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HISTORICAL DEVELOPMENT OF THE LAW OF BUSINESS COMPETITION

FRANKLIN D. JONES

The Clayton Act¹ went into effect October 15, 1914. Its principal purpose as stated by its sponsors was to "make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the Act of July 2, 1890, or other existing anti-trust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."² These practices, which Congress felt warranted specific condemnation were (a) price discriminations, (b) exclusive and tying contracts, (c) intercorporate stockholding, particularly by holding companies and (d) interlocking directorates where the effect of these practices may be substantially to lessen competition or to tend to create monopolies. The test of lawfulness laid down by Congress, so far as these practices are concerned, is perhaps more strict than that previously applied by the courts under the Sherman Act. The test is that of probable effect, and if the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce" the practice is unlawful. The use of the words "may be" makes the test not whether the specified practice unduly restricts competition, but whether its probable effect, if permitted to continue, will be to lessen competition substantially or tend to create a monopoly.³

This act represented an entirely new development in the regulation of industry, in that instead of being made a criminal statute as originally drawn, it was amended so that its enforcement by public action was left to the newly created Federal Trade Commission. It was felt, in view of the experimental character of the legislation, that the harshness of the criminal law should not be applied.⁴

Price discriminations. Subject to seven exceptions, section 2 of the Clayton Act makes it unlawful for any person in the

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¹ Continued from the December 1926 issue, 36 YALE LAW JOURNAL, 207.
³ SEN. REP. No. 698, 63d Cong. 2d Sess., Ser. No. 6553, at 1.
⁵ Supra note 2, at 42.
course of commerce 5 to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption or resale within the United States, or any place within the jurisdiction of the United States where the effect of such discriminations may be substantially to lessen competition or tend to create a monopoly in any line of commerce. It will be noted that this prohibition does not apply to goods sold here in this country or abroad which are intended solely for export trade. The exceptions to the section provide that it shall not prohibit discrimination in price (1) on account of difference in grade, (2) or quality, (3) or quantity, (4) or cost of selling, (5) or cost of transportation, (6) or when made in good faith to meet competition, nor (7) prevent any person from selecting his own customers in bona fide transactions not in restraint of trade.

The purpose of this provision is explained by Congress in the following language:

“In the past it has been a most common practice of great and powerful combinations engaged in commerce—notably the Standard Oil Co., and the American Tobacco Co., and others of less notoriety, but of great influence—to lower prices of their commodities, oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made. Every concern that engages in this evil practice must of necessity recoup its losses in the particular communities or sections where their commodities are sold below cost or without a fair profit by raising the price of this same class of commodities above their fair market value in other sections or communities. Such a system or practice is so manifestly unfair and unjust, not only to competitors who are directly injured thereby but to the general public, that your committee is strongly of the opinion that the present antitrust laws ought to be supplemented by making this particular form of discrimination a specific offense under the law when practiced by those engaged in commerce.”

Some nineteen states had already enacted laws against price discriminations which, however, could be easily circumvented by a concern with a national distribution by merely keeping the price in the particular state uniform although making different prices elsewhere, and this act was designed to correct the situation.

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5 Commerce as defined in the act includes interstate and foreign commerce and commerce in and between any places under the jurisdiction of the United States (with the exception of the Philippine Islands) or between such places and any foreign nations.


7 Supra note 6.
The maze of generally-worded exceptions to this section made it practically worthless as a regulatory measure and the decisions of the courts have still further restricted its application. Two important cases arising out of the struggle between wholesalers and co-operative groups of retailers, and between chain stores and independent retailers have been decided. In the first, involving the granting of larger discounts by the Mennen Company to wholesalers on quantity purchases than to groups of retailers organized in the corporate form or otherwise for the purchase of similar quantities of merchandise for their members, the court held that even though such a discrimination tended to decrease competition among the two different groups of the company's customers it was not a violation of the law. The court decided that the words “where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce” applied only to competition between the party to the discrimination and his competitors, on the ground that the wording in the act as originally introduced prohibited discrimination “with the purpose or intent thereby to destroy or wrongfully injure the business of a competitor of either such purchaser or seller.” The subsequent change of wording in the court's opinion restricted the scope of the section and eliminated discriminatory practices designed by a powerful manufacturer to restrict and control competition among his distributors. The court took this position even though the chairman of the House Committee in reporting the bill stated that the change was made to give this section “more elasticity and breadth.”

In a later case the court held the granting of discounts in price by a large cracker manufacturer based upon total monthly purchases by its customers adopted partly in order to induce frequent purchases and thus insure freshness and quality when the product reaches the consumer, such discounts being given to chain store organizations on the total of the separate purchases of their store managers but being refused to pools of independent retailers organized to combat the competition of the chain stores, was not a violation of this section although it tends substantially to lessen competition among such buyers. It may be safely said, therefore, that this section will be successfully employed by the Commission only in most flagrant cases of price discrimi-

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9 51 CONG. REC. 16273. A writ of certiorari was denied by the Supreme Court, 262 U. S. 759, 43 Sup. Ct. 705 (1922) so the limited application of this section is finally established.
nation clearly designed to injure competitors of the party making the discrimination.

Tying and exclusive contracts. Section 3 of the Clayton Act makes it unlawful for any person to lease or make a sale or contract for sale of any commodity for use, consumption, or resale within the United States or any place under the jurisdiction of the United States (except the Philippine Islands) or to fix the price thereof, or discount or rebate from such price, on the condition of understanding that the lessee or purchaser shall not use or deal in the commodities of a competitor of the person making the sale or lease, where the effect of such action may be substantially to lessen competition or tend to create a monopoly in any line of commerce. The House Committee on the Judiciary, in presenting its report on the measure, assigned a number of reasons for the adoption of this section. It was asserted that the practice enabled a powerful manufacturer to hamper the dealer in the conduct of his own business; that it tended to drive competitive articles from the market and often to create a complete local monopoly in many small towns; that it resulted in higher prices to the consumer; that the public is often put to the inconvenience of securing many commodities it desires from other communities or through mail order houses and that when used by very large concerns such as a few mentioned in the report the practice becomes "one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man." The section was not designed to apply to bona fide agency contracts.

The courts in two cases have held that contracts made by dress pattern manufacturers with dealers representing a large percentage of all the dealers in the United States, requiring them not to deal in the goods of competing manufacturers, violate this section. But a contract made by a manufacturer, representing only 1% of the total production in a highly competitive industry, requiring his dealers to refrain from dealing in the products of competitors has been held not to be a violation of this section because of the absence of any probable effect in substantially lessening competition.

Another form of contract having much the same competitive

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11 Supra note 6, at 11–13.
effect is a contract often used in the past by manufacturers of patented articles or other commodities in great demand, wherein they tie up the sale of such products with other products sold by them so as to compel buyers to purchase these other products and thus restrict the ability of competitors to sell the same class of products to dealers and others who are parties to such contracts. One of the express purposes of this section was to reach such practices employed by very large concerns such as the United Shoe Machinery Company. The government, therefore, soon after the passage of the act brought suit to enjoin the use by that company of leases containing cleverly-worded clauses which, while they did not in express words, did in practical effect compel lessees of their patented machinery to use only machines and supplies of their manufacture with such machinery. The Supreme Court held such clauses to be a violation of the law, in view of the dominating position of the United States Shoe Machinery Company in the industry. The court further held that such a prohibition made in the public interest to prevent monopoly, even though applicable to patented articles for which patents had been secured prior to the passage of the act, was not an unconstitutional restriction on the legitimate rights secured by the patents. The lower court did however hold, and this decision was not disturbed by the Supreme Court, that in view of the extremely delicate and intricate nature of the company's machinery it was reasonable to require the lessee to secure all duplicate parts and devices used in the operation, repair or renewal of the patented machinery.

