upon which the law rests. These difficulties will be increased by the stricter construction which obtains in the criminal courts and the presumption of innocence and the strict rules of evidence which govern in criminal cases. Moreover, since the cases will be criminal, few, if any, of them can reach the Supreme Court for the purpose of reconciling inconsistencies between the decisions of the circuit courts and correcting errors of construction.

The transformation of the attitude of the law toward this class of cases from the preventive and civil jurisdiction of the Federal Trade Commission to the remedial and criminal jurisdiction of the courts will bring about a result which, if there were no other argument present, should give reason for pause. The Federal Trade Commission has, through the practice known as "trade practice submittal," evolved a process of conference between an industry and the Federal Trade Commission in which the industry proceeds to crystallize in the form of a statement its own concepts of unfair competition which thereafter the industry endeavors to regulate by pressure from within, aided by the processes of the Federal Trade Commission where necessary. This can only be done through an administrative agency working on the civil side. Its value is being more and more clearly recognized and the possibility of service through this one agency alone in the future would warrant the continuance of a civil rather than a criminal treatment of this

phase of business practices. The effect of the adoption of the criminal statute governing interstate commerce is to put an end to the possibility of an internal development by a business group in which the Government agencies serve the development merely by the policing of such cases as the business group is not able to reach.

The criminal law separates government and business inevitably. On the other hand, the civil remedy and the administrative agency with a power merely to enter an injunctive order subject to court review, provides a medium for a direct contact through which the business group may express its concept of the methods and practices of the industry and permits a uniform construction and development of the law by a continuous interpretation originating through one source. Each successive case is thus dealt with in the light of all those cases and those industrial conferences which have preceded it whereby the law is adapted to various industries and to the innumerable circumstances and conditions which present themselves in the administration of a statute which requires constant application of fundamental principles to divergent states and conditions of fact. If the law be administered in this manner the great mass of cases will be settled by an administrative order, only an occasional case reaching the courts. Such an administration will, in the long run, be more effective than an enforcement through criminal prosecution. In short, it is the opinion of the Federal Trade Commission that the enactment of either of these two bills would not work out any permanent benefit but would seriously endanger those results which have already been accomplished and prevent the accomplishment of still greater results under the existing Federal Trade Commission Act.

By direction of the Commission.

Cordially yours,

HUSTON THOMPSON.

Hon. SAMUEL E. WINSLOW,
Chairman Committee on Interstate and Foreign Commerce,
House of Representatives.

ANALYSIS OF THE PROPOSED LEGISLATION

The bill has been drafted after consideration of the provisions of, and the procedure and judicial decisions under, the pure food and drugs act, and the orders of the Federal Trade Commission, and the judicial review of such orders, relating to misbranding and false advertising.

PURPOSES OF THE BILL

The main purposes of the bill are threefold:

(1) It defines more specifically what is "misbranding" and removes some doubts upon the present jurisdiction of the Federal Trade Commission;

(2) It reinforces the enforcement powers of the commission very materially by providing for judicial condemnation of misbranded articles; and

(3) It removes the necessity of applying the test of competition in cases of this kind under the Federal Trade Commission act, and adopts the policy of protection to the public as well as of protection of one competitor against another.

DEFINITION OF MISBRANDING

Subdivision (a) of section 3 is an attempted enumeration, in general language, of various methods of misbranding. In dealing with false advertising, however, your committee was confronted with so many differing practices that it decided not to attempt an enumeration. There is no doubt about the power of Congress to deny the channels of interstate commerce to articles the sale or

shipment of which is induced by false advertisements. (See, Weeks *v.* United States, 1918, 245 U. S. 618.) Subdivision (c) covers specifically the situations which the "truth-in-fabric" bills were designed to meet.

There is reprinted as an appendix to this report an extract from an article which appeared in a current legal periodical, which sets out the various methods of misbranding and false advertising in respect of which the Federal Trade Commission has assumed jurisdiction.

ENFORCEMENT OF THE ACT

The Federal Trade Commission has been particularly successful in its fight against misbranding and false advertising. In addition, its informal "trade practice submittals" have produced very satisfactory results. It is primarily for this reason that your committee decided to place the enforcement of the act in the hands of the commission.

