EXPERIENCE AND EXPERIMENT IN THE LEGAL CONTROL OF COMPETITION IN THE UNITED KINGDOM

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NOVEMBER 3, 1958, was a memorable day in twentieth century English legal history. In the Royal Courts of Justice in London in a court customarily occupied by Her Majesty's Judges sat a collection of prominent men from various walks of life comprising the newly-constituted Restrictive Practices Court. Two of these men were English High Court Judges and one was a member of the Outer House of the Scottish Court of Session, but even they sat informally, without the customary judicial paraphernalia of robes and wigs. With them sat two industrialists, an accountant, and a trade union official. They held unlawful a long-standing arrangement among the manufacturers of proprietary medicines which prevented such goods from being sold through any retail outlet other than a pharmacy.

A few months later, this same court struck down a price-fixing arrangement in the declining Cotton Spinning Industry. After marathon legal arguments, the court, although it agreed that its decision might close many mills and throw about 20,000 employees out of work, nevertheless held that the agreement was against the public interest. For the first time for many years in England, a legal decision on a civil question was headline news in the newspapers. In the succeeding months other equally important decisions were handed down. Price-fixing in carpets and blankets, bread and flour, chocolate and cars, all fell under the censure of the court. Market sharing and discriminatory discounts met a similar fate. Even the noncompetitive nature of the Cooperative Societies, to which almost a quarter of the families in England belong, was challenged.

When contrasted with the more mundane questions with which the English courts are normally faced these decisions can only be described as startling. The Restrictive Trade Practice Act of 1956, the source of these decisions, marked an important change of policy. For the first time in many centuries the United Kingdom had a law designed to strengthen competition. Restrictive

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tive trade practices were required to be registered with the government, and then submitted to the Restrictive Practices Court to determine whether they were in the public interest. Further sections endeavored to effect a compromise between the conflicting views about resale price maintenance, and to maintain machinery to investigate the activities of monopolists and oligopolists.

THE BREAK WITH TRADITION

The Restrictive Trade Practices Act is unlikely to strike the American reader as revolutionary; yet such was its appearance in England. Building on an act passed in 1948, the 1956 legislation marked a vital change not only in legal attitude to competition, but even towards the role of law itself. In the era between the beginning of the First World War and the end of the Second, the English had lost their faith in competition, and the courts had finally expressed their inability or unwillingness to decide issues concerning the control of the economy.

The loss of faith in competition

In 1914 the United Kingdom had probably the most competitive economy of any of the industrial countries of the world.¹ In some industries there had been largely unsuccessful attempts by competitors to make agreements with their rivals,² and in others attempts to establish monopolies.³ The free trade economy, however, gave no tariff shelter to the inefficient manufacturer or monopolist, and since industry was distracted by the potential of the apparently inexhaustible export market, England was left with an economy largely regulated by the functioning of the market in the classical economic tradition.⁴

During the 1914-18 War this competitive structure changed considerably. The export trade was badly injured, and imports ceased to be a stimulus to competition. The Government found it expedient to deal with large companies, or through trade associations representing a group of companies. This latter form of cooperation became so common that the Federation of British Industries was established in 1917 to coordinate activities of these associations and by 1919 their influence, which was generally anticompetitive, was felt in almost every industry.⁵ Even so it is possible that the economy might have returned to a fairly competitive state after the War had the world reverted at once to its pre-War economic pattern. As it was, however, protectionism and isolationism became the order of the day, encouraged by economic problems which culminated in the Great Depression.

1. Allen, *Monopoly and Competition in the United Kingdom*, in *MONOPOLY AND COMPETITION AND THEIR REGULATION* 88, 99 (Chamberlin ed. 1954).

2. *Ibid.* (e.g., textile finishing, sewing thread).

3. *Ibid.*; see Cook, *The Cement Industry*, in *EFFECTS OF MERGERS* 21 (Cook ed. 1958) (cement); Cohen, *The Soap Industry*, in *EFFECTS OF MERGERS* 215 (Cook ed. 1958) (soap); 3 CLAPHAM, *AN ECONOMIC HISTORY OF MODERN BRITAIN* 215 (1938) (salt).

4. Allen, *supra* note 1, at 88.

5. COMMITTEE ON TRUSTS, CMD. No. 9236 (1919).

In the early 1920's the Government showed concern about the disappearance of competition;⁶ for during that decade the trade associations grew in strength,⁷ and mergers gave control to monopolists in some industries,⁸ while in many new industries there seemed to be room for only one firm.⁹ But in the 30's the situation of the British economy was such that the most important thing was to keep it moving at all. Trade associations attempted to rationalize industries by devising plans to divide orders between companies, and the government itself offered financial incentives to reduce production.¹⁰

The Second World War completed the process of eliminating competition. The wartime Government preferred to negotiate with industries through trade associations,¹¹ and by 1945 seventy five per cent of the production of all manufacturing industries was covered by one of these organizations.¹² There was even a suggestion that after the war they should be made legally responsible for operating a quota system of production in their industries.¹³ In almost every industry, there was either a monopolist or restrictively-minded trade association. Public opinion, which had once felt strongly enough about anti-competitive behavior to be responsible for the break-up of at least two trusts,¹⁴ was now silent. Radical movements in the United Kingdom had apparently given up any thought of controlling the market behavior of corporations in favor of the more drastic solution of nationalization. The government had come to regard its function as keeping industry alive rather than vigorous. Meanwhile, the business community itself had grown accustomed to working

6. See COMMITTEE ON TRUSTS, CMD. No. 9236 (1919); BALFOUR REPORT (1929); COMMITTEE ON RESTRAINT OF TRADE (1931). See generally WILBERFORCE, CAMPBELL & ELLES, *THE LAW OF RESTRICTIVE TRADE PRACTICES AND MONOPOLIES* §§ 150-53 (1957).

7. In 1917, there had been 62 with 350 members; in 1918, 129 with 704 members; in 1925, 195 with 2100 members. Leyland, *Trade Associations*, in *THE BRITISH ECONOMY 1945-1950*, 87, 88 (Worswick and Ady ed. 1952).

8. In the early part of the decade Spillers Milling and Associated Industries was formed to become the giant in the grain milling industry. 1926 saw the birth of I.C.I., the giant in the chemical industry. See Allen, *supra* note 1, at 90.

9. For instance, Courtauld in rayon, and Lucas in electrical equipment for automobiles. See *ibid.*

10. *E.g.*, Coal Mines Act, 1930, 20 & 21 Geo. 5, c. 34; Cotton Spinning Industry Act, 1936, 26 Geo. 5 & 1 Edw. 8, c. 21. The Government also encouraged the formation of the Iron and Steel Federation in 1935 to stabilize that industry. See Burn, *Steel*, in 1 *STRUCTURE OF BRITISH INDUSTRY* 260, 296 (Burn ed. 1958).

11. Hall, *Monopoly Policy*, in *THE BRITISH ECONOMY 1945-1950*, 399, 405 (Worswick and Ady ed. 1952).

12. See Leyland, *supra* note 7, at 88.

13. Allen, *supra* note 1, at 103.

14. The Salt Trust, when it was formed in 1888, was violently attacked in the press, and this no doubt encouraged its demise. See 3 CLAPHAM, *AN ECONOMIC HISTORY OF MODERN BRITAIN* 215 (1938).

When the ambitious head of Lever Brothers attempted to put his company at the head of a soap trust in 1906, the popular press and particularly the *Daily Mail* began a violent attack on the scheme, so that it had to be abandoned. See Cohen, *supra* note 3, at 222.

with government,¹⁶ as well as with other members of the same industry. The executive class had been absorbed into the Establishment,¹⁷ and so lost many of the urges which might have encouraged the dynamic behavior which is alleged to characterize the American business community.¹⁸

As far as the English common law was concerned in the hundred years leading up to 1945, there was not only a loss of faith in competition, but also a general reluctance to become involved in analysis of issues concerning the public interest, and specifically with cases which required a judgment on the benefits of competition.¹⁹

In the eighteenth century the judiciary, inspired by such men as Lord Mansfield, had been conscious of its creative role, and had not hesitated to decide cases involving problems relating to the economy. But in the space of a few decades in the late nineteenth century the situation altered radically.²⁰ The judges, reared on the works of Blackstone, began rigorously to deny that they had any creative role in society;²¹ yet at the same time they were inject-

16. See Crosland, *The Private and Public Corporation in Great Britain*, in *THE CORPORATION IN MODERN SOCIETY* 260, 263 (Mason ed. 1959).

17. See Sanderson, *The Confidence Trick*, in *THE ESTABLISHMENT* (Thomas ed. 1959); ERICKSON, *BRITISH INDUSTRIALISTS: STEEL AND HOSIERY 1850-1950*, 33 (1959); NEALE, *THE ANTITRUST LAWS OF THE U.S.A.* 475-76 (1960).

18. "A typical British Director probably still feels there is something ungentlemanly and vulgar about too much competition." FOREIGN TRADE CONFERENCES, STAFF MEMORANDUM OF THE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY OF THE SENATE COMMITTEE ON THE JUDICIARY, PURSUANT TO S. RES. 61, 84TH CONG., 1ST SESS. (1955). See also DEWEY, *MONOPOLY IN ECONOMICS AND LAW* ch. 19 (1959).

For an English acceptance of this view, see *The Gospel of Work*, 155 *ECONOMIST* 957 (1948); *Condition of Wealth*, 161 *ECONOMIST* 605 (1951); *Government Without Enterprise*, 165 *ECONOMIST* 358 (1952); *The Riddle of Prosperity*, 168 *ECONOMIST* 79 (1953); *Enterprise in the Air*, 170 *ECONOMIST* 482 (1954); *Operation Manufacture*, 185 *ECONOMIST* 1026 (1957).