In a number of cases involving many of the large oil companies of the United States, it was held that the leasing of gasoline pumps, containers and storage tanks to dealers on the condition that their use should be restricted to the lessor's product, but making no requirement that the products of competitors should not be dealt in, was not a violation of this section in the absence of proof of a tendency to eliminate competition or create a monopoly. Important precedents have been established under this section, widely known in the business world, and it may be safely said that this prohibition is having and in the future will have a considerable effect.

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15 United Shoe Machinery Co. v. United States, supra note 3; see also Motion Picture Patents Co. v. Universal Film Co., 243 U. S. 502, 37 Sup. Ct. 416 (1917).
16 Supra note 3.
Intercorporate stockholding. Section 7 of this act makes it unlawful for a corporation engaged in interstate or foreign commerce to acquire the stock of another corporation also engaged in interstate or foreign commerce where the effect of such acquisition may be substantially to lessen competition between the two corporations or to restrain commerce in any section or community or to tend to create a monopoly in any line of commerce. It also is specifically directed at holding companies, i.e., corporations formed, the primary purpose of which is to acquire and hold the stock of other corporations. It prohibits the acquisition by such a corporation of the stock of other corporations which are engaged in interstate or foreign commerce, where the effect may be substantially to lessen competition between any of such corporations or to restrain such commerce in any section or community. There are three exceptions to this prohibition. (1) It does not apply to the purchase of stock solely for investment, providing no attempt is made to use the stock by voting or otherwise to bring about a substantial lessening of competition. (2) It does not prevent a corporation from forming subsidiary corporations and holding the stock of such corporations when the effect is not to lessen competition substantially. (3) It does not impair any rights in stock acquired before the passage of the act, provided such holding was not already unlawful under existing anti-trust statutes. Congress viewed holding companies as a "mere incorporated form of the old fashioned trust." 18

This section is of great importance. The provision of the section against stock acquisitions "where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition" is a rigorous prohibition full of menace to many mergers now being formed in apparent ignorance of its provisions. While the section does not prohibit the acquisition by one corporation of the physical assets of another, the complicated financial structure of many corporations makes it difficult to effect mergers without an acquisition of stock. The court decisions seem to make this unlawful between competing corporations of any substantial size.19 Plans for evading the provisions of this statute which have involved in their operation any stock acquisition have thus far been unsuccessful. An interesting scheme was involved in the Aluminium Company case. That company, instead of purchasing directly the stock of a competitor, which as a part of its business was milling sheet aluminum, agreed with its competitor upon a

18 Supra note 6, at 17.
plan whereby a new corporation was to be organized to take over the rolling mill and sheet aluminum business for a fixed price from such competitor. This competing corporation subscribed for one-third of the stock issued, the Aluminum Company subscribing for the remaining two-thirds. The plan as carried out enabled the Aluminum Company to control, through such acquisition of stock, the operation of the new corporation carrying on the business formerly conducted by its competitor. The obvious purpose of this plan was to create a situation where it could be contended that there was no elimination of competition between the corporation acquiring the stock and the corporation whose stock was acquired. The court, however, held that by reason of the arrangements made which must be viewed as a whole, the new corporation acquired a competing business, which competition was immediately controlled and lessened by the acquisition of stock control, and that the transaction also came within the prohibition against such a stock acquisition where the effect may be to “tend to create a monopoly.”

But shortly thereafter the court refused to issue a restraining order when the Aluminum Company proposed to bid in at a sheriff’s sale the various properties of which it had been compelled to divest itself, it appearing that the competing plant had closed because of financial difficulties and that such action was the only means the company could take to recover a bona fide debt.

In a more recent case the court has held that the creation by one corporation of a new corporation to acquire the stock of a competitor is a violation of the statute, the court holding that it would disregard the corporate fiction under such circumstances.

The power of the Commission to compel disposition of physical property has been a subject of litigation. It is not unlawful, so far as this statute is concerned, for one corporation to acquire physical assets if it does not also acquire the stock. Where stock control of a corporation has been secured, and as a result the corporation has been stripped of its physical assets, can the Commission compel disposition of the property to restore the competitive situation or is its power limited so that it can compel only the disposition of the new worthless stock? One court has held that the Commission has the power to extend its hand to the property, even though commingled with other property, as otherwise the transgressor would retain the fruits of

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its violation of the law. Another court, even though the property had not been divested, held that the Commission could only order the divesting of the stock and it could not order the respondent to divest itself of the physical property. As the *Swift, Thatcher* and *Western Meat Company* cases are now pending before the Supreme Court, no authoritative statement can be made of the scope of this section, but it is evident that its effect upon industry may be far-reaching.

**Interlocking directorates.** Section 8 was directed at the evil of centralized control of trade arising from an interlocking of the personnel of directorates of three great classes of corporations—common carrier corporations, industrial corporations and bank and trust corporations—which it was felt had been established by congressional investigation. This discussion is limited to the law as applicable to industrial corporations. The provisions of this section relating to industrial corporations provide that no person shall serve as the director of two or more corporations any one of which has capital surplus and undivided profits aggregating more than $1,000,000 (other than banks, banking associations, trust companies and common carriers) if such corporations are or have been competitors to such an extent that the elimination of competition between them by agreement would constitute a violation of any of the anti-trust laws. It was felt by Congress that such a provision would not only prevent the centralization of control over production and distribution but would also bring "new blood in the management of our business enterprises." This section, however, has remained lifeless on the statute books.

**Procedural rights.** The Clayton Act also contains several provisions considerably amplifying the application of the Sherman law. The law up to this time had been designed primarily for governmental action. It was now so enlarged as to give much broader rights to a private party injured so that such party would not only be more adequately protected, but the law itself be in fact made more effective. Section 4 gives to an individual injured in his business or property by a violation of any of the anti-trust acts the right to sue the defendant in any district where he resides or is found or has an agent. Section 12 provides that any anti-trust proceeding against a corporation may be brought not only in the district in which it is an inhabitant but also in any district wherein it transacts business or may be found, and provides also for the service of process there. Section 13 permits subpoenas to run into other federal districts. By these amendments a private party injured is greatly aided

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23 *Supra* note 22.
24 *Supra* note 19.
25 *Supra* note 6, at 20.
in the successful prosecution of a suit against any trust or combine. Section 5 makes a final judgment or decree, when not taken by consent in any suit brought by the United States for violation of the anti-trust acts, prima facie evidence against such defendant in any proceeding brought against him by any other party under the anti-trust acts as to all matters with respect to which the judgment or decree would be an estoppel as between the parties to it. There is a qualification, however, that the provision does not apply to consent decrees or judgments entered into before the taking of testimony. It is also provided that when the federal government brings a proceeding for violation of these laws the running of the statute of limitations as to the rights of private parties with reference to any part of the matter complained of in such proceedings shall be suspended during the pendency of the proceeding. The chief purpose for these provisions was to help persons of small means who are injured in their property or business by violators of these laws.25

Section 14, the so-called personal guilt provision, provides that whenever a corporation shall violate any of the penal provisions of the anti-trust laws, such violation shall be deemed to be also that of the individual directors, officers or agents of the corporation, who authorized, ordered, or did any of the acts constituting in whole or in part such violation. Such violation is made a misdemeanor punishable by fine or imprisonment or both. This section has put real teeth in the law, and in recent prosecutions officers of corporations have been fined or imprisoned for violation of this law.

Section 16 of the act was designed to give a more ample remedy to parties injured by violation of the law. Under the Sherman Act a party injured had merely the right to sue for damages suffered by such violation. This section extends his rights so as to permit him to secure relief by injunction against threatened loss and damage from an impending violation of the anti-trust laws.

