"UNFAIR METHODS OF COMPETITION"

The debate in the Senate, upon the Federal Trade Commission Bill¹ as originally reported to the Senate, in which appeared for the first time the declaration that "unfair competition" is unlawful, developed the greatest divergence of opinion, even among the supporters of the bill, regarding the meaning of "unfair competition."

Senator Newlands, opening the debate in behalf of the bill, said:

"The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance, or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others. . . . It is believed that the term 'unfair competition' has a legal significance which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition."²

The originality of legislating against "unfair competition" in the generic sense was frankly admitted by Senator Newlands:

"There must always be a commencement for a legal term in the administration of the law, and that certainly in the evolution of the law we are not always confined to the terms that have existed in the past."³

¹ The Federal Trade Commission Act (Public, No. 203, 63d Congress H. R. 15613, approved September 26, 1914) in section 5 provides that "unfair methods of competition in commerce are hereby declared unlawful." In vigor, acuteness and research, the debate preceding the adoption of this provision did justice to the best traditions of the Senate. The salient points of this debate are reviewed in this article.

² Cong. Rec. vol. 51, p. 12136.

³ Cong. Rec. vol. 51, p. 12154.

Coming to the definition of "unfair competition" Senator Newlands said:

"Now, then, the question is what unfair competition covers. It covers every practice and method between competitors upon the part of one against the other that is against public morals, in my judgment, or is an offense for which a remedy lies either at law or in equity."⁴

How extensive he deemed "unfair competition," and how completely he considered that it occupied fields of legislation remote from what is commonly thought of as any kind of "competition," appears from Senator Newlands' response to an inquiry as to whether interlocking directorates could be dealt with under this provision.

Senator Newlands said:

"My individual opinion is that an interlocking directorate would come under this provision with reference to unfair competition if an interlocking directorate were used for the purpose of creating a community of interest between two or three or four corporations that would make them more powerful in their competition with an individual competitor; and I wished the test to be not simply the fact that there were common directors in numerous corporations but the fact that the creation of that common directorate involved oppression to the independent concern, and thus involved unfair competition."⁵

In the progress of the debate, however, Senator Newlands came to the conclusion that his definition, above quoted, broad as it was, was still not broad enough to include everything comprehended within "unfair competition." His mature opinion was that "unfair competition" included many acts which lay far outside the antitrust laws. As he expressed it:

"There are numerous practices tending toward monopoly that may not come within the provisions of the antitrust law and amount to a monopoly or to monopolization. We want to check monopoly in the embryo."⁶

Summed up, Senator Newlands' definition of "unfair competition" included:

⁴ Cong. Rec. vol. 51, p. 12158.

⁵ Cong. Rec. vol. 51, p. 12152.

⁶ Cong. Rec. vol. 51, p. 13111. For further remarks by Senator Newlands upon "unfair competition" see especially Cong. Rec. vol. 51, pp. 12130-2, 12136, 12152-5, 12158, 12449-50, 13111, 14067.

(a) Substantially all violations of the antitrust laws, including even wrongs arising from interlocking directorates and intercorporate relationships.

(b) All other acts affecting a competitor, for which any remedy "lies either at law or in equity."

(c) All other acts affecting a competitor that are "against public morals," though heretofore quite lawful and not forbidden by the Sherman Law or any other law.

Senator Cummins, one of the chief sponsors of the bill upon its legal points, defined "unfair competition" quite differently from Senator Newlands.

On the opening day of the debate, Senator Cummins declared:

"We have chosen to report a rule for the trade commission in the language which has been suggested, namely, 'unfair competition.' It is that competition which is resorted to for the purpose of destroying competition, of eliminating a competitor, and of introducing monopoly. That is the 'unfair competition,' in its broad sense, which this bill endeavors to prevent . . . The unfairness must be tinged with unfairness to the public; not merely with unfairness to the rival or competitor. . . . We are not simply trying to protect one man against another; we are trying to protect the people of the United States, and, of course, there must be in the imposture or in the vicious practice or method something that has a tendency to affect the people of the country or be injurious to their welfare."⁷

Later, Senator Cummins emphasized the fact that "unfair competition" was intended to outlaw acts which heretofore were lawful under antitrust laws.

"The attempt is to go further and make some things offenses that are not now condemned by the antitrust law;

That is the only purpose of section 5—to make some things punishable, to prevent some things, that can not be punished or prevented under the antitrust law."⁸

"There may be unfair competition which does not constitute restraint of trade. Unfair competition must usually proceed to great lengths and be destructive of competition before it can be seized and denounced by the antitrust law. In other cases it must be associated with, coupled with, other vicious and unlawful practices in order

⁷ Cong. Rec. vol. 51, pp. 12150-12151.

⁸ Cong. Rec. vol. 51, p. 12454.

to bring the person or the corporation guilty of the practice within the scope of the antitrust law. The purpose of this bill in this section and in other sections, which I hope will be added to it, is to seize the offender before his ravages have gone to the length necessary in order to bring him within the law that we already have."⁹

"But we propose to do one thing more. We propose to make it an offense. We propose to make it unlawful for any corporation, or any person, indeed, to practice unfair competition, and wherever the practice of unfair competition has not reached a point that constitutes a violation of the antitrust law, then we intend to do what we can to maintain fair, full, free competition through the intervention of the trade commission."¹⁰

The originality of legislating against "unfair competition" had no terrors for Senator Cummins:

"Our language is not made up by the courts; our language is made up in a hundred different ways. 'Unfair competition' means what the people who use the English language commonly believe that those words mean; and it makes no difference whether they have been instructed by a decree or a judgment of a court or whether they have received that definition from a dictionary or whether they have received it from any other form of literature. It is to me a most astonishing proposition that when we use the words 'unfair competition' in a law we are limited to what some court has said is unfair competition in a particular case. No court ever attempted to limit the words 'unfair competition,' but many a court has declared that certain facts established in a legal proceeding constituted unfair competition. Business men are just as potent in determining what unfair competition means as are the courts; the writers who make our literature, after observing the affairs of men, are just as influential in determining the meaning of unfair competition as are the courts."¹¹

"My contention is that there is a principle underlying every such phrase if used in the common law; that there is an evil to be reached, and that when we employ such a word or such a phrase we must keep in view all the while the principle upon which the definition or application was given to the word or phrase, and apply it from

⁹ Cong. Rec. vol. 51, p. 12622.