For an analysis of the attitude of American businessmen towards competition see SUTTON, HARRIS, KAYSEN & TOBIN, *THE AMERICAN BUSINESS CREED* 162 (1956); KAYSEN & TURNER, *ANTITRUST POLICY; AN ECONOMIC AND LEGAL ANALYSIS* 89 (1959). For more popular expositions, see RANDALL, *A CREED FOR FREE ENTERPRISE* 19 (1952); PATON, *SHIRTSLEEVE ECONOMICS* 178-80 (1952). For a more skeptical view of the picture, see ARNOLD, *THE FOLKLORE OF CAPITALISM* ch. 9 (1937); MILLS, *WHITE COLLAR* ch. 3 (1951).

19. The American common law in these years showed no such reluctance. Whatever may in fact have been the position, the federal judges interpreting the antitrust laws have assumed that the State courts before 1890 did refuse to enforce contracts in restraint of trade, at least where they were nonancillary. See *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898) (Taft, J.); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (White, C.J.).

20. For a survey of the law up to Victorian times, see Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954); WILBERFORCE, CAMPBELL & ELLES, *THE LAW OF RESTRICTIVE TRADE PRACTICES AND MONOPOLIES* §§ 201-83 (1957).

21. Note especially Lord Campbell in *Beemish v. Beemish*, 9 H.L. Cas. 274, 338 (1861), since that would arrogate to the courts the power of legislating vested in Parliament; and Lord Halsbury in *London Street Tramways Co. v. London County Council*, [1898] A.C. 375, 380—it would involve the country in the "disastrous inconvenience" of uncertainty in the law.

ing into the cases their own policy view that there should be a minimum amount of governmental interference in public affairs.²² There was therefore not only a judicial retreat from questions relating to the running of government,²³ but also in matters concerning the control of competition in the economy.

The latter traditionally came up in two contexts, in conspiracy cases, and in contract actions where one of the parties alleged a restraint of trade.²⁴ It was reasonably easy for the courts to distinguish their earlier decisions in conspiracy cases. This was mainly accomplished in the celebrated case of *Mogul Steamship Co. v. McGregor Gow & Co.* decided in 1891.²⁵ There the efforts by a nonmember of a shipping price ring to break into the market had been met by a concerted system of discriminatory prices to drive him out of the business. He endeavored to claim damages, but met with judicial hostility at each stage of the case; the defendants being held only to be exercising their lawful rights.²⁶ From this time onward, the tort of conspiracy has only been allowed where the defendants have not had as their "real and preponderant purpose" the "advancing of their own lawful business interests,"²⁷ an exception so wide that it has insured that there has been no successful conspiracy action involving business in recent years.²⁸

22. See Parry, *Economic Theories in English Case Law*, 47 L.Q. REV. 183 (1931); Kahn-Freund, *Labour Law*, in *LAW AND PUBLIC OPINION IN ENGLAND IN THE 20TH CENTURY* 215 (Ginsberg ed. 1959) (specific discussion on retreat of the judiciary from the field of labor law).

23. The judiciary was reluctant to become embroiled in questions of constitutional and administrative law. *E.g.*, *Local Government Board v. Arlidge*, [1915] A.C. 120.

24. For general discussions of the common law both as to conspiracy and restraint of trade see: HASLAM, *THE LAW RELATING TO TRADE COMBINATIONS* (1931), HEDGES, *THE LAW RELATING TO RESTRAINT OF TRADE* (1932), GARE, *THE LAW RELATING TO COVENANTS IN RESTRAINT OF TRADE* (1935), DIX, *THE LAW RELATING TO COMPETITIVE TRADING* (1938), WILBERFORCE, CAMPBELL & ELLES, *THE LAW OF RESTRICTIVE TRADE PRACTICES AND MONOPOLIES* § 201-92 (1957).

Note also the following articles, Simpson, *How Far Does the Law of England Forbid Monopoly?*, 41 L.Q. REV. 393 (1925); Eastwood, *Trade Protection and Monopoly*, 3 CURRENT LEGAL PROBLEMS 100 (1950); Grunfeld & Yamey, *United Kingdom*, in *ANTI-TRUST LAWS; A COMPARATIVE SYMPOSIUM* 540 (Friedmann ed. 1956).

25. [1892] A.C. 25.

26. See per Lord Coleridge, C.J., 21 Q.B.D. 544, 552 (1888); per Bowen, L.J., 23 Q.B.D. 598, 611 (C.A. 1889); per Lord Halsbury, L.C., [1892] A.C. 25, 38 (1891).

27. The tort was expounded in "the famous trilogy," *Allen v. Flood*, [1898] A.C. 1; *Quinn v. Leatham*, [1901] A.C. 495 (Ir.); *Sorrell v. Smith*, [1925] A.C. 700. For an analytical exposition of these cases, see STREET, *THE LAW OF TORTS* 353-57 (2d ed. 1959). The most recent leading case is *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] A.C. 435. See also Friedmann, *The Harris Tweed Case and Freedom of Trade*, 6 MODERN L. REV. 1 (1942); Lewis, *Monopoly and the Law: An Economist's Reflection on the Crofter Case*, 6 MODERN L. REV. 97 (1943).

28. Cf. the American common law. The idea of "lawful business interest" as a justification was limited. *Vegelahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896); *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011 (1900). Successful conspiracy actions have not been uncommon, even in situations similar to the *Mogul* case. See successful actions against

In the area of contractual restraint of trade, however, it was not so easy for the judges to escape from the problems of competition.²⁹ The courts had traditionally concerned themselves with pleas of "restraint of trade" in cases concerning contracts of service and sales of businesses. At first, all contracts found to be in restraint of trade were held to be illegal; from the early part of the eighteenth century, however, only those in general restraint were struck down. But in 1894 in *Nordenfeld v. Nordenfeld Guns & Ammunition Co.*³¹ the view was expressed that the true test should be one of reasonableness, and this was soon accepted as the law.³² In propounding this test of reasonableness Lord MacNaughten had said that the restraint should not only be reasonable between the parties, but also should be reasonable with reference to the interests of the public.³³ This second requirement might have given the judges an opportunity to take an active role in shaping the competitive nature of the economy. In fact, they behaved in much the same way as they had towards the tort of conspiracy; and by equating the public interest with reasonableness between the parties to the contract, they avoided deciding questions about the public interest in competition.³⁴

They were thus able to uphold as in the public interest a price ring among hop producers when one of the members tried to cut prices,³⁵ a market sharing agreement in the salt industry,³⁶ bid rigging at auctions,³⁷ and even a ty-

collective boycotts by a price-cutting retail pharmacist, *Klingel's Pharmacy v. Sharp & Dohme*, 104 Md. 218, 64 Atl. 1029 (1906), and a coal trader, *Hawarden v. Youghiogheny & L. Coal Co.*, 111 Wis. 545, 87 N.W. 472 (1901).

29. The American judges did not make any effort to escape. For a comment on the strength of the doctrine at common law. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497 (1940) (Stone, J.). For an interesting comparison of English common law and the laws of the several States in this area see Peppin, *Price-Fixing Agreements Under the Sherman Anti-Trust Law*, (pts. 1-2), 28 CALIF. L. REV. 297, 667 (1940).

30. *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (Ch. 1711).

31. [1894] A.C. 535.

32. *Herbert Morris, Ltd. v. Saxelby*, [1916] 1 A.C. 688.

33. [1894] A.C. 535, 565.

34. See *Attorney-General of the Commonwealth of Australia v. Adelaide S.S. Co.*, [1913] A.C. 781, 795 (P.C. Aust.) (Lord Parker).

Although in *McEllistram v. Ballymacelligott Co-operative Agricultural & Dairy Soc'y, Ltd.*, [1919] A.C. 548, 563 (Ir.), Lord Birkenhead L.C. said that it would not be "difficult to conceive of a case in which a contract in restraint of trade might be adjusted to safeguard the reasonable interests of the contracting parties, and yet might be opposed to the public interest," this has happened in only two cases, both dealing with contracts of service: *Wyatt v. Kreglinger & Fernau*, [1933] 1 K.B. 793 (C.A.) (agreement to pay retirement pension to clerk); *Kores Mfg. Co. v. Kolok Mfg. Co.*, [1959] Ch. 108 (C.A.) (agreement between corporations not to hire one another's former employees). On two occasions trade association cases have been held to be unreasonable between the parties. See *McEllistram v. Ballymacelligott*, *supra*, and *Evans & Co. v. Heathcote*, [1918] 1 K.B. 418 (trade association quota case; restrictive arrangement enforced on other grounds).

35. See *English Hop Growers Ltd. v. Dering*, [1928] 2 K.B. 174 (C.A.).

36. *North Western Salt Co. v. Electrolytic Alkali Co.*, [1914] A.C. 461.

37. *Rawlings v. General Trading Co.*, [1921] 1 K.B. 635 (C.A.).

ing arrangement whereby a bus company was forced to buy its requirements of petrol in perpetuity from the vendor of a piece of land.³⁸ The maintenance of monopolies by the leasing of machines was upheld even to the extent of an injunction indirectly compelling the use of the leased machines.³⁹ One court even held that letters written by a notorious monopoly inducing its customers not to trade with a potential competitor were original literary works within the meaning of the copyright laws, and enjoined efforts to publicize them.⁴⁰

Resale price maintenance agreements were enforced without a qualm,⁴¹ even if the plaintiff had given up the policy of fair trading for other retailers,⁴² and apparently even if, after an initial fair trade contract, the defendant began to buy his supplies elsewhere.⁴³ It was also regarded as contrary to public policy to help break a "fair trade" scheme.⁴⁴ At times there were problems about privity of contract⁴⁵ or the genuineness of liquidated damages,⁴⁶ but these were overcome by a system of black lists and private courts, schemes which ultimately received the blessing of the House of Lords.⁴⁷

The judiciary justified its refusal to entertain trade conspiracy cases or to discuss the competitive implications of restraint of trade cases on the ground that the courts were not equipped to decide economic questions.⁴⁸ This rationalization probably masked two main predispositions in the minds of the

38. *Foley v. Classique Coaches*, [1934] 2 K.B. 1 (C.A.).