As heretofore stated, your committee was confronted with the necessity of determining upon effective but reasonable methods of enforcement. A criminal penalty, with its harsh punishment and consequences, does not seem necessary. And, furthermore, the principal purpose is to keep the channels of interstate commerce free—to prevent violations and thus to protect the public, rather than to punish the offender. Consequently, your committee did not adopt the criminal penalties of the pure food and drugs act, but resorted instead to the administrative and civil processes of the Federal Trade Commission act, reinforced by judicial condemnation.

Subdivision (a) of section 4 places the enforcement of the act in the hands of the Federal Trade Commission. For this purpose the commission may use any of the powers conferred upon it by the Federal Trade Commission act, including its power to require reports, if it deems it necessary, to issue subpœnas, and to compel the production of testimony. Acting under this section, the commission, after proper procedure, would issue its order to cease and desist. This order should, of course, be broad enough to include future violations, even though not of exactly the same nature, for otherwise there would merely be a change in the method of misbranding (see, for example, clause (5) of the order as modified by the Supreme Court in Federal Trade Commission *v.* Beech-Nut Packing Co., 1922, 257 U. S. 441, 456). Upon application by the commission or petition of the party, the court of appeals affirms, modifies, or sets aside the order

Subdivision (b) strengthens this means of enforcement by specifically authorizing a temporary injunction, pending the final determination by the court.

Subdivision (c) removes whatever doubt there might be as to the jurisdiction of the Court of Appeals of the District of Columbia.

Subdivision (d) authorizes inspections, analyses, and purchase of samples. It also provides, in order to prevent unnecessary waste of money and the time of Government officials, that a copy of the results of an analysis by a Government officer, when duly authenticated, shall be admissible as evidence. This does not interfere in any way with the right of the party to call the Government officer or to introduce his own evidence.

CONDEMNATION PROCEEDINGS

Section 5 of the bill is modeled upon the condemnation proceedings of the pure food and drugs act, except for two important departures. The necessity for the section is found in the fact that, under normal proceedings, several months are usually required before the commission enters its order, and several months at least are required thereafter before a proper order will be affirmed by the circuit court of appeals. During all of this time the violations continue without possibility of punishment. If the order of the commission is not broad enough to include future violations, or if the courts should unduly limit the application of the order of the commission, a change in practice, even when accompanied by the most culpable intent, will require new proceedings.

It is not expected that condemnation will be resorted to except in extraordinary cases, but, to protect the individual from possible abuse of the power, wide discretion is given the court. Instead of providing, as the pure food and drugs act provides, solely for condemnation of the misbranded article, paragraph (3) of subdivision (b) of section 5 permits the court to deliver the article to the owner upon the giving of a bond that he will not ship, deliver for shipment, sell, or offer for sale, the article until the false brand is removed.

An extension of the proceedings under the pure food and drugs act will be found in the power to seize and condemn the article if it is being held for sale or exchange after having been shipped in violation of the act, irrespective of whether it remains in the original package, and irrespective of whether interstate commerce has ended. Your committee is convinced that this extension is necessary in order properly to enforce the act and to keep misbranded articles out of interstate commerce. Opportunity for inspection seldom arises until after transportation is completed and usually not until the article is removed from the original package. Frequently the opportunity will not arise until after the first sale subsequent to interstate transportation. Again, the delay incident to notifying the Washington office of the violation, reporting the violation to the Department of Justice and to the Federal district attorney, to issuing process, and to making the seizure as directed by the monition, will provide an opportunity for a sale and thus permit the particular shipment to pass beyond interstate commerce before the seizure may be made. In such a case of course, the public is not protected and the benefits of the act are lost.

Your committee finds ample constitutional authority for this extension of the power to seize and condemn in the decisions of the Supreme Court of the United States in Hipolite Egg Co. *v.* United States (1911), 220 U. S. 45; McDermott *v.* Wisconsin (1913), 228 U. S. 115, and Weigle *v.* Curtice Bros. Co. (1919), 248 U. S. 285, 287–288.

PRESENT JURISDICTION OF THE COMMISSION

The jurisdiction of the Federal Trade Commission over misbranding, under section 5 of the Federal Trade Commission act, was definitely settled by the Supreme Court of the United States in Federal Trade Commission *v.* Winsted Hosiery Co. (1922) (258 U. S. 483). The first court decision enforcing an order of the

Federal Trade Commission in a false advertising case was Sears, Roebuck & Co. *v.* Federal Trade Commission (C. C. A. 7th Circuit) (258 Fed. 307).

