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federal courts. Schwegmann Brothers, Louisiana retailers and long time foe of "fair trade," challenged this Act on grounds that it violates the due process clause of the Federal Constitution and constitutes an unlawful delegation of legislative power to private individuals. The Louisiana Federal District Court in *Ely Lilly Co. v. Schwegmann Bros.*²⁸ upheld the constitutionality of the Act. In *General Electric v. Klein on the Square*²⁹ the New York Supreme Court declared the McGuire Act constitutional as not being in contravention of the due process or equal protection clauses and not an unlawful delegation of legislative power. Ultimately the United States Supreme Court may rule on the constitutionality of the McGuire Act and its sanction of the controversial non-signers clause.³⁰ Since the Supreme Court of the United States has already held that the Fair Trade Acts do not contravene the Fourteenth Amendment in intrastate commerce³¹ it is quite unlikely that it will now hold the McGuire Act as applied to interstate transactions is violative of the Fifth Amendment.

Although most states will leave the economic wisdom of Fair Trade Acts to the Legislature and hence those declaring such Acts to be unconstitutional will remain in the minority, it is evident that the courts will give more careful scrutiny to this legislation in the future than has been true in the past.

JOHN RALPH CAMBRON

Unfair Competition—Export Trade Act—Unfair Methods of Competition under Section Four

The Sherman Act of 1890 prohibited concerted action by independent exporters including the formation of trade associations for the purpose of eliminating competition among themselves in foreign trade.¹ The importance of allowing American exporters to combine into such an association was stressed in a report submitted to Congress by the Federal Trade Commission in 1916.² Spurred by this report,

²⁸ TRADE REG. REP., CURRENT COURT DECISIONS, ¶ 67,443 (1953).

²⁹ 109 F. Supp. 269 (1953).

³⁰ The Supreme Court of the United States has never passed directly on the constitutionality of the Miller-Tydings Act.

³¹ *Old Dearborn Distributing Co. v. Seagrams-Distillers, Corp.*, 299 U. S. 183 (1936).

¹ The Sherman Act prohibits: "Every contract, combination . . . or conspiracy, in restraint of trade. . ." 26 STAT. 209 (1890), as amended by 50 STAT. 693 (1937), 15 U. S. C. §§ 1-7 (1946).

² Public hearings were conducted in 16 cities; several thousand questionnaires were sent out to interested individuals and firms; American consuls and commercial attachés sent in reports; a study of the ramifications of foreign cartel arrangements was made. On June 30, 1916, this report on *Cooperation in American Export Trade* was submitted to Congress. This report may be found in EXPORT PRICES AND EXPORT CARTELS (WEBB-POMERENE ASSOCIATIONS) 113-118 (TNEC Monograph 6, 1941). See also Love, *The Export Trade Act*, 8 GEO. WASH. L. REV. 608 (1940).

Congress enacted the Export Trade Act (otherwise known as the Webb-Pomerene Act) on April 10, 1918.³ The terms of the Webb-Pomerene Act specifically enable independent exporters to combine into an association and set forth the conditions under which such an association may be organized. Congress, however, was aware of the dangers inherent in permitting such a combination, and therefore included certain restrictive provisions in the Webb-Pomerene Act to govern the activities of these associations.⁴ Section 4,⁵ one of the restrictive provisions, prohibits unfair methods of competition in export trade. Unlike the other sections of the Act, it embraces not only the conduct of export associations but also the activities of any individual businessman engaged in export trade.