39. *British United Shoe Mach. Co. v. Somervell*, 95 L.T. 711 (K.B. 1907); *United Shoe Mach. Co. v. Brunet*, [1909] A.C. 330 (P.C. Can.).

40. *British Oxygen Co. v. Liquid Air, Ltd.*, [1925] 1 Ch. 383; see *MONOPOLIES & RESTRICTIVE PRACTICES COMM'N, THE SUPPLY OF CERTAIN INDUSTRIAL AND MEDICAL CASES* (1956) (a description of the activities of B.O.C. in these years).

41. *Elliman Sons v. Carrington & Son*, [1901] 2 Ch. 275.

42. *Livock v. Pearson Bros.*, 33 Comm. Cas. 188 (K.B. 1928).

43. *Palmolive Co. v. Freidman*, [1928] 1 Ch. 246 (C.A. 1927); see Comment, 44 L.Q. REV. 278 (1928); cf. Comment, 76 U. PA. L. REV. 1006 (1928).

44. *Berg v. Sadler & Moore*, [1937] 2 K.B. 158 (C.A.).

45. *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] A.C. 847.

46. *E.g.*, *Dunlop Pneumatic Tyre Co. v. New Garage Motor Co.*, [1915] A.C. 79.

47. *Thorne v. Motor Trade Ass'n*, [1937] A.C. 797.

48. When faced with a monopoly which exploited its power by the use of tie-ins, the Privy Council declared that "the evil, if it exists, may be capable of cure by legislation or competition, but in their view not by litigation." *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A.C. 330, 344 (P.C. Que.).

The *Mogul* case also reflected this view. See per Fry, L.J., 23 Q.B.D. 625 (C.A. 1889); per Lord Morris, [1892] A.C. 25, 50.

The great apologist of the Common Law was forced to concede that "our lady the common law is not a professed economist." POLLOCK, *THE GENIUS OF THE COMMON LAW* 94 (1911). The judicial view is rationalized *id.* at 108:

[J]udges ought to be very careful about committing themselves to fashionable economic theories: first, because they are quite likely to misunderstand or misapply such theories, secondly because the theory may well be discredited after a short time, and, thirdly because, when mistakes of this kind are once made, they are pretty sure to call for legislation, and the legislative amendment is almost sure to be unsatisfactory.

judges; that there should be a minimum amount of judicial interference with the economy,⁴⁹ and that competition was not a particularly desirable end.⁵⁰ Sitting as members of the Judicial Committee of the Privy Council, they were merciless in making nonsense of pro-competitive legislation passed in Australia⁵¹ and New Zealand.⁵² In striking down one of the Australian Industries Preservation Acts, which closely followed the provisions of the Sherman Act,⁵³ the views of the English judges on the question of competition became clear:

[I]t was proved that the prices prevailing when negotiations for this agreement commenced were disastrously low owing to the "cut-throat" competition which had prevailed for some years. . . . It can never, in their Lordships' opinion, be of real benefit to the consumers of coal that colliery proprietors should carry on their business at a loss, or that any profit they make should depend on the miners' wages being reduced to a minimum. Where these conditions prevail, the less remunerative collieries will be closed down, there will be great loss of capital, miners will be thrown out of employment, less coal will be produced, and prices will consequently rise until it becomes possible to reopen the closed collieries or open other seams. The consumers of coal will lose in the long run if the colliery proprietors do not make fair profits or the miners do not receive fair wages. There is in this respect a solidarity of interest between all members of the public.⁵⁴

A judiciary with such views was unlikely to prove an effective bulwark against the anticompetitive sentiments of the business community.

The Slow Change of Heart

Whereas in 1914 the British economy had ranked among the most competitive in the world, in 1945 it ranked among the least competitive.⁵⁵ But by that time it had already passed through the worst part of its anticompetitive phase. A Government White Paper in 1944⁵⁶ had said that something would have to be done about restrictive practices in industry when the war was over, and

49. Again illustrated by the *Mogul* case, see Lord Watson, [1892] A.C. 25, 43.

50. See *North Western Salt Co. v. Electrolytic Alkali Co.*, [1914] A.C. 461, 469 (Lord Haldane); note 54 *infra*.

For economists' views of the judicial treatment of competition, see Cooke, *Legal Rule and Economic Function*, 46 *ECON. J.* 21 (1936); Hunter, *Competition and the Law*, 27 *MANCHESTER SCHOOL* 52 (1959).

51. *Attorney-General of the Commonwealth of Australia v. Adelaide S.S. Co.*, [1913] A.C. 781 (P.C. Aust.).

52. *Crown Milling Co. v. The King*, [1927] A.C. 394 (P.C., N.Z.).

53. The Australian Industries Preservation Act, 1906, No. 9 of 1906.

54. [1913] A.C. at 809-10.

55. The stagnant and inefficient state of British Industry at the end of the War was the cause of much comment. See, e.g., Rothbarth, *Causes of the Superior Efficiency of U.S.A. Industry as Compared with British Industry*, 56 *ECON. J.* 383 (1946); YELVERTON & TERBOROUGH, *TECHNOLOGICAL STAGNATION IN GREAT BRITAIN* (1947); BOWEN, *BRITAIN'S INDUSTRIAL SURVIVAL* (1947).

56. Employment Policy, CMD. No. 6527, para. 41 (1944).

it was rumored in 1945 that the Coalition Government would have introduced legislation then had it not been for the pressure of big business.⁵⁷ The victory of the Labour Party in the election that year, committed as it was to a policy of nationalization, was regarded by some as a blow to the idea of a more competitive economy.⁵⁸ This proved wrong, for nationalization took time, and in the interim the party elected to attack the restrictions in the private sector of the economy.⁵⁹

It was not long before the Labour government found itself face to face with the problems presented by restrictive practices in important industries. Perhaps the most vital problem of domestic politics in these years was the building of houses, which was largely under government sponsorship. Contact with the price ring in cement soon led to a departmental investigation,⁶⁰ and the results of this survey were sufficiently alarming to cause a committee to be set up to investigate building materials as a whole; this produced an equally alarming report.⁶¹ Restrictive practices also came in for unfavorable comments when the government-sponsored Working Parties, representing both management and labor, investigated various industries and made detrimental comparisons between their operation in the United Kingdom and the United States.⁶²

The Government therefore decided to implement the suggestion in the 1944 White Paper. Early in 1948 it introduced a bill, the central feature of which was the establishment of an independent tribunal,⁶³ known as the Monopolies

57. See Plant, *Monopolies and Restrictive Practices*, 10 LLOYD'S BANK REVIEW 1, 3 (1948).

58. On the relationship between the 1945 election and monopoly problem, see Morgan, *Britain's Election: A Debate on Nationalization and Cartels*, 61 POL. SCI. Q. 222 (1946).

59. See LEWIS, *MONOPOLY IN BRITISH INDUSTRY* 1 (Fabian Research Series No. 91, 1945).

60. MINISTRY OF WORKS, COMMITTEE ON CEMENT COSTS (1946); see *The Cement Bottleneck*, 152 ECONOMIST 816 (1947); *Cement Monopoly: Acquittal*, 152 ECONOMIST 861 (1947).

61. MINISTRY OF WORKS, REPORT OF THE COMMITTEE OF ENQUIRY INTO THE DISTRIBUTION OF BUILDING MATERIALS AND COMPONENTS (1948); see *The Builders' Merchant*, 154 ECONOMIST 722 (1948); *The Builders' Merchant Replies*, 154 ECONOMIST 775, 851 (1948).

There was also a government investigation into the production of textile machinery. See *Spotlight on Cotton Machinery*, 152 ECONOMIST 862 (1947).

62. For a full list of these, see WILBERFORCE, CAMPBELL & ELLES, *RESTRICTIVE TRADE PRACTICES AND MONOPOLIES* 46 (1957). The International Trade Organization Charter, signed in March 1948 and dealing *inter alia* with restrictive practices, also probably influenced the government. See GUENAUT & JACKSON, *THE CONTROL OF MONOPOLY IN THE UNITED KINGDOM* 37 (1960).

63. The Commission was intended to be an Administrative tribunal. See Speech of Shepherd, 452 H.C. DEB. (5th ser.) 2159 (1948); JOINT COMMITTEE OF THE LABOUR PARTY AND THE TRADE UNION CONGRESS ON TRUSTS AND CARTELS, *THE PUBLIC CONTROL OF MONOPOLY* 2 (1947).

There was no effort to follow the procedure of a court of law, or at least the common law concept of the adversary procedure. Section 8 allowed the Commission to decide its

and Restrictive Practices Commission, to investigate restrictive business practices.⁶⁴ To this body specific industries⁶⁵ or generalized restrictive practices⁶⁶ might be referred by the Board of Trade. The primary task of the Commission was to investigate the industry⁶⁷ or practice and to determine whether the behavior revealed was in the public interest.⁶⁸ The Board of Trade had to lay any report of the Commission before Parliament,⁶⁹ and then interested Government Departments were entitled to declare illegal by delegated legislation any or all of the restrictive practices found by the Commission to be contrary to the public interest.⁷⁰ The bill caused almost no controversy and stirred little interest,⁷¹ the main support coming from a few enthusiasts on both sides of the House.⁷²

own procedure, and specifically conferred the right to decide who should be entitled to be heard; and also gave extensive subpoena powers.

64. Now the Monopolies and Restrictive Practices (Enquiry & Control) Act, 1948, 11-13 Geo. 6, c. 66, § 1 sets up the Commission.