Other court decisions affirming (or modifying to accord with the facts) orders of the commission in respect of misbranding or false advertising are: Royal Baking Powder Co. *v.* Federal Trade Commission (C. C. A. 2d Circuit, 1922) (281 Fed. 744); Guaranty Veterinary Co. *v.* Federal Trade Commission (C. C. A. 2d Circuit, 1922) (285 Fed. 853); Juvenile Shoe Co. *v.* Federal Trade Commission (C. C. A. 9th Circuit, 1923) (289 Fed. 57); L. B. Silver Co. *v.* Federal Trade Commission (C. C. A. 6th Circuit, 1923) (289 Fed. 985); Fox Film Corporation *v.* Federal Trade Commission (C. C. A. 2d Circuit, 1924) (296 Fed. 353); Federal Trade Commission *v.* Pure Silk Hosiery Mills (Inc.) (C. C. A. 7th Circuit, Dec. 8, 1924), not yet reported.

In John Bene & Sons *v.* Federal Trade Commission (C. C. A. 2d Circuit, 1924) (299 Fed. 468), the commission's order was reversed upon the ground that there was no proof of a public interest. In Chicago Portrait Co. *v.* Federal Trade Commission (C. C. A. 7th Circuit, Dec. 23, 1924), not yet reported, the order of the commission was vacated upon the ground that there was no possibility of injury to competitors.

UNFAIR COMPETITION

Section 5 of the Federal Trade Commission act declares unlawful "unfair methods of competition in commerce." Under this provision, therefore, the commission must find not only the existence of competition but a present or very probable future injury to competitors. All of the decisions cited above apply this test, as of course they must.

However, the public is injured by the misbranding even though a competitor may not be, or even though there is no competitor. Consequently, your committee has based the bill solely upon injury to the public and the time and money of the commission spent in establishing evidence to support a finding of injury to competitors will be saved.

EXCLUSION OF MISBRANDED IMPORTS

In order to permit enforcement at the border where violations can be detected more readily than after the article has entered domestic commerce, the provisions of the pure food and drugs act excluding misbranded imports have been incorporated into the bill.

DEFINITIONS

Section 8 of the bill defines certain of the terms used.

The term "person" is given its usual meaning.

The term "interstate or foreign commerce" is defined to include transactions within any Territory or possession of the United States or the District of Columbia, in addition to the recognized transactions normally in interstate or foreign commerce. Your committee did not include, as in the case of the pure food and drugs act, manufacture within a Territory or possession or the District of Columbia, for that seemed to be a matter within the jurisdiction of other committees of the House.

The term "article" is defined to include "goods, wares, and merchandise of every description". It is intended to be broad enough to cover all subjects of interstate commerce.

The term "district court of the United States" is defined so that the Supreme Court of the District of Columbia will be included.

In the term "name, description, or statement" as used in subdivision (a) of section 3 the word "description" is used as including, in addition to a description by the use of words, a description by the use of a design, device, picture, symbol, or other method.

GUARANTIES

Section 9 of the pure food and drugs act grants an immunity to a dealer who can establish a guaranty from the person from whom he purchased the article that it is adulterated or misbranded. This provision is not carried into the bill for the reason that the commission will have ample authority, under its existing power to issue rules and regulations, to provide for guaranties and to prescribe forms to meet the various circumstances and practices involved in the cases.

APPLICATION OF STATE LAWS

The bill does not affect in any manner the application of nonconflicting State laws. (See Savage *v.* Jones, 1912, 225 U. S. 501; Armour & Co. *v.* North Dakota, 1916, 240 U. S. 510; Weigle *v.* Curtice Bros. Co., 1919, 248 U. S. 285; Hebe Co. *v.* Shaw, 1919, 248 U. S. 295; see, also, Plumley *v.* Massachusetts, 1894, 155 U. S. 461.)

APPLICATION OF FEDERAL LAWS

Section 11 expressly provides that this act shall be in addition to, and not in substitution for, the provisions of any other law of the United States. This provision is expressly intended to prevent a construction that the bill removes any of the powers of the commission to prevent misbranding or false advertising under the Federal Trade Commission act. If this bill becomes law, the commission may determine, from the facts in the particular case, under which law it should proceed to prevent the practices complained of. Nor is the application of the pure food and drugs act and the many other similar Federal laws affected.