At the insistence of the labor organizations of the country, Congress in this act also placed some considerable restrictions upon the courts in the issuance of injunctions and punishment for contempt of court.

War legislation. With the entry of the United States into the World War, the gigantic requirements of the government and our allies utterly disorganized the customary processes of trade and brought about serious shortages of supply, mounting prices and excessive speculation which if permitted to continue might destroy the morale of the nation. The government therefore supplanted the competitive system with the most rigorous and

25 Supra note 6, at 14.
far-reaching governmental control, severely curtailing competition.

In August, 1917, Congress enacted the Food and Fuel Control Act. This law authorized the president to fix the prices of wheat, coal and coke, and under its provisions the Food Administration and the Fuel Administration were created, which by regulation controlled the prices of these two great classes of commodities. This act also prohibited the wilful destruction of necessaries for the purpose of enhancing prices, the restriction of the supply, any attempt to monopolize either locally or generally, the use of any discriminatory, unfair or deceptive practices, the making of unjust or unreasonable rates or charges, any conspiracy to limit facilities of production or distribution, the hoarding of necessaries, or the withholding of them from market for the purpose of unreasonably increasing or diminishing the price, or the exaction of excessive prices. To make these provisions effective, the president was granted the power to issue licenses to trade in such necessaries, to requisition factories or supplies whenever necessary for the common defense, and to prescribe regulations. Violation of the law was made a criminal offense.

In October of the same year the Trading with the Enemy Act was passed, which prohibited any kind of communication or trading with any subject of any nation with which the United States was at war, or of any ally of such nation except with the license of the president. Under this law the War Trade Board exercised complete control over the foreign trade of the nation.

On December 26, 1917, the president, acting under authority granted him by the Army Appropriation Act of 1916 took over control of the railroads of the country. In March, 1918, Congress made further provisions for the operation of the railroads by the president and made it a criminal offense to interfere with their operation. This act, however, provided that all pending anti-trust cases affecting the railroads should proceed to determination as if the United States had not assumed control over the transportation systems, but gave to the courts jurisdiction on application of the United States to stay execution of any final judgment or decree until such time as they deemed proper.

In the Deficiency Appropriations Act of June 15, 1917, Congress gave to the president almost complete control over the production side of the shipping industry. In July, 1918, power

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was granted to the president to prescribe charter forms, freight charges and the order of priority in which goods should be carried in any American vessel, and to requisition vessels and terminal facilities.\textsuperscript{26a}

In April, 1918, the War Finance Corporation was created\textsuperscript{26f} with a capital of one-half billion dollars. This corporation was not only given the power to make advances to enterprises aiding in the prosecution of the War, but a Capital Issues Committee was established which had a large control over the use of the capital of the nation through its power to prevent or prohibit (with certain exceptions) the sale or subscription to any issue of securities in excess of $100,000.

In preparation for future wars the Council of National Defense had been created in 1916.\textsuperscript{26f} This body in July, 1917, created the War Industries Board which in 1918 was made directly subordinate to the president, and which developed into a large organization establishing direct contacts with most industries of the country. Without any clear grant of statutory power it developed two powerful methods of control: (1) a priority system; (2) an indirect price fixing system. By the first it determined the order in which different industries and different concerns in an industry should be entitled to secure their requirements of materials. Price fixing was secured by voluntary agreements entered into by representative committees of the different industries. While the government acting through these different agencies did not arbitrarily fix prices and endeavored to secure the best judgment of patriotic men in each industry as to the fair level of price, there was not the slightest hesitancy in employing the threat of the use of its complete control over the transportation systems, its power to requisition plants and supplies, its power to prevent any person from securing materials under the priority systems and the possibility of indictment as means to force recalcitrants to agree on a reasonable price.

Beyond any question the administration of these laws profoundly affected the situation and largely supplanted the operation of the competitive system. Moreover, as has rarely happened in the history of nations, prices fixed were fixed on a reasonable basis to stimulate production and to keep all producers in business, thus avoiding many of the customary evils of price fixing. This basic policy was determined by President Wilson personally in conferences with the Federal Trade Commission at the beginning of the War. To reach the more efficient concerns

\textsuperscript{26a} 40 Stat. 913, (1918) U. S. Comp. Stat. (Supp. 1919) § 3115 1/2 et seq.
which made exorbitant profits from such prices the excess-profits tax law was enacted, under which very high graduated taxes were imposed based upon earnings.\textsuperscript{26}\textsuperscript{h} Since the war the unconstitutionality of action taken under some of these laws has been established\textsuperscript{26}\textsuperscript{d} but during the War the force of public opinion, the patriotism of business men and the menace of government action under the powers granted brought far reaching results. Most of these laws were temporary statutes for the period of the War only.

\textit{Packers and Stockyards Act (1921).} The investigations of the meat packing industry by the Federal Trade Commission as well as the agitation of trade organizations such as the National Wholesale Grocers' Association and the great organizations of farmers had aroused a belief particularly among the farmers of the country that the packers were not only engaged in many unfair practices but also rapidly procuring a monopoly in many lines of food products. The great meat packers had several times been involved in important proceedings under the anti-trust act and powerful organizations of farmers demanded a more thorough regulation of their activities by the Federal Trade Commission. The packers under threat of criminal prosecution had already entered into a consent decree with the government whereby they agreed to withdraw from the manufacture and sale of numerous food products. The demand for legislation was insistent and culminated in the passage of the Packers and Stockyards Act of 1921.\textsuperscript{27} The administration of the law, however, after a strenuous debate in Congress, was vested in the Department of Agriculture rather than the Federal Trade Commission. This act very strictly regulates the competitive practice of the packers in the meat business and the allied lines of dairy products, poultry and eggs and also regulates the operation of stockyards and practically all persons supplying facilities and services in connection with such stockyards. Carefully providing that the act should in no way alter or modify the existing prohibitions of the anti-trust act, the law forbids the packers from in any way monopolizing or restraining trade in any branch of the business, or from dividing territory, apportioning purchases, or sales, or doing any act to manipulate or control prices, or from engaging in any unjustly discriminatory or deceptive practice, or from giving any unreasonable preferences to

\textsuperscript{26}\textsuperscript{h} 40 Stat. 300, 302 (1917); 40 Stat. 1057, 1088 (1919); 42 Stat. 227, 271 (1921).

\textsuperscript{26}\textsuperscript{d} United States v. Cohen Grocery Co., 255 U. S. 81, 41 Sup. Ct. 298 (1921); United States v. Marcus & Son (C. C. A. 4th) No. 2429.

\textsuperscript{27} 42 Stat. 159–169, (1921) U. S. Comp. Stat. (Supp. 1923) § 8716½ et seq.
any person. The constitutionality of this act, despite the necessary control exercised under it over intrastate transactions in order to protect interstate commerce, was recently upheld by the Supreme Court.28

*The Grain Futures Act (1922).* The following year the Grain Futures Act, which regulates trading in futures in grain became law. It was felt by the farming interests that future trading led to speculation and manipulation of the markets in such a way as often to depress prices to the producers or enhance prices to the consumer and that such transactions in a necessity of life were of such public interest as to warrant regulation. Broadly speaking, this law prohibits future trading and hedging in grain or its by-products except by owners of the physical property, or growers, or associations of such owners or growers, or members of boards of trade which have been designated by the Secretary of Agriculture as contract markets. These so-called contract markets were boards of trade selected by the Secretary of Agriculture upon their compliance with the conditions specified in the Act, designed to eliminate abuses alleged to exist in such exchanges. An interesting provision of this statute, harking back to the old English cases on forestalling, makes it a misdemeanor subject to fine or imprisonment to knowingly or carelessly transmit false or misleading reports concerning grain, market information or conditions that tend to affect the price of grain in interstate commerce.