65. Industries might be referred by the Board of Trade either at its own discretion or as a result of complaints received. 11-13 Geo. 6, c. 66, §§ 2, 16(3); see 449 H.C. DEB. (5th Ser.) 2029 (1948). Before any industry reference could be made it had to be shown that at least one third of the supply, processing or export of goods in that industry was controlled by or from a group of corporately related firms or firms which worked together to prevent or restrict competition. 11-13 Geo. 6, c. 66, §§ 3, 4, 5.

66. 11-13 Geo. 6, c. 66, § 15.

67. The normal industry reference was coupled with a request for recommendations. 11-13 Geo. 6, c. 66, §§ 2, 7. But it might be limited to a fact-finding inquiry. 11-13 Geo. 6, c. 66, § 6.

68. What amounted to public interest caused controversy, but ultimately a definition was included at the third reading. 11-13 Geo. 6, c. 66, § 14.

69. 11-13 Geo. 6, c. 66, § 9. But there was a wide reservation of withholding if the Board of Trade felt publication of the report would not be in the public interest, § 9(a), or where publication of trade secrets might do harm to the firms concerned, § 9(b).

70. 11-13 Geo. 6, c. 66, § 10. Section 11 provided for the enforcement of the orders; § 12 for investigations to ensure that the recommendations of the Commission were being complied with.

71. The chief clash came when a group of right-wing conservatives sought to include trade unions and the nationalized industries within the Act. See Speech of Osborne, 449 H.C. DEB. (5th ser.) 2101 (1948); Speech of Lyttelton, 449 H.C. DEB. (5th ser.) 2114 (1948). The Government's reply appears in the Speech of Morrison, 449 H.C. DEB. (5th ser.) 2126 (1948).

72. The idea of some such attack had the support of the Conservative Party even before the Bill was introduced. See speech of W. S. Churchill, reported 153 ECONOMIST 475 (1947). Indeed the opposition spokesman had produced a pamphlet recommending a solution similar to that proposed by the Labour Government in the bill. See MAXWELL-FYFE, *MONOPOLY* (1948). See also discussion of Conservative Party's proposals in *The Times* (London) Apr. 1, 1948, p. 2.

The lack of interest caused surprise. See Speech of Maxwell-Fyfe, 452 H.C. DEB. (5th ser.) 2160-61 (1948). See also Speech of Macpherson, 452 H.C. DEB. (5th ser.) 2151 (1948); *Manchester Guardian*, Apr. 2, 1948, p. 4, cols. 1-2.

There was also little interest outside Parliament, although *The Economist* thought the Act had not gone far enough. *Offensive Against Monopoly*, 154 ECONOMIST 574 (1948); *Monopolies Commission*, 156 ECONOMIST 95 (1949). From the American viewpoint it was

The Monopolies and Restrictive Practices Commission⁷³ made twenty reports on specific industries,⁷⁴ and a general report on collective discrimination⁷⁵ before it underwent a major alteration as the result of legislation in 1956. The individual industries surveyed varied in their structure; but each was controlled by a trade association or a monopoly. In many, entry was controlled by the use of approved lists, and in almost every industry there were price-fixing and exclusive dealing agreements, frequently supported by a host of other restrictions.⁷⁶ In no industry was anything resembling classical competition found.⁷⁷ The industries concerned were not altogether happy to be awakened from their slumber and questioned about competition; and they were full of arguments about why the restrictions were absolutely necessary, and why competition in their industry would be against the public interest.⁷⁸

suggested that the act was a sinister design on the part of the Labour Party to take over British Industry. Comment, 59 YALE L.J. 899 (1950).

73. On the working of the Commission, see GUENAUULT & JACKSON, *THE CONTROL OF MONOPOLY IN THE UNITED KINGDOM* (1960); WILBERFORCE, *op. cit. supra* note 62, ch. 3, 4, 8; Grunfeld & Yamey, *United Kingdom*, in *ANTI-TRUST LAWS* (Friedman ed. 1956); Clay, *The Campaign Against Monopoly and Restrictive Practices*, 24 LLOYDS BANK REVIEW 14, 25-29 (1952); Kilroy, *Tasks and Methods of the Monopolies Commission*, 22 MANCHESTER SCHOOL (1953); Harbury & Raskind, *The British Approach to Monopoly Control*, 67 Q.J. ECON. 380 (1953); Hunter, *The Monopolies Commission and Economic Welfare*, 23 MANCHESTER SCHOOL 22 (1954); Hunter, *The Monopolies Commission and Price Fixing*, 66 ECON. J. 587 (1956); Jewkes, *British Monopoly Policy 1944-55*, 1 J. LAW AND ECON. 1 (1958); Cairns, *Monopolies and Restrictive Practices*, in *LAW AND OPINION IN ENGLAND IN THE 20TH CENTURY* (Ginsberg ed. 1959).

74. *Report on the Supply of Dental Goods* Dec. 1, 1950; *Report on the Supply of Cast Iron Rainwater Goods* March 14, 1951; *Report on the Supply of Electric Lamps* Oct. 4, 1951; *Report on the Supply of Insulated Electric Wire and Cables* June 10, 1952; *Report on the Supply of Insulin* Oct. 14, 1952; *Report on the Supply and Export of Matches and the Supply of Match-Making Machinery* May 12, 1953; *Report on the Supply of Imported Timber* Oct. 20, 1953; *Report on the Supply of Buildings in the Greater London Area* July 29, 1954; *Report on the Supply and Export of certain Semi-Manufactures of Copper and Copper-Based Alloys* July 27, 1955; *Report on the Supply and Export of Pneumatic Tyres* Dec. 8, 1955; *Report on the Supply of Sand and Gravel in Central Scotland* March 22, 1956; *Report on the Supply of Hard Fibre Cordage* June 7, 1956; *Report on the Supply of Certain Rubber Footwear* July 30, 1956; *Report on the Supply of Linoleum* Aug. 2, 1956; *Report on the Supply of Certain Industrial and Medical Gases* Dec. 20, 1956; *Report on the Supply of Standard Metal Windows and Doors* Dec. 20, 1956; *Report on the Supply of Electronic Valves and Cathode Ray Tubes* Dec. 20, 1956; *Report of the Supply of Tea* Dec. 20, 1956; *Report on the Supply and Exports of Electrical and Allied Machinery and Plant* Feb. 21, 1957.

75. *Report on Collective Discrimination*, CMD. No. 9504 (1955).

Another general reference was made to the Commission on Common Prices and Collective Tendering, Oct. 29, 1955. The Reference lapsed in 1956. *Monopolies Inquiries Shelved*, 179 ECONOMIST 65 (1956).

76. See GUENAUULT & JACKSON, *op. cit. supra* note 73, ch. 6; Jewkes, *supra* note 73.

77. Cf. 2 THE STRUCTURE OF BRITISH INDUSTRY 429 (Burn ed. 1958). The only industries with some remote semblance of "perfect" competition found by this study were wool, textiles, cutlery, and some parts of cotton and pottery.

78. Among other things competition was alleged to debase quality and service (*Copper Report* paras. 264-65); and to interfere with modernization and research (*Calico Printing*

The Commission, however, proved to be attracted to the idea of competition; of the twenty reports, only three found the agreements in the industry to be in the public interest.⁷⁹

Almost as soon as the 1948 Act was passed, there were those who felt that a stronger law was needed.⁸⁰ In 1949 the Lloyd Jacob Committee on Resale Price Maintenance, which had been set up in 1947, recommended that all forms of collective resale price maintenance be made illegal.⁸¹ In June of 1950 a White Paper announced that the Labour Government intended to introduce a bill to implement the Lloyd Jacob Report, and to limit the power of manufacturers in individual resale price maintenance to the naming of the maximum prices which might be charged.⁸²

In the Autumn of 1951 a General Election was held, in which the Conservatives were returned. Although the party's election manifesto had talked of stronger measures to control monopolies and restrictive practices,⁸³ for a while the official policy became softer toward business.⁸⁴ The Labour Government's bill to abolish resale price maintenance was dropped; and the Board of Trade adopted the practice of negotiating with industries about the restrictions found contrary to the public interest in the Commission's Reports, in place of its earlier policy of declaring such practices illegal by delegated legislation.⁸⁵ But there was a growing feeling of uneasiness about restrictive practices, the slowness of the Commission's operations⁸⁶ and the anticompetitive behavior revealed when reports finally emerged.⁸⁷ This ultimately resulted in the

Report paras. 175, 180). Among its alleged advantages were that it kept up capacity in bad times (*Electrical Machinery Report* para. 756); and acted as a short cut to perfect competition (*Tyre Report*, para 451).

79. *The Insulin, Tea, and Metal Windows Reports*, *supra* note 74.

80. *Teeth and Monopoly*, 159 *ECONOMIST* 1132 (1950); *Quiet Life for Monopolies*, 160 *ECONOMIST* 475 (1951).

81. *Report of the Committee on Resale Price Maintenance*, CMD. No. 7696 (1949). See WILBERFORCE, *op. cit. supra* note 20, ch. 9.

82. *A Statement on Resale Price Maintenance*, CMD. No. 8274 (1951).

83. *Monopolies and Motives*, 161 *ECONOMIST* 495 (1951); *No Signposts*, 161 *ECONOMIST* 777 (1951); *Creation of Wealth*, 161 *ECONOMIST* 605 (1951).

See also *The Manifesto of the Conservative and Unionist Party*, 1951, p. 5.

84. *The Programme*, 161 *ECONOMIST* 1016, 1021 (1951); see *Mere Begiming*, 161 *ECONOMIST* 1085 (1951); *Manchester Guardian*, May 20, 1952, p. 6, col. 2.

