

No. 45

UNFAIR PRACTICES ACT, "CEASE AND DESIST" PROCEEDINGS UNDER—FEES—CLERK OF DISTRICT COURT—COURT COSTS

Held: "Cease and Desist" Proceedings under Unfair Practices Act are civil proceedings and court costs and fees must be paid as in other civil cases.

March 17, 1941

Mr. Hugh J. Lemire
County Attorney
Custer County,
Miles City, Montana

Dear Mr. Lemire:

You have submitted the following question:

"Is an individual or a corporation required to pay court costs or fees of the Clerk of the District Court in a proceeding under the Unfair Practices Act, being Chapter 80 of the Session Laws of 1937, as amended by Chapter 50 of the Session Laws of 1939, upon the said individual or corporation filing a written petition for a review of an order of the Commission to cease and desist from selling or advertising for sale merchandise below cost?"

It is well settled fees can be collected by public officers only when expressly authorized by law (46 C. J. 1017). In the *United States v. Shields*, 153 U. S. 88, the Supreme Court of the United States said:

"Fees allowed to public officers are matters of strict law, depending upon the very provisions of the statute. They are not open to equitable construction by the courts, nor to any discretionary action on the part of the officials."

The crux of the question you present is a determination as to whether or not "Cease and Desist" proceedings under the Unfair Practices Act are civil in nature.

An examination of the Act under consideration reveals that, under Section 3 of Chapter 80, Laws of 1937, and Section 4 of Chapter 50, Laws of 1939, violations of the Act are made a misdemeanor. Section 11 of Chapter 80, Laws of 1937, prescribes the penalties for such violations. Yet under Section 12 of Chapter 80, Laws of 1937, as amended by Chapter 50, Laws of 1939, an additional means of enforcing the Act is provided whereby the Montana Trade Commission may, under defined procedure, order the offender to "cease and desist" the Unfair Practices complained of. This remedy is tantamount to injunctive relief to prevent criminal violations. The purpose and effect of such type of statute is well stated in 28 Am. Jur., at page 338, where the following language is found:

"Statutes of this kind are designed, not as means of punishing those guilty, but to protect property rights and the community. They are within the constitutional power of the legislature to pass; they do not violate the guaranty of the right to trial by jury, deprive persons of their liberty or property without due process of law, or interfere with due course of law. . . . Nor is such an Act objectionable as twice putting a person in jeopardy for the same offense, on the theory that, if disobeyed, the defendant might be punished for contempt and also for the commission of the crime."

And in 28 Am. Jur., at pages 341 and 342, the text declares:

"In such cases, according to the weight of authority, when the interests of the state or other political division or the interests of those entitled to its protection are thus affected by criminal acts or practices, the state, acting through its governmental agencies, may invoke the jurisdiction of equity to have them restrained. Generally speaking, the courts, in considering whether an injunction against the commission of acts which are criminal will be granted at the suit of the state, take the view that when the state appears before courts, it appears not in its sovereign capacity, and can only invoke such powers and jurisdiction as are conferred upon the court before which the action is brought. In other words, the state stands as any other litigant, with no distinction drawn in its favor."

In 19, R. C. L., at page 88, injunctive relief, under the Sherman Act, is considered a civil proceeding. There the following language is found:

"Under this section, the United States has full standing in court to maintain a bill in equity for an injunction, though without pecuniary interest in the result of the litigation, and the remedy has been often resorted to. It is entirely competent for Congress to authorize such civil proceeding in equity to suppress and restrain combinations and conspiracies to accomplish the obstruction and destruction of interstate commerce and trade before it is accomplished. It was just as competent for Congress to provide this civil remedy of prevention as it was to provide for punishment in a criminal proceeding for the unlawful conspiracy entered upon or consummated. Authorizing an injunction by a federal court against illegal combinations in restraint of interstate commerce, although they are made misdemeanors, does not violate the provisions of the constitution of the United States requiring the trial of crimes to be by jury."

We believe that "cease and desist" proceedings, under the Unfair Practices Act, are civil in nature and are separate and distinct from prosecutions for criminal offenses under the same Act and that, therefore, the defendant must pay court costs and fees as in other civil cases.

Sincerely yours,

JOHN W. BONNER
Attorney General