*Qualifications of anti-trust policy.* The more effective enforcement of the law had meanwhile created enemies. Labor was hostile. The farmers erroneously felt the law prevented the free development of co-operative marketing agencies. Exporters feared to enter into combinations, although they were compelled to face the competition of the German cartels, the French comptoirs and other great combinations in foreign countries. Business organizations were not friendly. So, as Congress strove to strengthen the existing law, great organizations bent every effort toward weakening its application to themselves. The labor and farm organizations, over the opposition of President Wilson, secured the insertion of a rider in the appropriations act providing that no appropriation should be used in the prosecution of anyone entering into an agreement with a view to increasing wages, shortening hours or bettering conditions of labor, or anyone co-operating to obtain and maintain a fair and reasonable price for farm products.29

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aged by their success in securing the insertion of this proviso in the appropriations act, the farm and labor associations fought strenuously to secure exemption from the provisions of the anti-trust act and were finally successful in securing the first qualifications of the anti-trust policy of this country. They secured the insertion in the Clayton Act of section 6, which reads as follows:

"That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 31

At the time these organizations felt that these provisions made them no longer amenable to the anti-trust acts. But the debates in Congress clearly showed this was not the intention of Congress, and the Supreme Court soon held that while this provision did legalize such organizations so that the organizations themselves could not be dissolved, yet the same test of legality applied to all their acts as applied to any person or individual under the anti-trust laws. 32

Export Trade Act (1918). Meanwhile the World War had brought home to American business men the importance of foreign trade to the economic life of the nation. Our increasing production and our enormous holdings of gold made the development and maintenance of our export trade of prime importance. Our dependence on foreign shipping and banking facilities was emphasized by the compelling force of existing conditions. Our exporters who before the War had sometimes unsuccessfully contended against great trade combinations of other countries demanded that Americans be permitted to organize similar cooperative groups to cope with these organizations in foreign markets. The Federal Trade Commission after an investigation of export trade conditions recommended to Congress that the anti-trust acts be so amended as to permit the formation of associations of American exporters in foreign trade. In 1918 Congress enacted the Export Trade Act, better known as the

Webb-Pomerene law, to meet the situation.\(^3\) This law provides that nothing contained in the Sherman Act shall be construed as making illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade or any act done in the course of export trade, provided the association or any act done by it alone or in co-operation with others (a) does not artificially or intentionally enhance or depress the price within the United States of the class of commodities exported by the association, or (b) restrain trade within the United States, or (c) restrain the export trade of any domestic competitor of the association. These provisos are all the result of the fear of Congress that the close co-operation of members within an export association would inevitably lead to tacit understandings as to price, or restriction of production within the United States. The supporters of the measure felt this legislation would be of great benefit to American industry. It was thought such an association, by controlling the bulk of the supply available for export, could deal on a parity with combinations of foreign buyers and government purchasing agencies and thus prevent undue depression of prices. It was believed also that distribution costs would be greatly reduced, that small concerns through such an agency could maintain an expert personnel, advertising campaigns, information and credit services and many other facilities at a cost far below that possible for a single company. It was contended, too, that such an association through standardization and uniform inspection could better meet the exact needs of foreign markets, thus building up the repute of American goods and avoiding disputes and losses, and that these organizations would greatly strengthen American industry and competition with the great combinations of foreign companies. The results of the law have not been so great as were expected. The World War placed American exporters in a most advantageous position and lessened the need for such organization. While the copper and steel industries have formed powerful associations, not many associations have been formed and a number of these are of little importance.

**Merchant Marine Act (1920).** The great expansion of American shipping during the War and the exactions of foreign marine insurance companies brought about a third qualification of our anti-trust policy. The Merchant Marine Act of 1920 \(^4\) provides that nothing contained in the “anti-trust laws” shall be construed as declaring illegal an association entered into by marine insurance companies for the following purposes: to transact a marine insurance and reinsurance business in the United States and in foreign countries and to reinsure or otherwise apportion among

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\(^3\) 40 Stat. 516, (1918) U. S. Comp Stat. (Supp. 1919) §§ 8836\(1/2\)a–8836\(1/2\)e.

its membership the risks undertaken by such association or any of its component members.

_Capper Volstead Act (1922)._ The post-war depression which brought heavy losses to the farming sections of the United States created a demand for remedial legislation. Members of Congress from the mid-western and western states, who held the balance of power, to a considerable extent controlled legislation. The great difference between the price received by the farmer for his products and the ultimate price paid for them by the consumer together with the fact that the farmer was paying prices which, comparatively speaking, were much higher than the prices received for the commodities he sold, aroused intense resentment. The impracticability of organizing the great number of farmers in an effective marketing organization made it impossible for the farmers to retard the downward movement of prices during the depression and as a result the prices of farm products declined violently. On the other hand, the effective organizations of manufacturers and distributors, combined with the tolerant attitude of the government in view of the serious economic crisis existing, enabled the manufacturers and distributors, generally speaking, to retard the decline in prices. As a result of this and other causes, the prices of agricultural products and of manufactured products were out of line, working extreme hardship upon the farmers. The great farm organizations of the country therefore demanded legislation legalizing co-operative marketing organizations, which could control the market price. In 1922 Congress enacted the Capper Volstead Act which authorized the formation of co-operative organizations for the marketing of agricultural products, provided they were operated for mutual benefit and either allowed each member only one vote or limited their dividend on stock or capital to not more than 8% per annum, and provided they did not deal in the products of non-members to an amount greater in value than the volume handled for their own members. The law further provides that if the Secretary of Agriculture has reason to believe that any such organization monopolizes or restrains trade to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall issue a complaint and hold hearings. If he finds the price of the commodity is thus being unduly enhanced he may issue an order upon such association to cease and desist from such monopolization or restraint of trade. Provision is made for appeal to the United States District Court either by the association against the order or for its enforcement by the Secretary of Agriculture. In this vague language there is thus introduced a novel method for indirect price fixing or control by the Department of Agriculture. Due to the vagueness of the wording it is unlikely that any action will ever be taken by the Department except in case of a gross abuse of power by
such an association. It is doubtful, however, whether this law gives the protection that the farming interests of the country feel it does. It is significant that the law contains no reference to the anti-trust acts specifically limiting their application. All it does is, first, to legalize such associations as such, and secondly, to provide a new remedy by a different department when prices are unduly enhanced by reason of any restraint of trade effected by such association. Probably the Department of Justice is still obligated to file proceedings in the courts when such organizations do any acts in restraint of trade, although it could not, of course, bring about a dissolution of such organizations. If this is true the act is little more than a reaffirmation of the provision of section 6 of the Clayton Act already discussed. Dissatisfied with present conditions, the farm organizations are demanding further legislation of a broader nature.