85. See *The Monopoly and Restrictive Practices (Dental Goods) Order*, 1951. S.I. 1951 No. 1200; *False Teeth*, 160 *ECONOMIST* 677 (1951).

86. See Motion on Monopolies Practices in House of Commons, June 15, 1951, 488 H.C. DEB. (5th ser.) 2689 (1951); Speech of Dalton, reported in 164 *ECONOMIST* 247 (1952).

In Parliament it was estimated that at the rate industries were being investigated it would take 2400 years to survey the whole of British Industry. Speech of Crosland, 488 H.C. DEB. (5th ser.) 2692 (1951). Another economist estimated that 8000 years would be needed. Hall, *Monopoly Policy*, in *THE BRITISH ECONOMY 1945-1950*, 399, 413 (Worswick & Ady ed. 1952).

87. See especially the reaction to the *Electric Lamp Report*. *Manchester Guardian*, Nov. 14, 1951, p. 6, cols. 1-2; *The Times*, (London), Nov. 14, 1951, p. 10 (editorial).

Monopolies and Restrictive Practices Commission Act of 1953,⁸⁸ which provided for an increase in the size of the Commission, and enabled it to sit in divisions.

Even this proved but a temporary measure, however, for dissatisfaction with the working of the Commission did not disappear. Some members of the public were skeptical about the efficacy of the process of negotiating with industries,⁸⁹ and looked for a more rigorous policy.⁹⁰ For other reasons, industry itself was unhappy. Individual industries objected to being singled out for investigation, and resented the inquisitorial nature of the Commission's proceedings and the subsequent pressures for enforcement by the Board of Trade.⁹¹

The final blow, however, came neither from liberal opinion nor from industry, but from the Collective Discrimination Report, published shortly after the Conservatives had been returned again in the General Election of 1955. This found an infinite variety of restrictive and discriminatory practices going on over a wide area of British Industry, and concluded that these were generally contrary to the public interest. The majority of the Commission felt that all such practices should be made illegal, with provision for certain exceptions where the public interest might be in favor of retaining them; the minority preferred a system of registration and investigation.⁹² Then, as if to confirm the need for a change, the Board of Trade conveniently published the Tyre Report. This caught the public imagination because of the flagrant nature of the restrictive practices; and the press called on the Government to act as

88. 1 & 2 Eliz. 2, c. 51.

89. The most notorious example of the failure of the negotiating process is shown by the imported timber industry. After the *Report on the Supply of Imported Timber* (1953) the industry agreed to drop many of its practices. *Timber and Monopoly*, 169 *ECONOMIST* 352 (1953). But a 1958 report by the Monopolies Commission, *Imported Timber: Report on whether and to what extent the Recommendation of the Commission has been complied with*, showed that despite the undertaking after the first report, most of the restrictions were still in effect. *An Order To Compete?*, 188 *ECONOMIST* 872 (1958). Two years later the Board of Trade at last made the practices illegal, but without any willingness. The Monopolies and Restrictive Practices Order, S.I. 1960, No. 1211 (imported hardwood and softwood timber). The President of the Board of Trade explained that there had been a "misunderstanding on the part of the members of the industry." HUTBER, *WANTED—A MONOPOLY POLICY* 11 (1960).

90. Many people were also unhappy with an arrangement whereby it was left to the Government to decide which recommendations of the Commission would be accepted, and how they would be enforced. See generally Jewkes, *supra* note 73; Manchester Guardian, May 20, 1952, p. 6, col. 2; *Monopoly Inquiries Shelved*, 179 *ECONOMIST* 65 (1956).

91. See the clash between the Cable Industry and the Board of Trade. *Implementing Monopoly Reports*, 171 *ECONOMIST* 734 (1954); *A Cable Maker's Reply*, 171 *ECONOMIST* 1000 (1954); *MONOPOLIES AND RESTRICTIVE PRACTICES ACTS, 1948 AND 1953, BOARD OF TRADE ANNUAL REPORT* para. 20 (1954).

92. Monopolies and Restrictive Practices Commission, *Report on Collective Discrimination*, CMD. No. 9504, paras. 249-50 (1955).

soon as possible.⁹³ It was to the accompaniment of such pressures⁹⁴ that Mr. Thorneycroft, as President of the Board of Trade, introduced the Restrictive Trade Practices Bill in February of 1956.⁹⁵

This bill contained two primary provisions, registration and investigation. The idea of registering restrictive agreements met with general approval on both sides of the House. In sharp contrast to this, the proposal for a Restrictive Practices Court to investigate the registered agreements led to violent disagreement, both at the second reading and at the committee stage. Although the Government spokesmen placed great faith in the judicial solution,⁹⁶ the idea of a court of law for investigating restrictive practices, even when tempered by the presence of laymen, was unacceptable to many, and became the center of Labour's hostility to the bill. Opposition members argued that questions of policy were involved, and that these were the responsibility of the Government⁹⁷ and Parliament⁹⁸ and should not be shuffled off on to the courts.⁹⁹ There was concern about the danger of forcing judges to decide what were thought to be essentially political and economic issues, which a former Solicitor-General alleged to be the "antithesis of law."¹⁰⁰ This concern was

93. Communist: *The Great Rubber Robbery*, Daily Worker, Dec. 10, 1955, p. 1; Labour: *Tyre Price Ring Condemned*, Daily Herald, Dec. 10, 1955, p. 1; *Desist*, *ibid.*; *Snooper with a Dirty Face*, *id.* at 3; Liberal: *Indictment of an Industry*, News Chronicle, Dec. 10, 1955, p. 4; Conservative: *Tyre Prices and Practices*, Daily Telegraph, Dec. 10, 1955, p. 6.

94. Some commentators thought the measure outlined was a capitulation to big business; but others realized that the proposal was a fundamental change of policy. *Bolder Than They Think*, 176 *ECONOMIST* 204 (1955). Industry, which had hoped for a soft measure, was unhappy. See *True Blue Incorruptible*, 175 *ECONOMIST* 1154 (1955); *Rings on the Run?*, 176 *ECONOMIST* 105 (1955); *Restrictions and the Unregenerate*, 177 *ECONOMIST* 372 (1955).

95. Which became the Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68. For the bill as originally drafted, see Public Bills 1955-56, No. 239.

96. See Speech of Thorneycroft, on March 6, 1956, 549 H.C. DEB. (5th ser.) 1934 (1956). See also Speeches of Kilmuir, June 26, 1956, 198 H.L. DEB. (5th ser.) 18 (1956), July 26, 1956, 199 H.L. DEB. (5th ser.) 350 (1956).

97. Speech of Jay, on March 6, 1956, 549 H.C. DEB. (5th ser.) 1951 (1956); Speech of Castle, on March 6, 1956, *id.* at 2002.

98. Speech of Darling, on March 6, 1956, *id.* at 1991.

100. See Speech of Ungoed-Thomas on March 6, 1956, *id.* at 2029.

The function of a court is not that which is mentioned in the Bill; it is entirely different, namely, to interpret and administer law, and not to make it. The Bill hands over to this court governmental and parliamentary power. All judgments are founded upon law or upon facts, but in this case the decision which really matters will be a decision founded neither upon law nor upon fact. It will be a political and economic decision.

The true place of public interest in law is as the foundation and reason for a general rule, which the law then applies. It is not for a judge to conceive what, in all the circumstances, he considers the public interest to be. That is not law; it is the negation of law.

supported by quotations from the judges themselves expressing the opinion that they were not equipped to make such politico-economic decisions;¹⁰¹ and even Mr. Thorneycroft and Viscount Kilmuir, the Government Spokesmen, conceded that their plan had novel aspects. But despite the existence of these pressures the English system of party discipline ensured the passage of the bill.¹⁰²

THE RESTRICTIVE TRADE PRACTICES ACT, 1956

The Major Provisions

The first object of the 1956 Act¹⁰³ is to ensure disclosure of restrictive business practices. Part I creates the post of Registrar of Restrictive Trading Agreements, and delegates to him the task of keeping the Registers in which all restrictive agreements must be recorded.¹⁰⁴ As is the English tradition, the act defines in great detail that conduct which will be construed as registrable. In general the act calls for registration of all agreements relating to the production, processing, supply, or acquisition of goods which contain restrictions affecting prices, terms or conditions concerning output, persons, or places. At least two of the parties to the agreement must accept some restriction. Un-

101. Speech of Turner-Samuels, on March 6, 1956, *id.* at 2023, quoting Lord Bowen and Fry, L.J.

102. *A Bouquet for Mr. Thorneycroft*, 179 *ECONOMIST* 248 (1956).

103. 4 & 5 Eliz. 2, c. 68.

See generally: HAILSHAM & McEWEN, *THE LAW RELATING TO MONOPOLIES, RESTRICTIVE TRADE PRACTICES AND RESALE PRICE MAINTENANCE* (1956); HEATHCOTE-WILLIAMS, BERNSTEIN & ROBERTS, *THE LAW OF RESTRICTIVE TRADE PRACTICES AND MONOPOLIES* (1956); ALBERY & FLETCHER-COOKE, *MONOPOLIES AND RESTRICTIVE TRADE PRACTICES* (1956); WILBERFORCE, CAMPBELL & ELLES, *THE LAW OF RESTRICTIVE TRADE PRACTICES AND MONOPOLIES* (1957); MARTIN, *RESTRICTIVE TRADE PRACTICES AND MONOPOLIES* (1957); JOHNSON-DAVIES & HARRINGTON, *RESTRICTIVE TRADE PRACTICES* (1957).