¹⁰ Cong. Rec. vol. 51, p. 12625.

¹¹ Cong. Rec. vol. 51, p. 13879.

time to time in consonance with that principle. If that be true, the words 'unfair competition' can grow and broaden and mold themselves to meet circumstances as they arise, just as the words 'restraint of trade' have grown and have been molded in order to meet the necessities of the American People."¹²

Summed up, Senator Cummins' definition of "unfair competition" included:

"Imposture," or any "vicious practice or method . . . that has a tendency to affect the people of the country or to be injurious to their welfare," though heretofore quite lawful under the Sherman Law.

Senator Robinson, who supported the bill in the Senate Committee on Interstate Commerce and also upon the floor of the Senate, defined "unfair competition" quite differently from both Senator Newlands and Senator Cummins.

On the opening day of the debate, Senator Robinson declared:

"The term 'unfair competition' in trade will embrace every practice which may be held by a court to be unjust, inequitable, or dishonest; and when Congress legislates on this subject I can see no reason for limiting the statute to one or two practices, when there are many which are equally objectionable."¹³

In support of this statement, Senator Robinson cited "a pretty well-recognized standard authority on the meaning of terms, namely, Words and Phrases, volume 8," quoting therefrom extracts from three cases, as follows:¹⁴

"With respect to articles placed upon the market for sale, it is only when the one article is dressed so as to represent the other, and to deceive a proposing purchaser as being that other, that there can be said to be a case of unfair trade." (*Sterling Remedy Co. v. Eureka Chemical & Manufacturing Co.* (U. S.), 80 Fed. 105, 108; 25 C. C. A. 314) . . .

"The doctrine of unfair competition in trade rests on the proposition that equity will not permit anyone to palm off his goods on the public as those of another. Unfair

¹² Cong. Rec. vol. 51, p. 14003. For further remarks by Senator Cummins upon "unfair competition" see especially Cong. Rec. vol. 51, pp. 12149-51, 12454, 12613-5, 12619-22, 12625, 13876, 13879, 14003, 14125-6, 14133, 14148-9, 14183-8, 14193-6, 14202-5.

¹³ Cong. Rec. vol. 51, p. 12153.

¹⁴ Cong. Rec. vol. 51, p. 12153.

competition in trade, as distinguished from infringement of trade-marks, does not involve the violation of any exclusive right to the use of trade-marks or symbols. The word may be purely descriptive, and the mark or symbol indicative only of style, size, shape, or quality, and as such open to the public. Yet there may be unfair competition in trade by an improper use of such mark or symbol." (*Dennison Manufacturing Co. v. Thomas Manufacturing Co.* (U. S.) 94 Fed. 651, 656)

"The term 'unfair competition in trade' includes the simulation of defendant of the packages of plaintiff, putting up and selling packages of the same general appearance as those of the plaintiff. The court will only interfere to protect the plaintiff and the public, and for the suppression of unfair and dishonest competition when 'the resemblance is such that it is calculated to deceive, and does in fact deceive, the ordinary buyer, making his purchases under the ordinary conditions which prevail in the conduct of the particular traffic to which the controversy relates.'" (*T. B. Dunn Co. v. Trix Manufacturing Co.*, 63 N. Y. Supp. 333, 335; 50 App. Div. 75).

This apparent limitation of "unfair competition" to passing off one's business or goods for another's was abandoned by Senator Robinson two days later.

Turning aside from the definitions of "unfair competition" contained in the law dictionaries, Senator Robinson drew upon the economists:

"Mr. William S. Stevens, of Columbia University, in an article called to my attention by Congressman Stevens, of New Hampshire, who introduced this provision in the House, discusses the subject of 'unfair competition' from an economic point of view, and classifies according to their elementary characteristics 11 forms of 'unfair competition' as follows: I read now from his article on page 283 of the *Political Science Quarterly* for June, 1914:

- "1. Local price cutting.
- "2. Operation of bogus 'independent' concerns.
- "3. Maintenance of 'fighting ships' and 'fighting brands.'
- "4. Lease, sale, purchase, or use of certain articles as a condition of the lease, sale, purchase, or use of other required articles.
- "5. Exclusive sales and purchase arrangements.
- "6. Rebates and preferential contracts.
- "7. Acquisition of exclusive or dominant control of machinery or goods used in the manufacturing process.
- "8. Manipulation.
- "9. Black lists, boycotts, white lists, etc.

"10. Espionage and use of detectives.

"11. Coercion, threats, and intimidation.

"The terms used fairly define without detailed discussion the various practices thus classified, and undoubtedly embrace nearly all of the methods of 'unfair competition' now in use. . . .

"Nearly all normal business men can distinguish between 'fair competition' and 'unfair competition.' Efficiency is generally regarded as the fundamental principle of the former—efficiency in producing and in selling, while oppression or advantage obtained by deception or some questionable means is the distinguishing characteristic of 'unfair competition.'"¹⁵

Summed up, Senator Robinson's definition of "unfair competition" included:

(a) The act of passing off one's business or goods for another's.

(b) "Unfair competition" from an economic point of view, as laid down by Dr. Stevens.

(c) All other acts which "normal business men" might deem inconsistent with "efficiency in producing and in selling."