UNFAIR COMPETITION

The law regulating competitive practices developed more slowly than the law dealing with monopolies and restraints of trade. It was but natural that peoples and governments, seeing the injurious effects of monopolies and restraints of trade, would first strike at the organizations causing such effects rather than seek to analyze and prevent the methods by which such organizations procured the power to control the markets. In the middle ages kings and queens were more interested in granting monopolies to court favorites, political supporters and church dignitaries as a means of enlarging their personal revenues or intrenching themselves in power than they were in safeguarding the interests of the lower classes. It was a hard-hearted world, dominated by the soldier, and the great masses of people had very limited rights and very few potentates eager to protect them. The English government for centuries, with varying degrees of success, did endeavor to protect the people against such grossly fraudulent practices as adulteration, false weights and measures and misbranding, particularly when necessities such as bread and ale were involved.35 The famous Assize of Bread36 enacted in 1266 was but one of numerous laws thus promulgated. But these laws, generally speaking, were designed to protect the public rather than to protect one trader against the unfair competition of another. As time passed the government, partly to protect the public against inferior goods, partly to protect the monopolies granted to the guilds, compelled traders in many different industries to place trademarks on all their goods. Bakers, ale sellers, cooperers, goldsmiths, armourers, weavers, cutlers, pewterers and producers of some other commodities were forced

thus to mark their products. In this way, the goods of any violator of the law could be detected. The enforcement of such laws and ordinances was very uncertain because the gilds in many towns for a considerable time controlled the town governments, and it was often their desire to be protected from unfair competition more than any desire to protect the public which prompted action. But when the law was enforced the guilty culprit usually had a most unpleasant experience. In London, for example, the law provided that the baker of defective bread "be drawn upon a hurdle from the Guildhall to his own house, through the great streets where there may be most people assembled, and through the midst of the great streets that are most dirty, with the faulty loaf hanging from his neck. If a second time he shall be found in the same transgression, let him be drawn from the Guildhall through the great street of Chepe, in form aforesaid, to the pillory; and let him be put upon the pillory, and remain there at least one hour in the day. And the third [time that such] default shall be found, he shall be drawn, and the oven shall be pulled, down and the baker [made to] forswear the trade within the City for ever. . . ."

The real regulation of competitive practices during the early part of the middle ages was by the gilds themselves. Trade was largely localized in towns. The gilds dominated the trade and the usual lack of a strong central government made these organizations very powerful within their own towns. Gild regulations prohibited various methods of competition and imposed fines and other severe penalties for their violation. The enticement of employees was prohibited by many gilds. The plumbers in London in 1365 provided that "no one of the said trade shall oust another from his work undertaken or begun." Interference with a competitor while making a sale to a customer or disparagement of a competitor's goods were likewise condemned. For example, the Merchant Adventurers of Newcastle-upon-Tyne in 1669 enacted the following ordinance:

"Whereas divers bretheren of this Fellowshipp have made complaint of severall disorders and unbeseeming words and actions used by severall members of this Court and their servents, not fit for marchants to use, in selling their marchandise for redressing of which and the like that may followe, it is ordered,

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37 For a valuable and scholarly treatise on this phase of government regulation see Schechter, Historical Foundations of the Law Relating to Trade-Marks (1925).
38 1 Munimenta Gildhallae Londoensis (Rolls. Ser. 1869) 265 and 3 ibid. (1862) 83–4, quoted in Schechter, op. cit. supra note 37, at 55.
40 Riley, Memorials of London (1868) 322.
41 Quoted from Schechter, op. cit. supra note 37, at 43; see also 4 Records of Borough of Leicester 1603–1688 (Stocks' ed. 1923) 355.
LAW OF BUSINESS COMPETITION

&c., That noe brother or sister shall, either by themselves, their servants, or any other person whatsoever, call to, or invite any person, either by word or any signe, to come to their shops or sellars, while such person is either speaking with another of this Fellowshipp or his servants, against their owne shops, sellar, or houses, or going with them to shew them any commodity, or be present with them or any of them; but shall diligently attend their customers, coming to their owne shops and sellars. And that in their selling they shall not undervalue or disgrace their neighbours goods, but leaving every chapman to his owne discretion in buying the goods he is to buy, and hath presented to him. Upon paine that every brother or sister so offending shall forfeite, for the first offence, twenty shillings, for the second forty shillings, and for the third five pounds.

In 1408, we find the Mistery of Bladesmiths providing against the infringement of trademarks in a provision that "no one of the said mistery shall counterfeit the mark of another maker upon his own work; but let him use and put his own mark upon his own work, on the pain aforesaid." Such a practice was originally deemed unfair because of the danger of prosecution to which the party whose marks were counterfeited was subjected if the product was not marked in compliance with the law, for trade marks were first used at the insistence of the government in order to identify the maker of defective goods. But before many years elapsed the good-will value of trade marks was recognized, and some gilds through their own tribunals carefully protected the trade mark rights of their members against imitation. The gilds during the period of their power were effective agencies for preventing adulteration, short weights and measures, and for the "abating of all guiles and trickery."

Naturally, few cases are to be found in the law courts during the period of dominance of the gilds in England. The gilds were granted monopolies of their trade in their own territory, and very extensive powers of government. They often completely dominated the town governments. Moreover, one of the well-established practices of the gilds was to avoid the law courts, and many gilds had rules compelling members under pain of penalty to arbitrate any and all disputes before the gild tribunal. The gilds became so arbitrary in their control of the disputes of members that Parliament in 1504 enacted a law prohibiting the enactment of such rules by the gilds but nevertheless they were subsequently adopted and enforced by some gilds for more than a century.

42 1 WELCH, HISTORY OF CUTLERS' COMPANY OF LONDON (1910) 237.
43 See SCHECHTER, op. cit. supra note 37, at 109ff.
44 CUNNINGHAM, op. cit. supra note 39, at 338, 343.
45 1 JOHNSTON, THE HISTORY OF THE WORSHIPFUL COMPANY OF THE DRAPEIERS OF LONDON (1914) 200. For citations to a number of such gild ordinances, see SCHECHTER, op. cit. supra note 37, at 17.
46 1 LIPSON, AN INTRODUCTION TO THE ECONOMIC HISTORY OF ENGLAND (1915) 309–310.
The second stage of the regulation of competitive methods began when the town governments acquired supremacy over the gilds. They did so only after a long struggle by the inhabitants of the towns. In 1437 a law was enacted providing that all gild ordinances must be submitted to the justices of the peace or the municipal authorities. This law, enacted at the insistence of the towns, resulted in a strict supervision of gild practices by some municipal authorities, and gradually the towns acquired control over the gilds, for while the gilds could still regulate the business methods of their members, the town authorities could refuse approval to rules which were unduly restrictive of the rights of individuals, or prejudicial to the public interest.

The third stage of regulation was reached when the national government became powerful enough directly to exercise control over the gilds. In 1503 a law was passed condemning the unreasonable ordinances of the gilds and directing that all such ordinances should be submitted to certain judicial officers who were national officers. Even under this law the regulation of business was vested in the gilds who actively exercised it and it was only when they overstepped the bounds of reasonable regulation by prejudicing the public interest that their regulations were disapproved. Doubtless a search of old town records would reveal a wealth of interesting data on the development of the law of business competition during these centuries. In a somewhat similar way the great companies engaged in foreign trade regulated competition between their own members without restriction until 1622 when the king issued a proclamation requiring their ordinances likewise to be submitted to the privy council for its approval. With the gradual breakup of the gilds under a very slow process of disintegration, and the abolition of the privileges of the great foreign trade companies, the national government by the eighteenth century exercised a far-reaching control over English trade and commerce.

Thus for several centuries there was little cause for cases involving competitive methods to reach the courts. While compulsory arbitration of disputes between traders ruled in the gilds and trade was highly localized as a result of the lack of transportation and other instrumentalities of commerce, the gild was a most effective agency for protecting one member from unfair competition by a neighbor. After the town secured the power of control over the gilds and even after the national government exercised control over them, they continued to regulate the practices of their members subject only to the annulment of any

47 LIPSON, op. cit. supra note 46, at 370.
49 CUNNINGHAM, op. cit. supra note 39, at 217.
regulations which the town or national authorities might deem improper. But the expanding force of trade brought about by the improvements in transportation, development of machinery, money, banking and other facilities of commerce, disrupted the whole local organization of industry and broke down the gild organization. Gild monopoly clashed with gild monopoly. New industrial towns independent of gild organizations and regulations brought along powerful competition. Foreign goods came into the markets and the era of competition slowly began. Regulation, if there were any regulation, had to be national regulation. The development of a strong national government resulted in the creation of a national judicial system and the flexible common law afforded an agency, although a very inadequate one, by which one trader could secure protection against unfair tactics by a competitor. But the wide acceptance of the laissez faire principle in the latter part of the eighteenth century, combined with a great emphasis laid up individual rights of liberty and freedom of contract, made the right of competition seemingly a justification for almost any practice.