Section 4 reads:

"The prohibition against 'unfair methods of competition' and the remedies provided for enforcing said prohibition contained in the Federal Trade Commission Act shall be construed as extending to unfair methods of competition in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States."⁶

Both the 1916 Report⁷ to Congress by the Federal Trade Commission and the ensuing legislative history⁸ of the Act lend weight to the conclusion that the conduct of single firms as well as export associations are within the purview of Section 4. In *United States v. United States Alkali Export Ass'n., Inc., et al.*,⁹ it was stated that "The effect of Section 4 . . . was to condemn such 'unfair methods of competition' wherever committed . . . this section [does not] draw any distinction between organizations organized under previous sections of the Webb

³ 40 STAT. 516 (1918), 15 U. S. C. §§ 61-65 (1946). For two years Congress gave the provisions of this act a thorough examination. In 1916, Representative Edwin Y. Webb from North Carolina introduced H. R. 16707, 64th Cong., 1st Sess. (1916) and H. R. 17350, 64th Cong., 2d Sess. (1916). Again in 1917 Representative Webb introduced H. R. 2316, 65th Cong., 1st Sess. (1917) (this bill was eventually passed by both houses), and Senator Atlee Pomerene from Ohio introduced S. 634, 65th Cong., 1st Sess. (1917).

⁴ 40 STAT. 517 (1918), 15 U. S. C. § 62 (1946); 40 STAT. 517 (1918), 15 U. S. C. § 63 (1946); 40 STAT. 517 (1918), 15 U. S. C. § 64 (1946); 40 STAT. 517 (1918), 15 U. S. C. § 65 (1946).

⁵ 40 STAT. 517 (1918), 15 U. S. C. § 64 (1946).

⁶ *Id.*

⁷ Report on *Cooperation in American Export Trade* as reported in EXPORT PRICES AND EXPORT CARTELS (WEBB-POMERENE ASSOCIATIONS) 117-118 (TNEC Monograph 6, 1941).

⁸ See 55 CONG. REC. 2786 (1917); 55 CONG. REC. 3577 (1917); 56 CONG. REC. 69 (1917); 56 CONG. REC. 111 (1917); 56 CONG. REC. 171 (1917); 56 CONG. REC. 173 (1917).

⁹ *United States v. United States Alkali Export Ass'n., Inc., et al.*, 86 F. Supp. 59 (S. D. N. Y. 1949).

Act and other corporations engaging in export trade."¹⁰ Although the Federal Trade Commission has brought several proceedings under Section 4, none have been directed against an export association.¹¹

It is interesting to note that the authority of the Federal Trade Commission is confined to investigatory functions under all the provisions of the Webb-Pomerene Act except Section 4.¹² Under Section 4 the Commission is empowered to determine that unfair methods of competition have been employed and then to command the violator to cease and desist.¹³

Since 1918 the Federal Trade Commission has proceeded against individual respondents only twelve times under this Section. Six complaints resulted in cease and desist orders and six complaints were dismissed. The following practices have been attacked as "unfair methods of competition" in export trade: labeling condensed milk cans so that they mislead the consumer as to the place of manufacture;¹⁴ misrepresenting the quality of apples;¹⁵ misrepresenting products as to certain iron and steel specialties;¹⁶ selling inferior or worthless automobiles and automobile parts as new;¹⁷ filling orders for wheat with grades inferior to that specified;¹⁸ representing and selling as new, certain trucks, automobiles, and parts which were unusable;¹⁹ failing to adhere to contract obligations in the exportation of coal;²⁰ employing threats of an infringe-

¹⁰ *Id.* at 67.

¹¹ *Branch v. Federal Trade Commission*, 141 F. 2d 31 (7th Cir. 1944); *Nestle Food Co., Inc.*, 2 F. T. C. 171 (1919); *Caravel Co., Inc.*, 6 F. T. C. 198 (1923); *Carnick Bros. Co.*, 6 F. T. C. 515 (1923); *Pacific Commercial Co., et al.*, 10 F. T. C. 458 (1926); *Barnes-Ames Co., et al.*, 10 F. T. C. 460 (1926); *M. Rea Gano*, 11 F. T. C. 492 (1928); *Robert M. Lease Co., Inc., et al.*, 12 F. T. C. 85 (1928); *Edmond Waterman et al.*, 12 F. T. C. 509 (1928); *Bond Bros. & Co., Inc.*, 15 F. T. C. 445 (1931); *Export Petroleum Co. of Calif., Ltd.*, 17 F. T. C. 119 (1932); *Lake Erie Chemical Co., et al.*, 29 F. T. C. 62 (1939).