Senator Saulsbury, another supporter of the bill, both in the Senate Committee on Interstate Commerce and also upon the floor of the Senate, defined "unfair competition" quite differently from Senator Newlands or Senator Cummins or Senator Robinson.

Senator Saulsbury said:

"Courts have always recognized the customs of merchants, and it is my impression that under this act the commission and the courts will be called upon to consider and recognize the fair and unfair customs of merchants, manufacturers, and traders, and probably prohibit many practices and methods which have not heretofore been clearly recognized as unlawful.

"Every man in his own business knows when a competitor is pursuing unfair methods. Every professional man knows when a competitor is guilty of unfair, unprofessional, and unethical conduct. It may be that heretofore we have been satisfied to allow only the usual punishment to come upon such persons as the violation of the ethics of a profession or a business in time naturally brings;

¹⁵ Cong. Rec. vol. 51, p. 12248. For further remarks by Senator Robinson upon "unfair competition" see especially Congressional Record, vol. 51, pp. 12153, 12246-9.

but it is undoubtedly true that sentiment in this country has come to the point where it will, if it can, by law prohibit, prevent, make unlawful, and punish unfair practices in competitive business."¹⁶

Summed up, Senator Saulsbury's definition of "unfair competition" included:

All "customs of merchants" which are in violation of "the ethics of a profession or a business."

Senator Walsh had somewhat the same idea:

"I do not at all agree that the phrase 'unfair competition' . . . will be construed as that phrase was understood at common law, if under the common law it was restricted in its meaning to include only the substitution of the goods of one man for the goods of another. I believe that when construed by the court it will be given the meaning which it has to-day in common parlance and the accepted significance that it has in the literature of this, our day."¹⁷

Summed up, Senator Walsh's definition of "unfair competition" was:

(a) Every act of passing off one's business or goods for another's.

(b) All other acts comprehended within the meaning which "unfair competition" has to-day in common parlance and in literature.

Senator Williams at first believed that "unfair competition" was a misnomer:

"What these people call 'unfair competition' is not competition at all; it is an effort to stifle competition; it is an effort to take competition by the throat and choke it to death."¹⁸

Later in the debate, however, Senator Williams declared:

"Unfair methods of stifling competition is what is meant by this bill or what is sought to be intended by the phrase

¹⁶ Cong. Rec. vol. 51, p. 12648. For further remarks by Senator Saulsbury upon "unfair competition" see especially Congressional Record, vol. 51, pp. 12648, 13109.

¹⁷ Cong. Rec. vol. 51, p. 14138. For further remarks by Senator Walsh upon "unfair competition" see especially Congressional Record, vol. 51, pp. 14062-4, 14138.

¹⁸ Cong. Rec. vol. 51, p. 13303.

'unfair competition.' . . . While the expression is not capable of an abstract definition, it is capable of concrete application all the way through."¹⁹

Summed up, Senator Williams' definition of "unfair competition" was:

All unfair methods of stifling competition.

Senator Kenyon, without attempting to define "unfair competition," professed to have no difficulty in understanding what it meant:

"It is no more difficult to me than the question of restraint of trade. It is no harder to define and no more difficult than has been suggested—undue influence, unsound mind, fraud, human affection. I can not define that, but I know what it means. . . . It is no more difficult than reasonable care, negligence. It has been used in the decrees of the courts, as has been pointed out, and decrees of courts are drawn with great care. The language 'fair competition' has been used by the Supreme Court."²⁰

Senator Hollis, who in the later stages of the debate upon the floor of the Senate was one of the chief sponsors for the provision regarding "unfair competition," defined "unfair competition" as follows:

"Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper. Without the use of unfair methods no corporation can grow beyond the limits imposed upon it by the necessity of being as efficient as any competitor. The mere size of a corporation which maintains its position solely through superior efficiency is ordinarily no menace to the public interest. . . .

"The Sherman Antitrust Act does not become effective until a monopoly is full grown, in full panoply, so that you can prove to the court that it is a monopoly and is in restraint of trade; but if the proposed trade commission has its attention called to some unfair method of competition, it can immediately investigate, and if it decides that

¹⁹ Cong. Rec. vol. 51, p. 14278. For further remarks by Senator Williams upon "unfair competition" see especially Congressional Record, vol. 51, pp. 13303-4, 14278-9.

²⁰ Cong. Rec. vol. 51, p. 14332-3. For further remarks by Senator Kenyon upon "unfair competition" see especially Cong. Rec. vol. 51, pp. 14332-4.

it is unfair competition and may lead to monopoly or restraint of trade, it may prohibit it; and then the court will come in and put that prohibition into effect. . . .

"The Sherman Act applies only to restraint of trade by a combination and to monopolization of commerce. Unfair competition is a means of restraining or of monopolizing trade. But there may be some doubt as to whether the mere use of an unfair method, without more, by a corporation of no conspicuous size, would be held to fall within the scope of the Sherman Act."²¹

Summed up, Senator Hollis' definition of "unfair competition" included:

(a) "Means of restraining or monopolizing trade" heretofore forbidden by the Sherman law.

(b) Methods which fall short of violating the Sherman Law but which "the proposed trade commission . . . decides . . . may lead to monopoly or restraint of trade."

(c) All other acts which interfere with "efficiency."

From all these various definitions, offered by sponsors of the bill, unfair competition would seem to include:

(a) Every act of passing off one's business or goods for another's.

(b) All methods of competition tending to restraint of trade or monopoly which have been forbidden by the Sherman Law.

(c) Substantially all violations of the antitrust laws, including even wrongs arising from interlocking directorates and allied incorporate directorships.

(d) All unfair methods of stifling competition.

(e) All other acts which the "commission . . . decides . . . may lead to monopoly or restraint of trade" though not now forbidden by the Sherman Act.

(f) All other acts affecting a competitor for which "a remedy lies either at law or in equity."