Only within the last seventy-five years, therefore, has there developed any substantial body of law dealing with unfair competition although the origin of the law traces back into the centuries. The first law affecting methods of competition grew out of the necessity of protecting trade mark rights. In 1613 a judge in the case of Southern v. How stating that he remembered a case in the twenty-second year of the reign of Queen Elizabeth in which the court held that a clothier was entitled to maintain an action for the use of his mark on inferior clothing by a trader. The recollection of the judge was adopted by the old law writers and digesters as law. It may be assumed that the statement of this principle of law by various writers of authority in the legal profession did have some effect in a regulatory way, but for many years no further case appears in the reports. Then, in 1742 a judge, fearful of the possibility of monopoly, refused to grant an injunction against an infringing trader unless fraudulent design to pass off inferior goods or draw away patronage was proven. Since the beginning of the nineteenth century, however, the English courts have built up a larger number of decisions which protect the business man against infringement of his trade marks or unfair competition.

In the American colonies there were likewise stringent regulations against such practices as adulteration, false weights,

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80 Popham, 143; in the same case in Cro. Jac. 468, Doderidge, J., is quoted as putting the date in 33 Eliz.
81 1 VinER, ABRIDGMENT (2d ed. 1791) *574; 3 BACON, ABRIDGMENT (6th rev. ed. 1793) *560.
82 Blanchard v. Hill, 2 Atk. *484 (Ch. 1742).
measures and the like. While most of these regulations were enacted to protect the public, a considerable number of them were designed to prevent practices of this character which would tend to destroy the prestige of American goods in foreign markets—our foreign trade, of course, being of great importance to the colonies.\(^5\) We find evidences also of efforts to establish the decaying system of guild regulation in the colonies as, for example, the establishment of the shoemakers and coopers gilds in Massachusetts in 1648 with the grant of power to regulate their trade.\(^6\)

But the real beginning of the law of unfair competition in this country grew out of the necessity for the protection of trade marks. Of course, when trade was highly localized, when buyers possessed a keen knowledge of the quality of the few commodities they purchased and when producers and customers lived in the same small community, there was no great need for trade marks and less likelihood of one neighbor counterfeiting the mark of another. But as transportation and communication began to open up, as goods entered distant markets, the trade mark became an important medium of identification of origin to the customer in making subsequent purchases. At the same time, an unscrupulous trader had little compunction in endeavoring to steal the benefit of the good will thus created by a distant competitor.

By the end of the eighteenth century, the need for protection against trade mark pirates began to be felt. In 1789 the General Court of Massachusetts, in the charter of incorporation of a cotton factory, provided that the company should attach a lead label to all its goods on which should be affixed the seal of the corporation, and that any persons using a like label should forfeit and pay treble the value of the goods to which the label was affixed.\(^7\)

Two years later Thomas Jefferson, then Secretary of State, to whom the House of Representatives had referred a petition of business men asking for trade mark protection, reported that in his opinion the grant of an exclusive right to use a trade mark on goods, under general laws extending equal rights to all, was desirable and suggested the enactment of a federal statute permitting the recording of such marks in the District Court and providing for the punishment of those who put the same mark on any other goods.\(^8\)

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\(^5\) For examples of such legislation, see Gibbons v. Ogden, 9 Wheat. 1, 82 (U. S. 1824).

\(^6\) 2 Records of the Governor and Company of Massachusetts Bay (Shurtleff's ed. 1853) 249, 250.


\(^8\) 10 American State Papers (1832) 48.
No action, however, was taken and it was not until 1837 that a trade mark infringement case appears in the printed reports of the State courts.\textsuperscript{57} In fact, up to 1870 the courts of this country had decided but sixty-two cases involving trade marks.\textsuperscript{58} Mass production, national advertising and country-wide distribution had not yet made the trade mark so vital a factor in the creation and maintenance of good will by affording the means for the identification of goods to millions of consumers. Applying the principles of the common law which protect against fraud or the invasion of property rights, the state courts on one of these grounds or both of them, gradually, however, built up a body of law affording protection to the owner of a trade mark against its unauthorized use or the use of a colorable, deceptive imitation of it on the same class of goods by a rival trader. But a trade mark in the legal sense defined by the courts is a very limited form of property. It must be affixed to the article; it must distinctively indicate the origin or ownership of such article; and it must be of such a nature that one person may, without injustice to others, be permitted to use it exclusively.\textsuperscript{59} These early decisions afforded protection only to the owner of such a trade mark. Interstate commerce was in the meanwhile becoming of increasing importance, but as there was no federal common law the business man in this great field of trade was largely unprotected.

Since 1870 Congress has enacted a number of trade mark statutes which, in practical effect, have codified the common law of trade marks and have afforded to the owners of such marks the rights of registration and of protection in the federal courts so that now the owner of a registered trade mark engaged in interstate commerce is reasonably well protected against infringement.\textsuperscript{60}

But the legal remedy against trade mark infringement was at best a limited protection because of the technical nature of a trade mark as legally defined. The fear of monopoly had caused the courts to act with great caution in fixing the limits within which a trader was entitled to the exclusive use of a mark. There were, moreover, many other methods involving deceptive imitations of name, label, color, design, dress and other features whereby a person could fraudulently pass off his goods as and for the goods of a successful competitor. And even though a person might not have an exclusive right to a word or symbol,

\textsuperscript{57} Thomson v. Winchester, 19 Pick. 214 (Mass. 1837).
\textsuperscript{58} Report of the Commissioners appointed to revise the statutes relating to patent, trade and other marks. 3 Sen. Doc. No. 20 (1902).
\textsuperscript{59} Nims, THE LAW OF UNFAIR COMPETITION AND TRADEMARKS (1917) 375.
\textsuperscript{60} In 1870 Congress enacted a law permitting the recording of lawful trade marks and giving rights of action for damages or an injunction in the federal court. 16 Stat. 198. But the Act was not limited to the commerce power granted to the federal government in the Constitution and
or other device, justice demanded for him protection against that fraudulent imitation of his manner of use which was clearly calculated to deceive the public into the belief that they were securing his article when in fact they were buying a substitute. This gradually forced the expansion of the law to cope with such practices. As a result, there slowly evolved what is known as the law of unfair competition, of which the law of trade mark is but a part.\(^6\) The basic principle underlying this law is that no man has the right to fraudulently sell his goods as and for the goods of a competitor.\(^6\) The basis for the rule rests in the power of the courts to prevent fraud which in unfair competition cases operates to injure the business and good-will of the trader whose goods are imitated and to deceive the public.\(^6\) Unfair competition cases differ from the ordinary technical trade mark case in that the party does not have any exclusive property right in a mark, but is merely protected from that imitation of the features he uses to distinguish his product, when such imitation is obviously fraudulent and calculated to deceive the public. Experience has shown that there are numerous fraudulent practices of this character against which the business man is entitled to protection, and some hundreds of cases have come before the courts in the last half century steadily enlarging the meaning of the term "unfair competition" so as to include them. As one court has well phrased it: "Unfair competition in trade is not confined to the imitation of a trade-mark, but takes as many forms as the ingenuity of man can devise. It may consider the imitation of a sign, a trade name, a label, a wrapper, a package, or almost any other imitation by a business rival of some distin-

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\(^6\) McLean v. Fleming, 96 U. S. 245 (1877).

guishing earmark of an established business, which the court can see is calculated to mislead the public and lead purchasers into the belief that they are buying the goods of the first manufacturer.”