See also: Solo & Heuss, *New Competition in the Old World*, 2 *ANTI-TRUST BULLETIN* 41 (1956); Symposium, *How Should We Control Monopoly?*, 66 *ECONOMIC JOUR.* 567 (1956); Keyes, *Anti-Trust at last in Britain: The Restrictive Trade Practices Act of 1956*, 25 *GEO. WASH. L. REV.* 627 (1957); Morrison, *The Restrictive Trade Practices Act*, 11 *INDUS. L. REV.* 168 (1957); Grunfeld, *Antitrust Law in Britain Since the Act of 1956*, 6 *AM. J. COMP. L.* 439 (1957); Martin, *The New British Antitrust Law*, 13 *BUS. LAW* 272 (1958); Dennison, *The British Restrictive Trade Practices Act of 1956*, 2 *JOUR. OF L. AND ECON.* 64 (1959); Heath, *The 1956 Restrictive Trade Practices Act: Price Agreements and the Public Interest*, 27 *MANCHESTER SCHOOL* 72 (1959); Hunter, *Competition and the Law*, 27 *MANCHESTER SCHOOL* 52 (1959); Korah, *The Restrictive Practices Court*, 12 *C.L.P.* 76 (1959); Rhinelande, *The British Restrictive Trade Practices Act*, 46 *VA. L. REV.* 1 (1960). Yamey, *Restrictive Agreements and the Public Interest*, [1960] *PUBLIC LAW* 152; Wiseman, Lloyd, Heath, *Symposium on Restrictive Practice Legislation*, 70 *ECON. J.* 455 (1960); Rostow, *British and American Experience with Legislation Against Restraints on Competition*, 23 *MODERN L. REV.* 477 (1960); Sich, *Current Legislation in the United Kingdom dealing with Restrictive Business Agreements*, *PROCEEDINGS, INTERNATIONAL CONFERENCE ON THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES* (Wallis ed, 1960).

104. The Act, § 1.

enforceable arrangements of this nature must also be registered,¹⁰⁵ as must recommendations of trade associations designed to achieve similar ends.¹⁰⁶ Certain industries where the government has established some form of rationalization¹⁰⁷ and some types of agreement such as supply and requirements contracts¹⁰⁸ are, however, totally excluded.

The process of registration has proved a less complicated procedure than had been expected.¹⁰⁹ Only on one occasion¹¹⁰ was it necessary to call on the High Court to act in its capacity as arbiter of registrability,¹¹¹ although the Restrictive Practices Court has twice declared itself without jurisdiction because it found the agreements at stake to be outside the scope of the act.¹¹² Considerable use seems to have been made by the Registrar of his power to invite registration of an agreement which he suspects exists,¹¹³ but there is no evidence that he has had to resort to the High Court to examine an oath,¹¹⁴ or that anyone has been convicted of the crime of failing to register an agreement after being invited to do so by the Registrar.¹¹⁵ After agreements have been registered, the Registrar is entitled to refer them to the Restrictive Practices Court,¹¹⁶ although in fact he has regarded himself as under a duty to refer all such agreements.

The court is in every sense a court of law, although in addition to Judges from the High Court of the three jurisdictions in the United Kingdom¹¹⁷ it also has lay judges, being persons "qualified by virtue of [their] knowledge or of experience in industry, commerce or public affairs."¹¹⁸ The court may

105. The Act, §§ 6(1)-(3).

106. The Act, §§ 6(6)-(8).

107. *E.g.*, The Act, § 8(2).

108. Supply contracts, § 7(2); requirements contracts, § 8(3). See also § 8(8) (foreign trade); § 8(4) (patents); § 7(4) (workmen).

109. See Registrar of Restrictive Trading Agreements, *Report* for the period 7th August, 1956 to 31st December 1959, CMND. No. 1273, ch. 1 (1961) [hereinafter cited as *Report of the Registrar* (1961)].

110. *In re Austin Motor Co.'s Agreements* L.R. 1 R.P. 6 (Ch. 1957).

111. The Act, § 13(2).

112. *In re Blanket Mfrs.' Agreement*, L.R. 1 R.P. 208 (1959), *aff'd*, L.R. 1 R.P. 271 (C.A. 1959) (an agreement between manufacturers not to allow any order to be cancelled); see Ison, *Restrictive Trade Practices—The Danger Sign*, 23 MODERN L. REV. 202 (1960); *In re Doncaster and Retford Cooperative Societies' Agreement*, L.R. 2 R.P. 105 (1960) (agreement not to accept members from the other's area).

113. The Act, § 14. By December 1959, some 250 agreements had been caught in this way. *Report of the Registrar* (1960), para. 26.

114. The Act, § 15.

115. The Act, § 16. For such an offence a £ 100 fine is provided. False statements may lead to a term of imprisonment of up to 2 years; and refusal to register after a conviction is punishable by a sliding scale of fees.

116. The Act, §§ 1(2), 17.

117. The Act, § 3. The High Court in England; the Court of Session in Scotland; and the Supreme Court in Northern Ireland.

118. The Act, § 4. Such appointments are customarily to be made for three years, with eligibility for reappointment. "Other members" may be dismissed by the Lord Chancellor

sit in divisions, with a minimum of three members, presided over by one of the High Court Judges,¹¹⁹ who alone decides purely legal questions.¹²⁰ He also must deliver the final judgment of the majority, and he may therefore find himself dissenting from the opinion which he reads, but neither he nor any member of the court is allowed to express a dissent.¹²¹ Appeals are allowed to the ordinary courts of appeal of the jurisdictions where the court is sitting, but on questions of law only; and as usual, the House of Lords acts as the final appeal court for the whole United Kingdom.¹²²

Although most of the agreements required to be registered would be found illegal *per se* under American antitrust law, the United Kingdom Act only presumes they are contrary to the public interest and so illegal. To rebut this presumption the parties to the agreement must persuade the Restrictive Practices Court that the agreement passes two tests. The first requires the court to be satisfied that the agreement comes within at least one of seven "gateways" set out in the act. Two of these are concerned primarily with purchasers of goods, the one allowing the agreement if it is necessary to protect the public from injury,¹²³ the other if its removal would deny a section of the public¹²⁴ a specific and substantial benefit.¹²⁵ The next two gateways allow restrictions where the structure of the industry reasonably demands them, namely where the agreement is designed to meet anticompetitive measures taken by another member or other members of the industry,¹²⁶ or where monopoly conditions among the suppliers or monopsony conditions among the buyers reasonably require such an arrangement.¹²⁷ The three final gateways allow the agreement to be upheld if its removal might be likely to cause serious unemployment in any area¹²⁸ or might reasonably be expected to make a serious inroad into the export business,¹²⁹ or where it is reasonably necessary to support an agreement already found to be in the public interest.¹³⁰

"for inability or misbehaviour, or on the ground of any employment or interest which appears to the Lord Chancellor incompatible with the functions of a member of the Court." Section 4(2)(b).

119. The Act, Schedule to the Act, § 4.

120. The Act, Schedule, § 5.

121. The Act, Schedule, §§ 3, 4, 5. This rule was justified on the ground that a judge would not wish to sit in a court with which he found himself constantly at variance. See Speech of Walker-Smith, 552 H.C. DEB. (5th ser.) 2313 (1956).

122. The Act, Schedule, § 7.

123. The Act, § 21(1)(a).

124. The definition of "public" in this gateway has caused some conflict. In *Yarn Spinners*, it was assumed without deciding that it meant the community as a whole. L.R. 1 R.P. 118, 190 (1959). But in *Black Bolt and Nut*, it was interpreted as referring to any section of the public, viz. as purchasers, or consumers, or users. Moreover, in the case of purchasers, it was limited to immediate purchasers. L.R. 2 R.P. 50, 93-94 (1960).

125. The Act, § 21(1)(b).

126. The Act, § 21(1)(c).

127. The Act, § 21(1)(d).

128. The Act, § 21(1)(e).

129. The Act, § 21(1)(f).

130. The Act, § 21(1)(g).

But bringing an agreement within one of these seven gateways only satisfies the first test. The court has to be further convinced that, balancing the satisfaction of one or more gateways against any detriment which might be suffered by society as a whole, the agreement is not unreasonable.¹³¹ Only when both these tests have been completely satisfied are the parties entitled to a declaration that their agreement is not contrary to the public interest.

In its first two and a half years the Restrictive Practices Court has decided twelve fully litigated cases.¹³² The first test was satisfied by only five of the twenty restrictive agreements referred to the court in these twelve cases, and only four were found to be in the public interest after the final balancing process. In only two cases has the main agreement been upheld. In about sixty other cases the parties to agreements have submitted to judgment.¹³³

131. The Act, § 21(1).

[A]nd is further satisfied (in any such case) that the restriction is not unreasonable having regard to the balance between those circumstances any any detriment to the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction.

This naturally caused the most interest and conflict; since it was here that policy considerations were most clearly delegated to the court for solution. See Speech of Ungood-Thomas, 552 H.C. DEB. (5th ser.) 726 (1956), "What the Amendment does, quite clearly, is to make it impossible for the Court to avoid the political economic decision which is involved in balancing the economic advantages and disadvantages." The new tailpiece was, however, incorporated into the act. *Id.* at 730.