(g) All other acts which either affect a competitor and are "against public morals," or in any way interfere with economic "efficiency," though heretofore quite lawful and not forbidden by the Sherman law or by any other law.

²¹ Cong. Rec. vol. 51, p. 13223. For further remarks by Senator Hollis upon "unfair competition" see especially Congressional Record, vol. 51, pp. 12194, 13219-24, 13223-6, 14140-3.

(h) All other acts comprehended within the meaning which "unfair competition" has to-day in common parlance and in literature.

Turning now to the critics of the provision against "unfair competition":

Senator Thomas, on the opening day of the debate, denounced the indefiniteness of "unfair competition":

"My construction of this term is that if we enact this measure into a law the commission to be appointed afterwards will have the absolute power, subject only, of course, to the ultimate determination of the legality of the act by the courts, of arbitrarily determining whether any act submitted to it is or is not unfair competition, whether that act is one which involves no competition or one which involves actual competition, and that as a consequence we are imposing upon the business world a condition almost similar to that which resulted during the Middle Ages in a declaration that all unbelief should be heresy."²²

Senator Clapp declared:

"If the authority sought to be conferred by section 5 is valid and constitutional and as far-reaching as the friends of the bill contend, we absolutely delegate to the commission power to enact a law prohibiting local underselling, or refuse to act."²³

"If Congress is to absolutely take the power and authority and function of legislation and turn it over to a handful of men, five or seven in number, and practically place their judgment beyond recall by the great lawmaking power of this country, theoretically at least, then we certainly stand at the threshold of a most remarkable change in the fundamental plan of government. It may be that in dealing with this subject, where the work is largely subterranean, where the methods are hidden and concealed, we have reached the point where Congress must thus abdicate the lawmaking function and turn it over to a commission. If we have, then of course it should be done, but I, for one, contemplate it with reluctance and hesitation. I may vote for the bill—it may be improved before the final vote—but I certainly hesitate to place the lawmaking

²² Cong. Rec. vol. 51, p. 12149. For further remarks by Senator Thomas upon "unfair competition" see especially Cong. Rec. vol. 51, pp. 12149, 12159, 12196, 12650-6, 14112.

²³ Cong. Rec. vol. 51, p. 13306.

and law-enforcing power in a position so fraught with danger, so liable to become the instrument of that very spirit which we are seeking to control and regulate."²⁴

Senator Pomerene, while favoring the passage of the bill, disagreed with its sponsors regarding "unfair competition":

"One of the most unsatisfactory features of this bill is that which declares unfair competition to be unlawful, without any attempt to define what unfair competition is; and I have seen no bill thus far which eliminates that objection. I was led to believe, and I believe now, that if it were to become the law of the land the courts would hold that the words 'unfair competition' mean only such practices as are held to be unfair competition under the common law. I can not believe that the term 'unfair competition' could be used in its colloquial or popular sense, if it has a colloquial or popular sense, which I do not believe."²⁵

Senator Sutherland distinguished between "unfair methods of competition" and "unfair competition," but saw in neither the meaning imputed to them by the sponsors of the bill:

"I do not know whether it is the view of the framers of this bill that unfair competition and unfair methods of competition mean the same thing, but I do know that the words 'unfair competition' have a very well settled meaning in the law and that the words 'unfair methods of competition' have not. So if we accept that provision as to unfair methods of competition it seems to me very clearly that we have authorized the commission to legislate without laying down any primary standard. What are unfair methods of competition? Can anybody tell me? Can anybody make a comprehensive list of the acts which will constitute unfair methods of competition? Of course we can frame a definition of what is unfair competition, under the authorities. 'Unfair competition,' as I have said, has a very well-settled meaning. It means simply and only, as I understand it, an attempt upon the part of one person or of a corporation to impose his or its

²⁴ Cong. Rec. vol. 51, p. 14213. Senator Clapp finally voted for the bill, Cong. Rec. vol. 51, p. 14497. For further remarks by Senator Clapp upon "unfair competition" see especially Cong. Rec. vol. 51, pp. 13306, 14206, 14212-6.

²⁵ Cong. Rec. vol. 51, p. 14002. For further remarks by Senator Pomerene upon "unfair competition" see especially Cong. Rec. vol. 51, pp. 14002-4, 14138-9, 14183, 14262.

goods or business upon the public as the goods or business of another."²⁶

Senator Borah discussed the trade-mark cases cited by Senator Robinson:

"The court in no instance undertakes to define or even discuss 'unfair competition' separate and apart from the infringement of trade marks. Nothing therein contained gives the slightest suggestion as to the general rules of business."²⁷

Any broader meaning of "unfair competition", Senator Borah declared, would be so indefinite as to be void for uncertainty.²⁸

Local price cutting, operation of bogus independent concerns, maintenance of "fighting ships" and "fighting brands," Senator Borah declared, had already been forbidden by the Sherman Act.

Dr. Stevens' classification of "unfair competition," which Senator Robinson had adopted, seemed to Senator Borah merely to demonstrate how adequately the Sherman Act already forbade every kind of so-called "unfair competition."²⁹

Senator Nelson, continuing in the same vein, described the prohibition of "unfair competition" as "only nibbling on one side of the real trust question." The Sherman Act, to his mind, seemed entirely adequate to reach "unfair competition" and every other method of monopoly.³⁰

Senator Colt enumerated four different constructions that the courts might place upon "unfair competition":

²⁶ Cong. Rec. vol. 51, p. 13994. For further remarks by Senator Sutherland upon "unfair competition" see especially Cong. Rec. vol. 51, pp. 12197, 13877, 13985-14001, 14123-5, 14128-9, 14140, 14183.

²⁷ Cong. Rec. vol. 51, p. 12456.