APPENDIX

[Extract from an article by Gregory Hankin in 6 Illinois Law Quarterly (April, 1924), 183 189–191]

What Constitutes Unfair Methods of Competition According to the Orders of the Federal Trade Commission

I. FALSE AND MISLEADING ADVERTISING

A. As to the advertiser's own business:

1. Misrepresentations on the letterheads and other stationery concerning the offices, factories, plants, etc., of the firm. (1 F. T. C. 285, 2 F. T. C. 295, 3 F. T. C. 13, 4 F. T. C. 87, 5 F. T. C. 120, 6 F. T. C. 51, 6 F. T. C. 60, 6 F. T. C. 101, 6 F. T. C. 131, 6 F. T. C. 149.)

2. Misrepresentation that the advertiser is the manufacturer of the product or that the products are sold from manufacturer to purchaser. (1 F. T. C. 316, 1 F. T. C. 495, 2 F. T. C. 414, 3 F. T. C. 13, 3 F. T. C. 168, 4 F. T. C. 87, 4 F. T. C. 215, 5 F. T. C. 245, 5 F. T. C. 410, 6 F. T. C. 155.)

3. Misrepresentations that the advertiser is conducting the business of warehouseman, and that the goods are sold to cover storage charges. (3 F. T. C. 156, 3 F. T. C. 163.)

4. False representation that the dealer is a wholesaler (3 F. T. C. 103) or importer (4 F. T. C. 373).

5. Misrepresentation as to the assets, plan of organization, financial standing of the business, and the quantity of capital stock to be sold. (2 F. T. C. 413, 5 F. T. C. 38, 5 F. T. C. 207, 5 F. T. C. 274, 5 F. T. C. 354, 5. F. T. C. 361, 6 F. T. C. 43, 6 F. T. C. 51, 6 F. T. C. 60, 6 F. T. C. 131, 6 F. T. C. 149.)

6. Misrepresentations as to the methods and standards of the business in comparison with its competitors. (1 F. T. C. 316, 2 F. T. C. 427, 3 F. T. C. 177, 3 F. T. C. 377, 4 F. T. C. 31.)

7. Advertising false indorsements accorded to the business. (2 F. T. C. 413, 3 F. T. C. 402, 6 F. T. C. 51.)

8. False statement that, due to its extent, the business enjoys special express rates. (4 F. T. C. 73.)

9. Pretending to guarantee a product. (4 F. T. C. 193.)

B. As to the goods advertised:

1. Misrepresentations as to the origin of the goods sold; for example, "Manchurian Linseed Oil Compound." (1 F. T. C. 285, 1 F. T. C. 163, 2 F. T. C. 427, 3 F. T. C. 177.)

2. False statements as to the methods of manufacturing the goods. (1 F. T. C. 400, 5 F. T. C. 38, 6 F. T. C. 43.)

3. Quality.

(*a*) False statements that the goods are not subject to the defects found in the goods of the competitors. (4 F. T. C. 73.)

(*b*) Misleading and deceiving statements that the goods are pure and unadulterated. (1 F. T. C. 285, 2 F. T. C. 195, 4 F. T. C. 27, 5 F. T. C. 55, 5 F. T. C. 203, 5 F. T. C. 264, 5 F. T. C. 290, 6 F. T. C. 24, 6 F. T. C. 35, 6 F. T. C. 107.)

(*c*) Failure to disclose that the goods sold are reconstructed second-hand products. (1 F. T. C. 105, 1 F. T. C. 109, 1 F. T. C. 380, 2 F. T. C. 11, 2 F. T. C. 88, 2 F. T. C. 119, 2 F. T. C. 216, 2 F. T. C. 327, 5 F. T. C. 219, 5 F. T. C. 327, 5 F. T. C. 385, 6 F. T. C. 89, 6 F. T. C. 119.)

(*d*) False statement as to the quality of the materials used in manufacturing the goods. (2 F. T. C. 120, 4 F. T. C. 51, 4 F. T. C. 182, 4 F. T. C. 193, 4 F. T. C. 199, 4 F. T. C. 373, 5 F. T. C. 33, 5 F. T. C. 55, 5 F. T. C. 120, 5 F. T. C. 136, 5 F. T. C. 183, 5 F. T. C. 219, 5 F. T. C. 290, 5 F. T. C. 303, 5 F. T. C. 321, 5 F. T. C. 345, 6 F. T. C. 11, 6 F. T. C. 35.)

(*e*) Advertising adulterated goods as pure; and conformity with universal custom is no defense, where the public is deceived. (1 F. T. C. 285, 2 F. T. C. 195, 3 F. T. C. 1, 3 F. T. C. 189, 5 F. T. C. 391.)