132. *In re Chemist's Fed'n Agreement* (No. 2), L.R. 1 R.P. 75 (1958), [1958] 3 All E.R. 448; *In re Yarn Spinners Agreement*, L.R. 1 R.P. 118 (1959), [1959] 1 All E.R. 299. *In re Blanket Mfrs.' Agreement*, L.R. 1 R.P. 208 (1959), [1959] 2 All E.R. 1, *aff'd*, L.R. 1 R.P. 271 (C.A. 1959), [1959] 2 All E.R. 630; *In re Scottish Ass'n of Bakers' Agreement*, L.R. 1 R.P. 347 (1959), [1959] 3 All E.R. 98; *In re Water-Tube Boilermakers' Agreement*, L.R. 1 R.P. 285 (1959), [1959] 3 All E.R. 257; *In re Fed'n of Bakers' (Great Britain and Northern Ireland) Agreement*, L.R. 1 R.P. 387 (1959), [1960] 1 All E.R. 227; *In re Fed'n of British Carpet Mfrs.' Agreement*, L.R. 1 R.P. 472 (1959), [1960] 1 All E.R. 356; *In re Phenol Producers' Agreement*, L.R. 2 R.P. 1 (1960), [1960] 2 All E.R. 128; *In re Black Bolt & Nut Ass'n's Agreement*, L.R. 2 R.P. 50 (1960), [1960] 3 All E.R. 122; *In re Doncaster & Retford Co-op. Soc'y's Agreement*, L.R. 2 R.P. 105 (1960), [1960] 3 All E.R. 541; *In re Wholesale Confectioners' Alliance's Agreement*, [1960] 1 W.L.R. 1417, [1961] 1 All E.R. 116; *In re Motor Vehicles Distribution Scheme Agreement*, [1961] 1 W.L.R. 92 (1960), [1961] 1 All E.R. 161.

133. For a list of the twenty-five groups of agreements submitted to judgment up to December 31, 1959, see *Report of the Registrar* (1961), Appendix C. For some of the cases submitted since that date, see *In re Master Process Engravers Agreement*, *The Times* (London), Feb. 2, 1960, p. 15; *In re Zinc Oxide Fed'n's Agreement*, *The Times* (London), Apr. 27, 1960, p. 17; *In re Association of Paving and Kerb Mfrs.' Agreement*, *ibid.*; *In re Electric Light Fittings Ass'n's Agreement*, *ibid.*; *In re Metal Bedsteads' Ass'n's Agreement*, *ibid.*; *In re Agreement of British Bath Mfrs. Association*, *The Times* (London), July 5, 1960, p. 19; *In re United Kingdom Glycerine Producers Ass'n's Agreement*, *The Times* (London), July 5, 1960, p. 19; *In re Association of Hard Fiber Rope Mfrs.' Agreement*, *The Times* (London), July 5, 1960, p. 19; *In re Association of Steel Drum Mfrs.' Agreement*, *The Times* (London), Oct. 5, 1960, p. 7.

The court has been stern in its interpretation of the public interest in price fixing cases. All types of price rings among manufacturers and wholesalers,¹³⁴ including collective "fair trade,"¹³⁵ have been struck down. The favorite attempted justification has been public benefit; and it has been alleged that such price-fixing agreements confer economic benefits because they stabilize prices,¹³⁶ avoid cut-throat competition,¹³⁷ keep small producers in business thereby avoiding monopoly,¹³⁸ and preserve capacity in bad times to cope with demand in good.¹³⁹ Other defenses have included the arguments that price-fixing cuts advertising and promotional costs,¹⁴⁰ encourages modernization,¹⁴¹ leads to good relations and confidence in the industry,¹⁴² and to improved quality and service.¹⁴³ But only in *Black Bolt and Nut* did the Court accept such an agreement as conferring a public benefit, apparently on the reasoning that the advantage of not having to "go shopping" was a specific and substantial benefit to the public—defined as the buyers of black bolts and nuts—particularly since the prices charged were reasonable and no higher than they would have been if there had been active competition.

The court has been equally hostile when the other gateways have been pleaded in support of price-fixing agreements. Arguments in favor of bringing such restrictions within the public safety¹⁴⁴ and export¹⁴⁵ gateways have been rejected; although the unemployment gateway was accepted as a primary justification for the price-fixing agreement in the *Yarn Spinners* case. But considering the overall approach, it is not surprising that the majority of cases where parties have submitted to judgment have involved a price-fixing scheme.¹⁴⁶

134. Blanket Mfrs., L.R. 1 R.P. 208 (1959) (minimum); Scottish Bakers', L.R. 1 R.P. 347 (1959) (fixed); English Bakers', L.R. 1 R.P. 387 (1959) (maximum); Carpet Mfrs., L.R. 1 R.P. 472 (1959) (fixed); Phenol Producers', L.R. 2 R.P. 1 (1960) (fixed); Wholesale Confectioners', [1960] 1 W.L.R. 1917 (fixed).

135. Motor Vehicles, [1961] 1 W.L.R. 92.

136. Yarn Spinners, L.R. 1 R.P. 118, 188 (1959); Scottish Bakers, L.R. 1 R.P. 347, 374-77 (1959); Carpet Mfrs., L.R. 1 R.P. 472, 540-41 (1960); Phenol Producers, L.R. 2 R.P. 1, 42-48 (1960).

137. Yarn Spinners, L.R. 1 R.P. 118, 182-84 (1959).

138. *Id.* at 188; Scottish Bakers, L.R. 1 R.P. 347, 382-83 (1959).

139. Yarn Spinners, L.R. 1 R.P. 118 (1959); Phenol Producers, L.R. 2 R.P. 1 (1960).

140. Carpet Mfrs., L.R. 1 R.P. 472, 542-43 (1960).

141. Yarn Spinners, L.R. 1 R.P. 118 (1959); Blanket Mfrs., L.R. 1 R.P. 271, 253 (1959).

142. *Id.* at 254; Scottish Bakers, L.R. 1 R.P. 347, 385 (1959), Wholesale Confectioners, [1960] 1 W.L.R. 1417, 1429.

143. Yarn Spinners, L.R. 1 R.P. 118, 188 (1959); Blanket Mfrs., L.R. 1 R.P. 208, 255 (1959); Carpet Mfrs., L.R. 1 R.P. 472, 537-38 (1960); Scottish Bakers, L.R. 1 R.P. 347, 384 (1959); Motor Vehicles, [1961] 1 W.L.R. 92, 113-15. An important argument related to this was the provision of service in remote areas, *e.g.*, Wholesale Confectioners, [1960] 1 W.L.R. 1417, 1426-27; Motor Vehicles, *supra* at 114.

144. Carpet Mfrs., *supra* note 143.

145. Motor Vehicles, *supra* note 143.

146. See *supra* note 133.

In each of the three agreements which have featured market sharing, both geographical and by bid rigging,¹⁴⁷ public benefit has been pleaded and rejected; although one was upheld under the export justification after the monopsony gateway had been rejected.¹⁴⁸ Three agreements involving discriminatory discounts,¹⁴⁹ and two agreements to sell only to certain persons,¹⁵⁰ have come before the court—and each has been found to be against the public interest; the public benefit argument being rejected in each one, and the export¹⁵¹ and injury to the public¹⁵² gateways rejected in different cases. In the two cases concerning trading terms, the court upheld as conferring a public benefit an intertrading agreement whereby one manufacturer allowed others in the same industry discounts on goods required to fulfill orders,¹⁵³ but found an agreement to maintain uniform arrangements for supplying samples and packaging orders not to be so.¹⁵⁴ The only example of an agreement to uphold standards in an industry was found to be a clear example of public benefit.¹⁵⁵

On the five occasions that agreements have been found to come within a gateway, only once has the agreement failed to pass the second test—the balancing process. This case¹⁵⁶ also represented the only occasion on which the court has fully spelt out the way it viewed the balancing process—here the probability that the abrogation of the agreement would have a serious and persistent adverse effect on unemployment in eleven areas contrasted with the Registrar's claims that the agreement was responsible for slightly higher prices for goods, losses in the export trade and waste of the national resources by excess capacity:

The effect on the general level of unemployment is much graver. But whether it be in relation to the four or the eleven areas, the effect is

147. *Water-Tube Boilermakers*, L.R. 1 R.P. 285 (1959) (quota agreement for bidding); *Black Bolt and Nut*, L.R. 2 R.P. 50 (1960) (allocation of orders for sales to government departments); *Doncaster Co-operative*, L.R. 2 R.P. 105 (1960) (geographical boundary agreement for sales).

148. *Water-Tube Boilermakers*, *supra* note 147.

149. *Carpet Mfrs.*, L.R. 1 R.P. 472 (1960) (special discounts to wholesalers on approved list); *Black Bolt and Nut*, L.R. 2 R.P. 50 (1960) (discounts to large buyers); *Motor Vehicles*, [1961] 1 W.L.R. 92 (discounts to unfranchised dealers, repairmen who introduced an ultimate buyer, and car fleet men).

150. *Chemist's Fed'ns*, L.R. 1 R.P. 75 (1958) (sales of proprietary medicines only through chemists' shops); *Carpet Mfrs.*, *supra* note 149 (no sales directly to the public).

151. *Ibid.*

152. *Ibid.*; *Motor Vehicles*, [1961] 1 W.L.R. 92.

153. *Black Bolt and Nut*, L.R. 2 R.P. 50 (1960) (intertrading arrangement; whereby one manufacturer allowed another in the industry a discount on goods required to fulfill an order).

154. *Blanket Mfrs.*, L.R. 1 R.P. 271 (C.A. 1959) (agreement concerning uniform arrangements for samples and packaging).

155. *Blanket Mfrs.*, *supra* note 154 (agreement as to quality of certain types of blankets).