²⁸ Citing *U. S. v. Reese*, 92 U. S. 214, 220, 221; *Tozer v. U. S.*, 52 Fed. 917; *Ex parte Jackson*, 45 Ark. 158, 164; *Cook v. State*, 26 Ind. App. 278, 282. Besides these might be cited: *Chicago & N. W. Ry. Co. v. Dey*, 35 Fed. 866, 876; *Alabama & N. O. Transportation Co. v. Doyle*, 210 Fed. 173, 181; *Hyatt v. Williams*, 84 Pac. (Cal.) 41; *State v. Great Northern Ry. Co.*, 111 N. W. (Minn.) 189, 293-4; *Czarra v. Board of Medical Supervisors*, 25 App. Cas. (Dist. of Col.) 443, 450, 451.

²⁹ Cong. Rec. vol. 51, pp. 12456-7. For further remarks by Senator Borah upon "unfair competition" see especially Cong. Rec. vol. 51, pp. 12150, 12448-58.

³⁰ Cong. Rec. vol. 51, p. 13105. For further remarks by Senator Nelson upon "unfair competition" see especially Cong. Rec. vol. 51, pp. 13105, 13112-3.

"First. A court may take the view that the words 'unfair competition' are used in a legal sense as understood in the law, and that Congress, under a well-established rule, must be presumed to have used these words in this sense. This will limit the construction of 'unfair competition' to transactions based upon fraudulent practices; and if the court should be inclined to take a narrow legal view of these words they would be limited to the practice of palming off the goods of one man for those of another. I think that all actions for unfair competition which are now known to the law are based upon this fraudulent practice in one or another of its various forms.

"Second. A court may take the view that Congress intended to give these words a broader meaning; that what Congress intended was that the court itself should decide whether a given transaction was fair or unfair, according to its own conscience, its own sense of right or wrong. Whether a transaction is fair or unfair thus becomes a moral question, to be solved by the conscience of each individual judge. This is a very uncertain rule, because the consciences of men differ very much as to what is fair or unfair. Unfair conduct means disingenuous or tricky conduct, and the consciences of men differ widely as to what would constitute such a disingenuous or tricky transaction as should be considered unlawful under this law.

"Third. A court may take the view that these words were not used in a legal sense or in a moral sense, but that they plainly refer to such transactions as are regarded by society as unfair; that is, such transactions as are regarded as unfair according to the customs and usages of merchants or in trade generally. Under this construction the court would seek by proof to find whether a given transaction was recognized as fair or unfair in trade, and would determine a given case according to the facts presented upon this issue.

"Fourth. A court may take the view that it was not the intention of Congress to use these words in a legal sense or in a moral sense or in a sense as known to trade and commerce, but that it was plainly the intention of Congress to use these words in the broad sense of comprising the various steps which lead up to monopoly; and hence that 'unfair competition' within the meaning of this law signifies the various things which have been forbidden by the courts in decrees entered under the antitrust laws and all transactions of a similar nature. That such was the intention of Congress clearly appears, a court may say, from the arguments in the Senate. And in support of this construction it may be further urged that Congress was engaged in a general scheme of legislation supplementary to the Sherman law, and hence that it intended that these

words should cover all those transactions which any person may employ in a scheme or plan to establish a monopoly in violation of law."³¹

"If this is to be the character of our legislation in the future," continued Senator Colt, "I believe that all of us must change our ideas as to what constitutes Anglo-Saxon liberty under a democratic form of government."³²

To the same effect, Senator Brandegee, with great spirit, denounced the provision of the bill relating to "unfair competition" as hopelessly indefinite, and as an unconstitutional attempt to confer both legislative and judicial functions upon the commission.³³

Senator Sterling saw in "unfair competition" a limitless field of speculation:

"We open wide the doors to a consideration of the innumerable standards of business morals, to questions of business ethics, varying as they will with the individual, with the community, with the particular trade or with the times. What a fine opportunity for the man who never is but is always afraid he is going to be hurt. What a fine chance for the overzealous and self-constituted guardian of the business morals of the community. And how tempting the situation will be to the man inspired by fear or jealousy of a business rival. I think it requires no great stretch of the imagination to see these as some of the possibilities arising out of the very generality of the term 'unfair competition,' and the prohibition against the use, not of any known or designated method of 'unfair competition' causing some known or designated injury, but just 'unfair competition.'"³⁴

Senator Sterling and Senator McCumber suggested various forms of language to avoid the indefiniteness of "unfair competition"; but none of them were adopted.³⁵

Senator Reed, who excelled the rest in vigorous criticism of the bill, inquired on the opening day of the debate:

³¹ Cong. Rec. vol. 51, p. 14330-1.

³² Cong. Rec. vol. 51, p. 14330-1. For further remarks by Senator Colt upon "unfair competition" see especially Cong. Rec. vol. 51, pp. 13876, 13879, 14258, 14189-90, 14330-1.

³³ Cong. Rec. vol. 51, pp. 13309-13312, 14262-5.

³⁴ Cong. Rec. vol. 51, p. 13306.

³⁵ Cong. Rec. vol. 51, pp. 12154-5, 13302-13, 14207, 14272-5.

"What about this commission that without any guide of law, without any statute to follow, is to sit down and say, 'We think this transaction is fair, we think this other transaction is unfair; we think Jones treats his competitors fairly; we think Smith treats his competitors unfairly'? Who is to determine what is fair and what is unfair? The commission. How will it determine the all-important question? Will it proceed according to the precedents of the courts, or will it examine dissertations upon ethics? Will it accept the western code of honor, or will it go down East for its rules of business fairness? Will it adopt the morals of the stock exchange or the Sunday school? No man can say, no man dare hazard a guess."³⁶

So far as "unfair competition" has any meaning in the law, continued Senator Reed,

"You will find that 'unfair competition' is used as a descriptive term to cover the substitution by A of his goods for the goods of B, selling his goods to the public or imposing his goods upon the public as and for the goods of another, thus defrauding the public and defrauding the producer of the particular line of goods that has an established reputation."³⁷

He also quoted the familiar rule that "words having a precise and well-settled meaning in the jurisprudence of a country are to be understood in the same sense when used in statutes, unless a different meaning is unmistakably intended."³⁸

³⁶ Cong. Rec. vol. 51, p. 12160.