¹² Section 5 of the Webb-Pomerene Act gives the Federal Trade Commission authority to investigate any conduct by an export association which may restrain domestic or export trade, to make recommendations for correction of this conduct, and to refer its recommendations and findings to the Attorney General. 40 STAT. 517 (1918), 15 U. S. C. § 65 (1946). In *United States Alkali Export Ass'n., Inc., et al.*, 325 U. S. 196, 210 (1945) the Supreme Court stated "that the only function of the Federal Trade Commission under § 5 of the Webb-Pomerene Act is to investigate, recommend and report. It can give no remedy. It can make no controlling finding of law or fact. Its recommendation need not be followed by any court or administrative or executive officer."

¹³ In *Branch v. Federal Trade Commission*, 141 F. 2d 31 (7th Cir. 1944) the respondent appealed from a cease and desist order by the Federal Trade Commission, *Joseph G. Branch*, 36 F. T. C. 1 (1943), and the Court of Appeals for the seventh circuit affirmed the order.

¹⁴ *Nestle Food Co., Inc.*, 2 F. T. C. 171 (1919) (cease and desist order issued).

¹⁵ *Caravel Co., Inc.*, 6 F. T. C. 198 (1923) (cease and desist order issued).

¹⁶ *Carnick Bros. Co.*, 6 F. T. C. 515 (1923) (complaint dismissed).

¹⁷ *Pacific Commercial Co., et al.*, 10 F. T. C. 458 (1926) (complaint dismissed).

¹⁸ *Barnes-Ames Co., et al.*, 10 F. T. C. 460 (1926) (complaint dismissed).

¹⁹ *M. Rea Gano*, 11 F. T. C. 492 (1928) (complaint dismissed).

²⁰ *Robert M. Lease Co., Inc., et al.*, 12 F. T. C. 85 (1928) (cease and desist order issued).

ment suit against competitors in the sale of certain fruits;²¹ misrepresenting the quality and sale terms of bailed newspapers;²² failing to fill gasoline containers to capacity and thus allowing respondent's vendees, in selling to the ultimate consumer, to misrepresent the quantity of gasoline being sold;²³ and misrepresenting the quality and source of certain chemicals and other material used in warfare.²⁴

Of the twelve proceedings, only one, *Branch v. Federal Trade Commission*,²⁵ reached the federal courts. In this case the charge was advertising falsely the qualifications and academic standards of a correspondence school which extended its services into Latin America. The petitioner claimed that the Commission did not have jurisdiction because he was not engaged in commerce and because the acts in question took place in Latin America. The court repudiated these arguments by ruling that (1) sending "books, instructions, and written examinations . . . is 'commerce' within the meaning of the Constitution and the Federal Trade Commission Act"²⁶ and, (2) the Federal Trade Commission has the power "to protect the petitioner's competitors from . . . unfair practices, begun in the United States and consummated in Latin America."²⁷ In finding a violation of Section 4, the Court of Appeals for the seventh circuit had to determine that export trade, as defined in the Webb-Pomerene Act, was involved.²⁸

Another significant feature of the *Branch* case is the fact that the court made it clear that Section 5 of the Federal Trade Commission Act had also been violated.²⁹ If acts committed in foreign commerce are condemned by Section 5 of the Federal Trade Commission Act as well as Section 4 of the Webb-Pomerene Act, is there any necessity for resorting to Section 4? The legislative history of the Webb-Pomerene Act indicates that Section 4 was probably inserted primarily to allay the fears of those who opposed combinations in export trade, to prevent export associations from using their position unfairly against individual exporters.³⁰ However, as previously indicated, the Commission has yet to direct Section 4 against an export association. Inconsistent as it may seem, Section 5 of the Federal Trade Commission Act is broader than Section 4 of the Webb-Pomerene Act. While Section

²¹ Edmond Waterman et al., 12 F. T. C. 509 (1928) (complaint dismissed).