While the courts for some years applied the law of unfair competition only to such cases involving deceptive imitation of some distinctive feature of a competitor's business which served to identify him or his goods in the public mind, logic inevitably compelled action by the courts against other competitive practices which were obviously fraudulent and designed to injure competitors. Thus gradually such methods as the inducing of breach of contract; the enticing of employees of competitors; procuring the betrayal of business secrets; and misappropriating values created by competitors received the condemnation of the courts.

Then hesitantly the courts enjoined the use of some coercive methods, such as the widespread circulation, in bad faith among competitors' customers, of threats to sue for infringement of patents; concerted efforts to shut off the sources of supply of a competitor; the intimidation or molestation of competitors of their customers and similar practices.

The common law of unfair competition, designed primarily to protect the business man from damages to his good-will and business, completely broke down in one respect. In so far as great classes of competitive acts were concerned, such as adulteration and misbranding, where the spurious article was sold as the genuine without imitating the mark of a particular concern, there was no remedy, for damage to an individual could not be proven. Laws, therefore, were necessary to correct the injustice to honest business, and to protect the public against fraud and deception, and legislation of this type began to appear on the statute books. It is best exemplified by the Food and Drugs Act of 1906, prohibiting adulteration and misbranding of food and drugs.

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64 Manitowoc Malting Co. v. Milwaukee Malting Co., 119 Wis. 542, 546, 97 N. W. 389, 390 (1903).
65 Rice v. Manley, 66 N. Y. 82 (1876); Sperry & Hutchinson Co. v. Pommer, 199 Fed. 309, 314 (N. D. N. Y. 1912).
70 Jackson v. Stanfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14 (1893).
While the protection of the public was the paramount consideration in the enactment of this law, the necessity of safeguarding business from unfair competition of this type was fully discussed in the committee reports. The Committee on Interstate and Foreign Commerce of the House of Representatives in its report on the measure said:

"In the competition of modern business life it becomes necessary to give some protection to the legitimate manufacturer and dealer as against his dishonest and unscrupulous rival who unfairly competes with imitations and spurious articles of poor quality."  

Other special measures dealing with such products as oleomargarine, cheese, flour, butter and other products have been enacted largely at the instance of competitive interests who demanded protection against this and similar forms of unfair competition.  

But the primary motive behind most of these measures was to protect the public against fraud and deception, rather than to relieve business men from unfair tactics of competitors, and of course these particular laws were applicable only to a small part of the trade in the innumerable commodities entering the course of interstate commerce.

Another respect in which the law of unfair competition was ineffective was its failure even to attempt to reach practices which tended to create monopoly. There had developed in this country great corporations, organized on the basis of mass production and nationwide distribution. They were able to adopt measures, which though not fraudulent, were unfair and tended inevitably to destroy their smaller competitors regardless of the efficiency of their business methods. These practices the courts seemed helpless to combat. A huge concern could sell its goods below cost in a small competitor's territory, easily recouping its loss from profitable sales elsewhere, while the small concern would inevitably be forced out of business. A large enterprise selling some patented article or a heavily advertised product in large demand would sell it to dealers only on condition that they purchase the full line of the company's product. In numerous ways the great organization could eliminate the smaller concern, equally efficient, manufacturing even a superior article, by methods which though in no way fraudulent inevitably tended toward monopoly. Economists like Walker, Stevens, Jenks, Van

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Hise, Seager, Seligman and many others, condemned such practices as against the public interest. Various decrees of the federal courts had enjoined the use of such practices, but only where they were part of a general plan before the court which amounted to an unlawful restraint of trade. There grew up a widespread opinion among publicists, economists and lawyers, that the anti-trust acts failed because they operated only against restraints which had actually been consummated. The sound policy, it was felt, was to prevent the use of these methods by which such restraints of trade were effectuated. At the same time, leading business men of the country expressed their belief in the necessity for the creation of a federal commission which would exercise in industry similar functions to those exercised by the Interstate Commerce Commission over transportation. A questionnaire circulated by the National Civic Federation among sixteen thousand prominent men of the country showed an overwhelming sentiment for the establishment of such a commission. Hearings conducted by Congress in 1911 likewise disclosed the same sentiment. The Progressive party in the campaign of 1912 incorporated in its platform a provision favoring the establishment of such a commission. Joseph E. Davies, United States Commissioner of Corporations, in 1913, made a study for President Wilson of the anti-trust legislation of all foreign countries, and also of the proposals made by practically all of the prominent statesmen, economists and business men in this country. There was a surprising unanimity of opinion that the creation of an administrative regulative body was highly desirable. In January, 1914, President Wilson in his message to Congress, urged the creation of a federal trade commission, as well as the enactment of legislation expressly prohibiting specific practices which, experience clearly demonstrated, were operating to restrain trade. As a result the Federal Trade Commission Act and the Clayton Act, were passed in the fall of 1914. The discussion of the measures in committees and in Congress clearly demonstrated a purpose to depart in important respects from the methods employed up to that time in dealing with monopolies and restraints of trade.

(1) It was the idea to create an administrative body composed of men, representing both the major political parties and chosen for long terms of office, so as to free them from political control, who could formulate constructive regulations, sound from an economic standpoint and carry out a uniform, stable policy.

(2) It was felt that supervisory action by such a body of experts, who could act to prevent the practices which, if permitted to continue, would create restraints and monopolies, would be more effective than the past practice of inflicting punishment for restraints already effected. The theory was that by preventing the use of unfair methods of competition, monopoly could thus be halted in its very inception.
(3) It was felt that a broad prohibition of unfair practices, to be administered by such an expert body, would meet changing economic conditions, avoid the rigidity of statutory definitions and permit of fair decisions based upon the particular facts in each case. It was a break away from the methods employed in the old statutes of enumeration in great detail of the practices condemned, and an adoption of the principle which had worked out so successfully in the Interstate Commerce Commission.

(4) It was deemed wise to have an administrative agency which could act quickly to protect the individual trader, who although he might have an abstract legal right of action could not hope with his limited resources to fight legal battles against powerful competitors.

**Federal Trade Commission Act.** The powers and functions of the Federal Trade Commission, created by this legislation, are divided into two groups—first, the power of investigation and secondly, the power of regulation. The Commission was given the broadest possible powers of investigation over American industry, primarily as a means of aiding in the more effective enforcement of the anti-trust acts through publicity; but also to enable it more effectively to exercise its own regulatory power. The chief regulatory power of the Commission is set forth in section 5 of the Federal Trade Commission Act, which declares unfair methods of competition in interstate commerce to be unlawful, and empowers the Commission to prevent the use of such methods. The term "unfair methods of competition" was used by Congress because of the fear that if the term "unfair competition" were used, the jurisdiction of the Commission might be limited only to that group of practices already discussed which were defined as unfair competition at the common law.

The broad general prohibition of unfair methods of competition was adopted because Congress deemed it impracticable to attempt to define the many forms of unfair competition, particularly in view of the fact that changing economic conditions steadily develop new competitive methods. The term "unfair methods of competition" has been defined by the Supreme Court of the United States as applicable to those practices which are "opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."

Under the ruling of the Supreme Court, which is in accord with the intent of Congress as shown by the committee reports, it will be noted that unfair methods of competition are divided into two groups.

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The first group contains those practices which are opposed to good morals because they have in them the element of deception, bad faith, fraud or oppression. This group of practices again divides itself into two groups—first, those which have in them the element of fraud, and secondly, those which have in them the element of oppression. Typical of fraudulent practices are misbranding, false advertising, fraudulent demonstration of competitive goods, the deceptive imitation of name or trade mark and any other practices, the obvious purpose of which is to deceive the public and thereby secure an advantage over honest competitors. Typical of the practices containing the element of oppression are such methods as the trailing and molestation of competitors' salesmen, procuring the destruction of competitors' catalogues and similar practices.