³⁷ Cong. Rec. vol. 51, p. 12934. Citing *Singer Manufacturing Co. v. June Manufacturing Co.*, 163 U. S. 169; *Sterling Remedy Co. v. Eureka Chemical Mfg. Co.*, 80 Fed. 105; *Dennison Manufacturing Co. v. Thomas Manufacturing Co.*, 94 Fed. 651; and other cases collected in Black's Law Dictionary and Words and Phrases under the title "Unfair Competition"; *Goodyear Co. v. Goodyear Rubber Co.*, 128 U. S. 598; *Howe Scale Co. v. Wyckoff Seamans & Benedict*, 198 U. S. 118; *Cole Co. v. American Cement & Oil Co.*, 130 Fed. 703; *Newcomer & Lewis v. Scriven Co.*, 168 Fed. 621; *Rathbone Sard & Co. v. Champion Steele Range Co.*, 189 Fed. 26; *Hilker Mop Co. v. United States Mop Co.*, 191 Fed. 613; *Everett Piano Co. v. Maus*, 200 Fed. 718; *Coca-Cola Co. v. Gay-Ola Co.*, 200 Fed. 720; and other cases collected in Singer: Trade Marks, 630; Paul: Trade Marks, par. 209; Nims: Unfair Business Competition, par. 15; Hesselstine: Trade Marks and Unfair Trade; Hopkins: Unfair Trade, pp. 24-25.

³⁸ Cong. Rec. vol. 51, p. 12933. Citing Lewis: Sutherland on Statutory Construction, 2d Edition, vol. 2, par. 398; *The Abbotsford*, 98 U. S. 440, *McDonald v. Hovey*, 110 U. S. 619; *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 328; *In re Greene*, 52 Fed. 104, 111, and other cases.

Senator Reed then declared:

"It is as certain as anything laying in the future can be that when the courts come to construe it they will take the meaning that has been attached to 'unfair competition' by all of the courts of England and of this country, that has been written into the digests, text-books, and dictionaries of the law, and he will find that he has accomplished nothing by his bill except to prohibit the imitation by one dealer of the goods of another."³⁹

Various state statutes⁴⁰ which had been cited as "laws prohibiting unfair competition" were then analyzed by Senator Reed. Although "unfair competition" was mentioned in the title or the caption of each of these statutes, Senator Reed pointed out that none of them forbade "unfair competition" as such, but that each of them either forbade some particular form of price discrimination or trade mark misappropriation or else declared some particular form of price discrimination or trade to be "unfair competition," and specifically forbade that.⁴¹ Sponsors of the bill had cited, during the course of the debate, various decisions in which "unfair competition" or "unfair methods of competition" or "unfair" practices had been mentioned⁴² and various other decisions in which "fair competition" had been mentioned⁴³ and a decree in which "unfair competition" had been enjoined^{43a} and a decree in which "fair competition" had

³⁹ Cong. Rec. vol. 51, p. 12934.

⁴⁰ Acts of California, Chapter 276, p. 508, June 10, 1913; Code Supplement of Iowa, Section 5028b; Acts of Louisiana, 1908, Act 128, p. 187; Laws of Montana, 1913, Chapters 7 and 8; Laws of Minnesota, 1907, Chapter 269; Laws of Nebraska, 1907, Chapter 157; Laws of North Dakota, 1913, Chapter 287; Laws of South Dakota, 1907, Chapter 131, p. 196; Laws of Utah, 1913, Chapter 41, p. 53; Laws of Wyoming, 1911, Chapter 62, p. 84. See Cong. Rec. vol. 51, pp. 13225-6, 13313.

⁴¹ Cong. Rec. vol. 51, pp. 14452-4.

⁴² *Standard Oil Co. v. United States*, 221 U. S. 1, 43; *State v. Central Lumber Co.*, 123 N. W. (S. D.) 504, 509, affirmed *Central Lumber Co. v. South Dakota*, 226 U. S. 157; *United States v. American Naval Stores Co.*, 172 Fed. 455, 459; *Ware-Kramer Tobacco Co. v. American Tobacco Co.*, 180 Fed. 160; *United States v. Patterson*, 205 Fed. 292, 301. Beside these might be cited the recent cases of *Buckeye Powder Co. v. E. I. du Pont de Nemours Powder Co.*, D. C. N. J. Feb. 25, 1914, not reported, and *United States v. Keystone Watch Case Co.*, 218 Fed. 502, 515.

⁴³ *In re Greene*, 52 Fed. 104; *Ware-Kramer Tobacco Co. v. American Tobacco Co.*, 180 Fed. 160; *State v. Fairmont Creamery Co.*, 153 Iowa 702, 709-710. Beside these might be cited the recent case of *Buckeye Powder Co. v. E. I. du Pont de Nemours Powder Co.*, *supra*.

^{43a} *United States v. Central West Publishing Co.*, D. C. N. D. Ill., August 3, 1912.

been mentioned⁴⁴ and various decrees in which neither "unfair" nor "fair" competition had been mentioned but certain specified methods of competition had been particularly enjoined.⁴⁵ These various decisions and decrees, all of which were rendered either under the Sherman Act or under one or another of the various state statutes against price discrimination, indicated to Senator Reed's mind no definition of "unfair competition." They merely convinced him of the importance of adhering strictly to the specific well-defined language of the Sherman Act and the various state statutes against price discrimination. Restraint of trade had long been a definite term in the law, and price discrimination was easily defined. "Unfair competition," however, had, in his opinion, acquired no such definiteness.⁴⁶ Senator Reed quoted from *Alabama and New Orleans Transportation Co. v. Doyle*,⁴⁷ in which the Court said:

"Of like effect and subject to like infirmity is the provision forbidding the sale of securities, if the Commission thinks that the company's organization or proposed plan of business is not 'fair.' Broader and vaguer language could not be chosen. It subjects to the practically uncontrolled discretion of the Commission every issue or general sale of stocks, bonds, or securities hereafter to be made in Michigan. For this and the provision regarding

⁴⁴ *United States v. General Electric Co.*, N. D. Ohio, October 12, 1911.