²² Bond Bros. & Co., Inc. 15 F. T. C. 445 (1931) (complaint dismissed).

²³ Export Petroleum Co. of Calif., Ltd., 17 F. T. C. 119 (1932) (cease and desist order issued).

²⁴ Lake Erie Chemical Co., et al., 29 F.T.C. 67 (1939) (cease and desist order issued).

²⁵ *Branch v. Federal Trade Commission*, 141 F. 2d 31 (7th Cir. 1944). The cease and desist order in the case was obtained under Section 5 of the Federal Trade Commission Act. Joseph G. Branch, 36 F. T. C. 1 (1943). Section 4 of the Webb-Pomerene Act was introduced into the proceeding when the case was appealed to the Court of Appeals for the seventh circuit.

²⁶ *Branch v. Federal Trade Commission*, 141 F. 2d 31, 34 (7th Cir. 1944).

²⁷ *Id.* at 35.

²⁸ *Id.* at 36.

²⁹ *Id.* at 35.

³⁰ See note 8 *supra*.

4 contains the language "unfair methods of competition,"³¹ thus requiring that the act complained of not only being *unfair* but also a *method of competition* in export trade.³² Section 5 now reads "unfair methods of competition in commerce and *unfair or deceptive acts or practices in commerce.*"³³ This latter addition to Section 5 of the Federal Trade Commission Act has been interpreted to mean that it is only necessary to show an *unfair act* in commerce.³⁴ It appears that the Federal Trade Commission can rely on Section 5 of the Federal Trade Commission Act entirely in assailing inequitable practices in export trade. However, it is the Commission's opinion that without Section 4 of the Webb-Pomerene Act there would be doubt as to their jurisdiction over acts *committed* in foreign countries.³⁵

Whether the Commission will rely on Section 4 of the Webb-Pomerene Act or Section 5 of the Federal Trade Commission Act, it is apparent that the enforcement of the anti-trust laws in the area of international trade is definitely increasing. Two recent cases prosecuted by the Attorney General under the Sherman Act clearly indicate that export associations organized under the Webb-Pomerene Act are not exempted from the Sherman Act for all purposes.³⁶ If the acts complained of amount to a restraint of trade, the association is still subject to prosecution by the Attorney General.³⁷ Thus it must be noted that the fact that the Federal Trade Commission may proceed under Section 4 of the Webb-Pomerene Act or Section 5 of the Federal Trade Commission Act does not necessarily preclude the Attorney General from proceeding under the Sherman Act. Although it is difficult to predict the extent to which Section 5 will be employed, it may be

³¹ 40 STAT. 517 (1918), 15 U. S. C. § 65 (1946) [emphasis added].

³² The terms "unfair methods of competition" in Section 4 of the Webb-Pomerene Act are the same terms that were found in Section 5 of the Federal Trade Commission Act prior to the Wheeler-Lea amendment to the Federal Trade Commission Act in 1938. The meaning of "unfair methods of competition" was determined in *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643 (1931).

³³ 38 STAT. 719 (1914), as amended by 52 STAT. 111 (1938), 15 U. S. C. § 45 (1946) [emphasis added].

³⁴ The terms "unfair or deceptive acts or practices in commerce," as added to Section 5 of the Federal Trade Commission Act by the Wheeler-Lea Act in 1938, have been interpreted in *Pep Boys-Manny, Moe & Jack v. Federal Trade Commission*, 122 F. 2d 158 (3d Cir. 1941); *Chas. A. Brewer & Sons v. Federal Trade Commission*, 158 F. 2d 74 (6th Cir. 1946) and many other cases.