The second group of unfair methods of competition, as thus defined by the Supreme Court, are those "against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." The Federal Trade Commission Act is more strict in this prohibition than the Sherman Act for it not only clearly applies to single acts by a single individual, but also applies to those acts having a dangerous tendency to bring about the result prohibited by the Sherman law. One of the purposes in the adoption of the law was to prevent the use of those methods by which restraints of trade were effected, and thus to prevent the possibility of achievement of monopolies through the use of such practices. In determining the legality or illegality of such a practice, the court therefore ascertains from all of the facts whether the practice has a dangerous tendency unduly to hinder competition or to create a monopoly. From the standpoint of the hindrances placed upon competition the courts apparently feel that there are two classes of practices which come within this prohibition.

First are those practices which unduly hinder competitors in conducting their business. Typical of such practices are boycotts and blacklists, attempts to control the channels of distribution and the like.

81 Botsford Lbr. Co. v. Federal Trade Commission, ibid. 60.
The second type of undue hindrances placed upon competition which the court seems to deem within this prohibition are voluntary acts of competitors to restrict competition unduly among themselves, even though such practices may not injuriously affect competitors of the parties engaging in such acts. Here the unfairness of the methods employed arises from its unfairness to the public making their use against public policy. Agreements fixing prices, classifying customers, dividing territory and similar devices, the language of the courts indicate, would be deemed within the prohibitions.85

While the law without qualification prohibits the use of unfair methods of competition, it further provides that the Commission "whenever it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public" shall issue a complaint. While this procedure or provision was obviously designed to give the Commission a discretion in the issuance of complaints,86 there has been a tendency on the part of the courts to make public interest a jurisdictional requirement and to substitute their discretion for that of the Commission.87

As to the first great group of competitive practices involving fraud or oppression, regardless of the extent of the practices or the number of competitors involved, the existence of such elements which are opposed to our whole public policy would seem to provide the necessary public interest in warranting action by the Commission.

As to the second great group of practices which involve undue hindrance of competition, the element of public interest would apparently not be present until the practice clearly tended to interfere with the status of free, fair competition—a status which the public policy of this country has for years fostered and supported.

Webb Export Act. The Webb Export Act, which has been already discussed in one respect, enlarged the jurisdiction of the Federal Trade Commission. It expressly provided that the Commission should have jurisdiction over unfair methods of competition used in export trade against competitors engaged in export


trade, even though the acts constituting such methods are done outside the territorial jurisdiction of the United States.\textsuperscript{3}

\textit{Revenue Act of 1916.} In this act, under the heading "unfair methods of competition," the systematic dumping of foreign products in this country at a price substantially below the actual market value or wholesale price of such goods in the country of their production at the time of exportation was prohibited, if it was done with the intent of destroying, injuring or preventing the establishment of an industry within the United States or if it restrained or monopolized any part of commerce in such a product within the United States.\textsuperscript{30} While an attempt was made to utilize the provisions of this act in one prosecution by the Department of Justice\textsuperscript{30} and the Federal Trade Commission has likewise brought one proceeding involving this practice\textsuperscript{31} both proceedings were unsuccessful.

\textit{Packers and Stockyards Act of 1921.} In 1921 the jurisdiction of the Commission was limited in one important respect. Under the Packers and Stockyards Act of 1921, the jurisdiction over methods of competition of the meat packers in their sales of meat, meat products, dairy products, poultry and eggs, was taken away from the Commission and placed under the jurisdiction of the Department of Agriculture.\textsuperscript{32} This act contains a number of prohibitions of specific practices directed only at the meat packers.

\textit{Tariff Act of 1922.} The Tariff Act of 1922 likewise contains a provision that "unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful. . . ."\textsuperscript{33} The United States Tariff Commission is given the power to issue complaints, hold hearings and issue orders, subject to review by the courts, and after the final findings of the Commission are transmitted to the president, and the existence of any such unfair method or act is established to the satisfaction of the president, he is given the power to fix an additional duty, within specified limits, on

such articles imported and in extreme cases to exclude such articles from entry into the United States.

CONCLUSION

Thus for seven centuries English speaking peoples have struggled to keep the markets free. For most of this period the people were able to secure some protection from monopolies and restraints of trade which affected absolute necessities of life but even these laws, as machinery for wider distribution began to develop, defeated their own purpose by hampering freedom of distribution and thus caused great irregularity of prices. Aside from farm products, however, England for centuries maintained a system fostering monopolies designed to bring the maximum of revenue into the coffers of greedy monarchs. Gild monopolies controlled the trade of the towns, but gradually developed such gross abuses that they were stripped of their powers while competitive forces which even kings and queens could not control forced their disintegration. National monopolies created by direct grant from the crown so enraged the people by their excesses that within a few years they were forced out of existence. The trade of the world was parceled out by government grant to monopolistic companies in foreign trade, but their inefficiency and corruption combined with the hostility of interlopers on their trade finally encompassed their destruction. The American colonists almost immediately upon their arrival in the new country were forced to prohibit monopolistic practices and there grew up a deep seated hostility toward monopoly in all its forms. The efforts of the mercantile and industrial interests of England to procure legislation which would not only give them a monopoly of the supply of manufactured articles going to the colonies, but also prevent manufacturing in the colonies and make England the sole market for the raw materials produced by the colonists, thus depriving them of the benefit of world wide competition was one of the great contributing factors leading to the American Revolution. The English government, in its efforts to protect the monopolistic privileges which had been granted by it, adopted regulations which interfered with the freedom of action of every man and woman. Even the shroud in which a man was to be buried was prescribed. The innumerable exactions caused grave dissatisfaction until finally the revolution in human thought which established the rights of man and brought about the American and French revolutions also forced a complete reversal in the policy of government toward business and ushered in a period of unregulated, unrestricted competition. After a struggle of nearly five centuries the English people thus forced the abandonment of a government policy designed to foster monopoly, and at the time of the birth of our nation were establishing a policy of unrestricted competition.
During the Revolution several colonies had difficulties with traders who endeavored to monopolize the supply of different communities. Several of our states in their constitutions expressly prohibited monopoly. On the other hand, the effort of one state to establish state monopolies forced to the Supreme Court the constitutional issue as to whether or not a state could grant a monopoly of trade within its borders which would directly burden and exclude interstate and foreign commerce. That court promptly ruled that the power did not reside in a state thus to restrict interstate and foreign commerce. The question as to the legal right of individuals to restrain such trade necessarily was not answered until the development of industry created individual organizations of combinations having the economic power so to restrain trade. The general acceptance of the laissez faire doctrine of unrestricted competition, the development of our vast resources and the absence of monopolies in this country immediately following the Revolution made monopoly a dead issue. But the excesses in banking and other competitive fields soon demonstrated that some regulations were essential to the protection of the public—that unrestricted competition created abuses as vicious as those arising under monopoly. Regulatory legislation in many forms resulted. Industry, however, remained largely free from regulation, although by the middle of the 19th century the courts began exercising their common law powers to reach activities in restraint of trade. Following the Civil War there came a great development of industry. Powerful corporations came into existence. Abuses began to multiply and in the eighties the state governments began to regulate business competition by legislation. Then quickly there came the enactment by the federal government of the basic prohibition against unreasonable restraints of trade, followed a quarter of a century later by the establishment of an administrative tribunal for regulation and the adoption of the second basic prohibition against the use of unfair methods of competition. Over a period of seven centuries there has thus come about a fundamental change in the relationship of government to business. A policy of fostered and protected monopoly after a trial of five centuries was discarded and the opposite extreme, a policy of wholly unrestricted competition, was for a time adopted. The unhappy effects of that policy within less than a century resulted in the adoption of a compromise—a policy of government regulation designed to maintain a status of free and fair competition protecting alike against the dangers of monopoly and the evils of uncurbed competition.