⁴⁵ *United States v. Aluminum Co. of America*, D. C. W. D. Pa., June 7, 1912; *United States v. American Coal Products Co.*, D. C. S. D. N. Y., March 4, 1913. Beside these might be cited the decrees in *United States v. Nome Retail Grocers' Association*, D. C. Alaska; *United States v. National Association of Retail Druggists*, C. C. Ind., May 9, 1907; *United States v. Southern Wholesale Grocers Association*, C. C. N. D. Alabama, October 17, 1911; *United States v. Standard Sanitary Manufacturing Co.*, C. C. Md., November 25, 1911; *United States v. Standard Wood Co.*, C. C. S. D. N. Y., March 11, 1912; *United States v. Pacific Coast Plumbing Supply Association*, C. C. S. D. Cal., January 6, 1912; *United States v. Philadelphia Jobbers Confectioner's Association*, E. D. Pa., February 17, 1913; *United States v. Burroughs Adding Machine Co.*, D. C. Mich., March 3, 1913; *United States v. New Departure Manufacturing Co.*, D. C. W. D. N. Y., May 27, 1913; *United States v. Elgin Board of Trade*, D. C. N. D. Ill., April 27, 1914; *United States v. National Wholesale Jewellers Association*, D. C. S. D. N. Y., June 30, 1914; *United States v. Eastern States Lumber Dealers Association*, C. C. S. D. N. Y.; *United States v. Hamburg-Amerikanische Packetfahrt Actien Gesellschaft*, and others, D. C. S. D. N. Y.

⁴⁶ Cong. Rec. vol. 51, pp. 14060-2.

⁴⁷ 210 Fed. 173, 181.

probable loss, we heard upon the argument and we find in the briefs no claim of justification on grounds of public welfare; and we know of none. They deprive plaintiffs of property, and they do not carry the semblance of 'due process of law.' . . .

"We were told, upon the argument, that the Commission was not enforcing the law as it is written, but only so far as the Commission thought wise. It was said that all so-called standard securities might be sold without requiring full data and without waiting 30 days, and it was intimated that the provisions regarding 'fairness' and 'probability of loss' were only to be resorted to when the Commission thought the securities were fraudulent but did not wish to put its finding on that ground. In so far as these statements or intimations may be true, they only emphasize the inherently unlawful character of the Act and the temptation and opportunity for a rule of individual discretion and not of law."

The theory of the sponsors of the bill, Senator Reed declared, involves the most hopeless confusion:

"Suppose the court should proceed according to the theory of the gentlemen who advocate section 5. The court would go back to the common law and find the term 'unfair competition' related simply to those practices by which one man substitutes his goods for those of another. The court would then wander through all the decisions that have been made, and wherever it found a court had in any decision employed the term 'unfair competition' arguendo and as a mere descriptive phrase, write that down also as included within the term 'unfair competition.' The court would also turn to the statutes of the various States in which the term 'unfair competition' is employed for more light. Here the court would find that for the most part those statutes had described as 'unfair competition' the sale of goods in one community at a less price than is being charged by the same concern in another community. Unfortunately the court would find also that the term had in many instances been used to cover many other practices and devices, so that when it took the statutes as a guide they would be confronted by some 18 or 20 different definitions of 'unfair competition.' Then the court should, according to these gentlemen, read through the works of all the writers on economy, and I suppose we might include in that the modern magazine writers, ex-presidential and otherwise. In this fruitful field the court would find hundreds of different things embraced with the expression 'unfair trade.' Out of this labyrinth of contrariety the court is to be expected to evolve a rule of law. The fact would be that, instead of finding a definite meaning which would make definite the law, the court

would be faced by as many different meanings as there were decisions, statutes, and writers. Consequently the commission would have no rule to go by, and if it proceeded to do anything it would have no guide save its own opinion as to what was fair and unfair."⁴⁸

By a vote of 53 to 16, the Senate passed the bill with the provision declaring "unfair competition" unlawful.⁴⁹ The bill then went to a committee of conferees of the Senate and the House, and was eventually reported with "unfair methods of competition" substituted for "unfair competition."⁵⁰ This change, perhaps, was made in pursuance of Senator Hollis' suggestion that the limitation of "unfair competition" to passing off one's business or goods for another's might thus be avoided.⁵¹ Senator Newlands and Senator Cummins stated that the House conferees had insisted upon this change; and while these Senators believed that "unfair competition" was better understood in the law, they seemed satisfied that the two phrases meant the same thing.⁵² In this form the bill passed the Senate and the House⁵³ and was approved by the President and became law on September 26, 1914.

How hard it is to dogmatize upon "unfair competition" appears from some of Dr. Stevens' illustrations in the articles above referred to by Senator Robinson.^{53a}

The International Harvester Company, by which Dr. Stevens illustrated various kinds of "unfair competition," has since been held by the Federal Court to have been "fair and just" to its competitors and to the public.⁵⁴ The National Cash Register Company, of which Dr. Stevens said that "no student . . . is likely to believe that the predominance of that organization could have been secured without the unfair methods which it employed," has since passed under the scrutiny of the Circuit Court of Appeals, which has overturned the conviction of the company's officials with the statement that the company's basic and improvement patents together with its "very great capacity in the management of its affairs . . . without reference to any

⁴⁸ Cong. Rec. vol. 51, p. 14061.