³⁵ In correspondence to the writer of this note, dated April 24, 1953, the Federal Trade Commission stated: "Section 4 of the Export Trade Act was passed because there was some doubt as to whether the Commission had jurisdiction under the Federal Trade Commission Act over acts committed in foreign countries. There was no doubt, however, of the Commission's jurisdiction in cases involving imports or exports because the law has always applied to 'commerce' which includes both interstate and foreign."

³⁶ *United States v. United States Alkali Export Ass'n., Inc.*, et al., 86 F. Supp. 59 (S. D. N. Y. 1949); *United States v. Minnesota Mining & Manufacturing Co.*, et al., 92 F. Supp. 947 (D. C. Mass. 1950).

³⁷ *Id.*

used to protect competitors and foreign consumers from American exporters who engage in unethical and dishonest business practice in foreign commerce.³⁸

MORTON L. UNION

Wills—Ademption—Insurance—Right to Proceeds

The specific legatee of an automobile sought to collect the proceeds of an insurance policy on the automobile after an accident in which it was damaged. The testatrix sustained injuries in the accident which resulted in her subsequent death. The insurance company paid to the executor the value of the automobile after the accident and took possession of it as salvage. The court held that the executor was entitled to the proceeds of the policy and that the legatee was entitled only to the value of the automobile as of the death of the testatrix. The insurance policy was held to be a personal contract between the testatrix and the insurer, hence the legatee had no interest therein.¹

The case clearly illustrates how the relationship of the death of a testator and the damage or destruction of a specific legacy may produce varied results. That is, since the rights of the legatee are ordinarily determined as of the death of the testator,² it will be important whether the damage or destruction of the legacy or devise occurred prior to or subsequent to the testator's death.

In the first instance, *i.e.*, where the damage or destruction occurred prior to the death, the law of ademption controls.³ Without elaborating on the intricacies of ademption, suffice it to say that ordinarily ademption is defined as the taking away of the subject matter of a specific legacy⁴ or devise by its destruction, or its disposition by the testator in his lifetime.⁵ Therefore, if the specific legacy or devise is damaged or

³⁸ This would certainly seem to be the conclusion to be drawn from *Branch v. Federal Trade Commission*, 141 F. 2d 31 (7th Cir. 1944); *Nestle Food Co., Inc.*, 2 F. T. C. 171 (1919); *Caravel Co., Inc.*, 6 F. T. C. 198 (1923); *Robert M. Lease Co., Inc., et al.*, 12 F. T. C. 85 (1928); *Export Petroleum Co. of Calif., Ltd.*, 17 F. T. C. 119 (1932); *Lake Erie Chemical Co., et al.*, 29 F. T. C. 67 (1939)

¹ *In re Barry's Estate*, 252 P. 2d 437 (Okla., 1952). *Accord*, *Ind. Mutual Cyclone Ins. Co. v. Rinard*, 102 Ind. App. 546, 200 N. E. 452 (1936); *Converse v. Boston Safe Deposit and Trust Co.*, 315 Mass. 544, 53 N. E. 2d 841 (1944); *In re Hilpert's Estate*, 165 Misc. 430, 300 N. Y. Supp. 886 (Sur. 1937); III AMERICAN LAW OF PROPERTY § 14.32 (1952).

² N. C. GEN. STAT. § 31-41 (1943 Recomp. 1950).

³ *In re Hilpert's Estate*, 165 Misc. 430, 300 N. Y. Supp. 886 (Sur. 1937); III AMERICAN LAW OF PROPERTY § 14.32 (1952) where it is stated: "The right to recover on a fire insurance policy when the loss occurred in the lifetime of decedent passes to his personal representatives, as in case of any other chose in action; this recovery is for the general benefit of the estate and not for the devisee or others entitled to the land."

⁴ 28 R. C. L. WILLS § 341 (1921).

⁵ *Green v. Green*, 231 N. C. 707, 58 S. E. 2d 722 (1950); *Tyner v. Meadows*, 215 N. C. 733, 3 S. E. 2d 264 (1939); *King v. Sellars*, 194 N. C. 533, 140 S. E.