(*f*) False and misleading representations tending to mislead the public into thinking that the article is of better quality. (1 F. T. C. 495, 2 F. T. C. 120, 4 F. T. C. 1, 4 F. T. C. 31, 4 F. T. C. 73, 4 F. T. C. 114, 4 F. T. C. 155, 4 F. T. C. 305, 4 F. T. C. 309, 4 F. T. C. 317, 4 F. T. C. 373, 4 F. T. C. 397, 4 F. T. C. 423, 4 F. T. C. 446, 4 F. T. C. 452, 5 F. T. C. 33, 5 F. T. C. 131, 5 F. T. C. 203, 5 F. T. C. 264, 5 F. T. C. 284, 5 F. T. C. 309, 5 F. T. C. 372, 5 F. T. C. 424, 6 F. T. C. 28, 6 F. T. C. 35, 6 F. T. C. 43, 6 F. T. C. 74, 6 F. T. C. 84, 6 F. T. C. 101.)

(*g*) Deceptive advertising tending to mislead the public into believing that the goods had been made for the United States Government according to specifications, and purchased by the advertiser as surplus stock. (3 F. T. C. 42, 3 F. T. C. 130, 5 F. T. C. 112, 5 F. T. C. 253.)

(*h*) False representations that the adulterated goods sold are in every respect as good as the pure product. (2 F. T. C. 427, 2 F. T. C. 321, 3 F. T. C. 64, 3 F. T. C. 151, 3 F. T. C. 177, 3 F. T. C. 393, 5 F. T. C. 203, 5 F. T. C. 349.)

(*i*) Falsely representing that the goods advertised can be used for specific purposes. (2 F. T. C. 335, 6 F. T. C. 35, 6 F. T. C. 107.)

(*j*) Falsely advertising the ingredients of products. (3 F. T. C. 402.)

4. Price.

(*a*) Falsely advertising "no extra charge for credit." (4 F. T. C. 330.)

(*b*) Falsely advertising that the product will be sold at 50 per cent less than the market price. (4 F. T. C. 73, 5 F. T. C. 396, 5 F. T. C. 424.)

(*c*) Falsely advertising that the goods are sold at prices below cost. (1 F. T. C. 186.)

(*d*) Falsely advertising that the purchaser saves from 25 to 50 per cent if he buys from such advertiser rather than from regular dealers. (1 F. T. C. 30, 1 F. T. C. 316, 1 F. T. C. 488, 1 F. T. C. 163, 2 F. T. C. 188, 3 F. T. C. 46, 3 F. T. C. 95, 3 F. T. C. 103, 3 F. T. C. 338.)

(*e*) False statements that the regular price is a certain amount whereas the actual price is much lower. (3 F. T. C. 156, 3 F. T. C. 163, 4 F. T. C. 193, 4 F. T. C. 199, 5 F. T. C. 33, 4 F. T. C. 373.)

(*f*) Labeling containers with fictitious exaggerated prices. (3 F. T. C. 31, 4 F. T. C. 199, 4 F. T. C. 163, 4 F. T. C. 167, 4 F. T. C. 172, 4 F. T. C. 177, 4 F. T. C. 182, 4 F. T. C. 188, 4 F. T. C. 204, 4 F. T. C. 284, 4 F. T. C. 317, 4 F. T. C. 334, 4 F. T. C. 338, 4 F. T. C. 342, 4 F. T. C. 346, 4 F. T. C. 351, 4 F. T. C. 363, 4 F. T. C. 368, 4 F. T. C. 372, 4 F. T. C. 378, 4 F. T. C. 382, 4 F. T. C. 397, 5 F. T. C. 33, 5 F. T. C. 100, 5 F. T. C. 172, 5 F. T. C. 189, 5 F. T. C. 424, 6 F. T. C. 126.)

(*g*) Announcing and carrying on a fictitious sale. (5 F. T. C. 424.)

5 Indorsements.

(*a*) Advertising goods as having been purchased by the United States Government and sold as surplus; also falsely representing that the advertiser is in the employ of the Government to sell such goods, or that he is the agent of the United States Government. (4 F. T. C. 102.)

(*b*) Falsely advertising indorsements, for example, that the products have been certified by the United States Bureau of Standards, or that the United States Supreme Court decided that the advertiser's system is the best. (1 F. T. C. 301, 1 F. T. C. 316, 2 F. T. C. 388, 3 F. T. C. 402, 6 F. T. C. 107.)