⁴⁹ Cong. Rec. vol. 51, p. 14497.

⁵⁰ Cong. Rec. vol. 51, pp. 16081, 16124.

⁵¹ Cong. Rec. vol. 51, p. 13222.

⁵² Cong. Rec. vol. 51, pp. 16143-5.

⁵³ Cong. Rec. vol. 51, pp. 16181, 16325.

^{53a} W. S. Stevens: Unfair Competition: *Political Science Quarterly*, June 1914, September 1914.

⁵⁴ *United States v. International Harvester Company*, 214 Fed. 987.

unfair treatment of its competitors are sufficient in themselves to account in large measure for the success it has attained.⁵⁵ The United Shoe Machinery Company's leases, the "unfairness" of which Dr. Stevens declared to be "so clear that a judicial decision upholding them can hardly be expected to stand the test of time," have since been appraised in the Federal courts, from Dr. Stevens' own "economic standpoint" of "economic and productive efficiency," and have been upheld.⁵⁶ Local price cutting for the purpose of regaining lost business, which Dr. Stevens denounced as "unfair competition," has since been apparently permitted by Section 2 of the Clayton Act, and upon economic grounds has been justified in the Federal courts.⁵⁷ The allowance of rebates by manufacturers to the trade, which Dr. Stevens included under "unfair competition," has since been apparently permitted by Section 2 of the Clayton Act, and has several times been justified by the courts.⁵⁸ Refusal to sell specially desired goods or brands, which Dr. Stevens declared was "unfair competition," has since been qualifiedly permitted by the provisions of Section 2 of the Clayton Act authorizing one to select his "own customers in bona fide transactions and not in restraint of trade"; and except when part of a monopolistic plan in violation of the Sherman Act, has several times been justified in the Federal courts.⁵⁹ The E. I. du Pont de Nemours Powder Co. and the National Cash Register Co., according to Dr. Stevens, had been accustomed to gather information regarding their competitors with such reprehensible minuteness as to constitute "unfair competition."

⁵⁵ *Patterson v. United States*, 222 Fed. 599.

⁵⁶ *United States v. United Shoe Machinery Co.*, 222 Fed. 349.

⁵⁷ *Buckeye Powder Co. v. E. I. du Pont de Nemours Powder Co.*, D. C. N. J., February 25, 1914, affirmed *Buckeye Powder Co. v. E. I. du Pont de Nemours Powder Co.*, 223 Fed. 881.

⁵⁸ *In re Corning*, 51 Fed. 205; *In re Terrell*, 51 Fed. 213; *In re Greene*, 52 Fed. 104; *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454; *Union Pacific Coal Co. v. United States*, 173 Fed. 737; *United States v. American Tobacco Co.*, 191 Fed. 371; *Buckeye Powder Co. v. E. I. du Pont de Nemours Powder Co. supra*; *Locker v. American Tobacco Co.*, 218 Fed. 487.

⁵⁹ *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433; *Eastern States Lumber Association v. United States*, 234 U. S. 600; *Whitwell v. Continental Tobacco Co. supra*; *Phillips v. Iola Portland Cement Co.*, 125 Fed. 593; *Union Pacific Coal Co. v. United States*, 173 Fed. 737; *Virtue Creamery Package Co. v. United States*, 179 Fed. 115, affirmed 227 U. S. 8; *United States v. American Tobacco Co. supra*; *Buckeye Powder Co. v. E. I. du Pont de Nemours Powder Co. supra*; *Locker v. American Tobacco Co. supra*; *Great Atlantic & Pacific Tea Company v. Cream of Wheat Company*, D. C. S. D. N. Y., July 20, 1915, not yet reported.

Regarding these activities of E. I. du Pont de Nemours Powder Co., the court in *Buckeye Powder Co. v. E. I. du Pont de Nemours Powder Co. supra*, declared that "the mere ascertaining to what person or place a competitor's product is being shipped is a legitimate means of keeping tab on the trade, and if a particular competitor has been making inroads upon the established trade of another, such other may keep a proper surveillance over the conduct of such new competitor." Discussing similar acts of the National Cash Register Co., the court in *Patterson v. United States, supra*, said that "it all depends on the manner in which the information in the one instance and the samples in the other were obtained or secured. If in a proper manner nothing unlawful was done." To the same effect see also *United States v. American Tobacco Co. supra*.

"It is hard to sympathize," said a Federal judge recently, "with the often-repeated expression that a merchant is not advised by the antitrust act of the character of a contemplated act. If the act is wrong under commonly accepted moral or ethical standards, it was wrong at common law, and wrong under the exception to the common law, and always was and always must be wrong, so long as there is community life, with common and relative rights belonging to each individual in the community and to the public as a whole."⁶⁰ This judge was later reversed by the Circuit Court of Appeals because of his failure, upon the trial of this very case, to instruct the jury correctly in respect of the application of this antitrust act, and because of his failure, in the very decision above quoted, to hold two of the three counts of the indictment bad.⁶¹

Perhaps the Federal Trade Commission Act, declaring "unfair methods of competition" unlawful, will eventually fulfill the view of the law expressed by the Judge above quoted. Perhaps, on the other hand, it will be found that "to draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts."⁶² Whatever be the ending, however, a new and fascinating and exceedingly important chapter of the law is now beginning.

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⁶⁰ *United States v. Patterson*, 201 Fed. 697, 717.

⁶¹ *Patterson v. United States, supra*.

⁶² *Mogul Steamship Co. v. McGregor*, Court of Appeals, L. R. 23 Q. B. 598, 625 (Lord Fry), see also 617-8 (Lord Justice Bowen) and L. R. Appeal Cases 1892, 25, 37 (Lord Chancellor Halsbury) and 50 (Lord Morris).