(*c*) False statements that the product has been tested and approved by a Government agency. (4 F. T. C. 387, 3 F. T. C. 361, 4 F. T. C. 149.)

6. Branding and labeling.

(*a*) Branding or labeling goods as of a certain kind or quality so as to mislead the purchaser into thinking that he is getting a better quality of goods. (1 F. T. C. 154, 1 F. T. C. 221, 1 F. T. C. 285, 1 F. T. C. 436, 2 F. T. C. 113, 2 F. T. C. 171, 2 F. T. C. 195, 2 F. T. C. 202, 2 F. T. C. 207, 2 F. T. C. 223, 2 F. T. C. 228, 2 F. T. C. 233, 2 F. T. C. 238, 2 F. T. C. 243, 2 F. T. C. 248, 2 F. T. C. 253, 2 F. T. C. 258, 2 F. T. C. 264, 2 F. T. C. 269, 2 F. T. C. 275, 2 F. T. C. 280, 2 F. T. C. 285, 2 F. T. C. 290, 2 F. T. C. 295, 2 F. T. C. 307, 2 F. T. C. 313, 2 F. T. C. 327, 2 F. T. C. 340, 3 F. T. C. 1, 3 F. T. C. 189, 3 F. T. C. 199, 3 F. T. C. 204, 4 F. T. C. 1, 5 F. T. C. 55, 3 F. T. C. 407, 3 F. T. C. 393, 3 F. T. C. 413, 5 F. T. C. 92, 5 F. T. C. 131, 5 F. T. C. 183, 5 F. T. C. 193, 5 F. T. C. 198, 5 F. T. C. 203, 5 F. T. C. 230, 5 F. T. C. 234, 5 F. T. C. 239, 5 F. T. C. 257, 5 F. T. C. 264, 5 F. T. C. 269, 5 F. T. C. 284, 5 F. T. C. 372, 5 F. T. C. 435, 6 F. T. C. 1, 6 F. T. C. 16, 6 F. T. C. 20, 6 F. T. C. 24, 6 F. T. C. 28, 6 F. T. C. 74, 6 F. T. C. 79, 6 F. T. C. 84, 6 F. T. C. 97, 6 F. T. C. 107 6 F. T. C. 144, 6 F. T. C. 159.)

(*b*) False claims as to the ownership of the trade name of an article. (1 F. T. C. 401, 3 F. T. C. 369.)

(*c*) Simulating the name of a genuine article or labeling adulterated goods as pure. (1 F. T. C. 13, 1 F. T. C. 16, 1 F. T. C. 154, 1 F. T. C. 436, 2 F. T. C. 41, 2 F. T. C. 58 2 F. T. C. 67, 2 F. T. C. 207, 2 F. T. C. 212, 2 F. T. C. 223, 2 F. T. C. 228, 2 F. T. C. 307, 3 F. T. C. 6, 3 F. T. C. 189, 3 F. T. C. 199, 3 F. T. C. 407, 4 F. T. C. 102, 4 F. T. C. 155, 5 F. T. C. 203, 5 F. T. C. 230, 5 F. T. C. 234, 5 F. T. C. 239, 5 F. T. C. 327, 5 F. T. C. 435, 6 F. T. C. 1, 6 F. T. C. 97, 6 F. T. C. 159, 6 F. T. C. 16)

(*d*) False labeling and misbranding tending to mislead the public into thinking that the product was prepared for the United States Government. (3 F. T. C. 413, 4 F. T. C. 102, 4 F. T. C. 144, 4 F. T. C. 149, 4 F. T. C. 41, 5 F. T. C. 112, 6 F. T. C. 24, 6 F. T. C. 107.)

7. Patents.

(*a*) Claiming that certain products are patented and that the goods of the competitors are infringements. (1 F. T. C. 310.)

(*b*) Claiming that the goods are patented, whereas actually the patent had expired. (3 F. T. C. 137.)

(*c*) Misrepresentations as to the inventor of the product. (2 F T. C. 143.)

C. Miscellaneous:

1. False statements that the advertiser has a large supply of a product. (4 F. T. C. 418, 5 F. T. C. 38.)
2. Misrepresentations that the firm's and a competitor's are one and the same business. (1 F. T. C 259.)
3. Publishing advertising matter as news and editorial. (2 F. T. C. 381, 3 F. T. C. 377.)

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