156. *Yarn Spinners*, L.R. 1 R.P. 118 (1959) (minimum price agreement found to qualify under the unemployment gateway).

localised; the price of its avoidance would have to be paid nationally. It would be paid not solely or primarily in the price of cotton goods or in the loss to export trade. Though both are substantial, we have in mind chiefly the waste of national resources in the form of excess capacity. So long as the scheme lasts, concentration in the industry will be postponed; it will not be until the excess capacity has been got rid of that the industry can be made into a more compact entity, a reorganisation which we believe will ultimately be beneficial not merely to the nation and the consuming public, but to the industry itself and those employed in it. We have decided that on balance it would be unreasonable to continue the restrictions in the scheme in order to avoid the degree of local unemployment which we fear.¹⁵⁷

If an agreement fails to survive these two tests then it is declared void by the court. It was thought from the wording of the act that the usual remedy would be an injunction, but in fact the court has so far been willing to accept an undertaking by the parties to the agreement that they will abandon their agreement, in lieu of granting an injunction.¹⁵⁸

The Minor Provisions

The problem of Resale Price Maintenance has been regarded as a three-fold one, covering collective agreements to have such a policy, collective arrangements for its enforcement, and individual resale price maintenance itself.¹⁵⁹ An agreement to have a policy of fair trade would fall within Part I of the act, and be required to be registered and then submitted to the Restrictive Practices Court; but the other two aspects of price maintenance are dealt with by Part II of the act. Section twenty-four, the only part of the act which made any specific behavior invariably illegal, outlaws collective enforcement of retail

157. *Id.* at 196 (Devlin, J.). In the other four agreements the balancing process has not been clearly articulated, presumably because the judges regard the process as obvious. But they may be seeking to avoid a conflict between satisfaction of a gateway as a legal test and the final assessment of reasonableness which is largely a policy choice. See *Water-Tube Boilermakers*, L.R. 1 R.P. 285, 346 (1959) (market sharing agreement); *Blanket Mfrs.*, L.R. 1 R.P. 208, 257 (1959) (minimum substance agreement); *Black Bolt and Nut*, L.R. 2 R.P. 50 (1960) (price agreement; and conditions of sale agreement).

In the *Chemist's Fed'n*, Devlin, J. said that even if the defendants had satisfied gateways (a) and (b), they would clearly have failed in the balancing process. L.R. 1 R.P. 75, 107 (1958) (sales of proprietary medicines only through chemists' shops).

158. The Act, § 20. See discussion by Devlin, J. in *Chemist's Fed'n*, L.R. 1 R.P. 75, 112 (1958).

159. This tripartite division may be traced back to two reports, the *Report of the Committee on Resale Price Maintenance*, CMD. No. 7696 (1948), and the Monopolies and Restrictive Practices Commission, *Report on Collective Discrimination*, CMD. No. 9504 (1955). The first report recommended that individual resale price maintenance be allowed, but that anything beyond the sanctions open to an individual manufacturer should be made illegal. The second report dealt only with collective arrangements concerning resale price maintenance, and the distinction between collective enforcement which was basically undesirable, and collective agreements about resale price maintenance, which might or might not be in the public interest.

prices whether by boycott, discrimination, penalties, or private courts. To compensate for this, the following section gives each individual supplier the right to enforce his chosen retail price for any goods he supplies, not only against those with whom he has a contract, but also against nonsigners. Only one case has apparently been brought to prevent collective enforcement,¹⁶⁰ but great use has been made of the individual right to enforce,¹⁶¹ the only serious problem being the amount of notice required to bind a nonsigner.¹⁶²

Part III of the act provides for the continuation of the Monopolies and Restrictive Practices Commission in an emaciated form, as the Monopolies Commission. The power of the Commission has been cut down to the investigation of industries where "monopoly conditions" prevail and where there are no agreements registrable under Part I of the act.¹⁶³ Since 1956 the new Commission has delivered one report on a specific industry,¹⁶⁴ and a special report analyzing how far a report of its predecessor had been complied with.¹⁶⁵ Four more industries are presently under investigation.¹⁶⁶

THE EFFECT OF THE 1956 ACT

On the Economy

Despite the decisions which the Restrictive Practices Court has been handing down, the overall effect of the act on the economy has been remarkably

160. An action by the Board of Trade against the Northern Council of the Grocers Association after its officers had sought to coerce manufacturers with the threat of a collective boycott if the manufacturers continued to deal with certain price cutters. The defendants submitted to judgment. See *Action Under Section 24 of Restrictive Trade Practices Act*, 174 BOARD OF TRADE JOURNAL 217 (1958). See also *Not To Discriminate*, 188 ECONOMIST 397 (1958).

161. See, e.g., *Austin Motor Co. v. Prince*, [1956] C.L.Y. 8761; *Imperial Tobacco Co. v. Deeming*, reported in 195 ECONOMIST 1238 (1960). See the numerous cases reported in the quarterly surveys of § 25 actions in the *P.A.T.A. Quarterly Record*.

162. The supplier is required to make certain that there was notice of the restriction and the defendant knew the chattel was supplied subject to it. *County Labs., Ltd. v. Mindel, Ltd.*, L.R. 1 R.P. 1 (Ch. 1957). But the notice need not be of the exact terms; it is sufficient if the defendant is aware that the chattel was supplied subject to some price restriction. *Goodyear Tyre & Rubber Co. v. Lancashire Batteries, Ltd.*, L.R. 1 R.P. 22 (C.A. 1958).

163. The Act, § 29. "Monopoly conditions" exist in an industry when one-third of its production is controlled by one company or corporately-related companies. Section 31 provides that where restrictive agreements relate solely to exports and are therefore exempted from registration with the Registrar by reason of § 8(8), they shall be registered with the Board of Trade, which may then refer them to the Monopolies Commission.

164. Monopolies Commission, *Report on the Supply of Fertilizers* (1959). The Commission also completed the last four reports of the Monopolies and Restrictive Practices Commission, which were published under the latter's name in late 1956 and early 1957.

165. Monopolies Commission, *Imported Timber: Report on whether and to what extent the Recommendation of the Commission has been complied with* (1958).

166. Electrical equipment for motor vehicles, cigarettes, tobacco manufacturing equipment, tied garages. See *The Commission and the Court*, 186 ECONOMIST 777 (1958); Speech of Maudling (President of Board of Trade), 627 H.C. DEB. (5th ser.) 184 (1960).

small. Although it was accepted that much of British industry was affected by restrictive practices, only some 2,300¹⁶⁷ agreements have appeared on the Register. Before the act came into effect, a few industries had abandoned them,¹⁶⁸ but many others had had them redrafted by counsel so that they no longer came within the definition of registrability contained in the act. The success of such activities was publicly demonstrated by the *Austin Motor Co.* case.¹⁶⁹ A High Court Judge there held that a registrable restrictive retailing scheme was no longer registrable after it had been redrawn as a series of bipartite supply contracts, which are specifically exempted from the operation of the act.

There are now about 1,270 agreements on the Register.¹⁷⁰ Of the agreements which have been abandoned only a handful had been held illegal by the court, some sixty others were given up after submission to judgment, and no doubt some were abandoned because they were very similar to agreements struck down by the court. But many of the abandonments of restrictive agreements are attributable to the practice of careful redrafting which enables the parties to inform the Registrar that their agreements no longer come within the terms of the registration section. Abandonments of this nature, however, do not necessarily represent any serious change in the conduct of the industry concerned.¹⁷¹

The English legal tradition with its emphasis on form has been so strong that even where the Restrictive Practices Court has held agreements to be contrary to the public interest the parties to them have been able to continue

167. Registrar of Restrictive Trading Practices, Press Release, Aug. 30, 1960. See *Approaching Half Way*, 196 *ECONOMIST* 920 (1960).

At the end of 1959, when the Register contained some 2240 agreements, they were found to cover some 127 of the 150 industries appearing in the Standard International Trade Classification. This may give a misleading picture, however, since in some industries the only registered agreement concerned the distribution scheme of an individual manufacturer. Of the 2240, nearly 1800 were between manufacturers, about 350 between wholesalers, and some 400 between retailers. About half the agreements were local, and half covered the whole country. About two-thirds of the agreements included a restriction covering selling prices, another 150 buying prices. About half of the agreements included a restriction as to standard terms. Area restrictions were included in 300 agreements, and boycott and discriminatory arrangements against certain persons appeared in 300 and 275 cases respectively. Production quotas figure in some 200 arguments. *Report of the Registrar (1961)*, ch. 2.

168. See 2 BURN, *THE STRUCTURE OF BRITISH INDUSTRY* 450 (1958); *A Price Ring Breaks*, 180 *ECONOMIST* 549 (1956).

169. *In re Austin Motor Co.'s Agreements*, L.R. 1 R.P. 6 (Ch. 1957). See DEWEY, *MONOPOLY IN ECONOMICS AND LAW* 298 (1959); Wedderburn, *Restrictive Trade Practices*, 1957 *CAMB. L.J.* 121, 124; *Casting Out the Old Adam*, 185 *ECONOMIST* 65 (1957).

170. See note 167 *supra*.

171. For a typical list of agreements abandoned or rewritten, see *Register of Restrictive Trading Agreements*, 175 *BOARD OF TRADE JOURNAL* 731 (1958). For an analysis of the registering, abandoning and rewriting of such agreements in a particular industry, see Cuthbert and Black, *Restrictive Practices in the Food Trades*, 8 *J. OF INDUS. ECON.* 33 (1959).

their activities in much the same way as before without apparently violating the terms of their undertakings. The first decision of the Court, the *Chemists Federation* case, which held illegal an agreement of manufacturers to sell proprietary medicines only through chemists shops, was not a day old when the individual manufacturers announced that they intended to continue their present retailing policies.¹⁷² Similarly, the recent *Motor Vehicles* case which, among other things, struck down a collective agreement on resale price maintenance, is unlikely to affect the industry seriously. This industry has had a long tradition of self-imposed rationalization,¹⁷³ and spokesmen for the industry have already predicted that this noncompetitive nature will remain unchanged.¹⁷⁴ In other industries collective price-fixing schemes have been struck down by the court only to be replaced by an equally anticompetitive system of price leadership. In the *Scottish Bakers* case, a price-fixing agreement, and in the *English Bakers* case, a minimum-price agreement, were held illegal. But neither of these decisions caused any sign of competition in the price of bread, which has continued to rise, with the British Bakers' Company acting as price leader.¹⁷⁵ English law, with its reluctance to infer agreement from parallel behavior, has so far not regarded any of these activities as amounting to an "arrangement" within the meaning of an undertaking or the registration section.

In some of the litigated cases, of course, no effect on the economy could be expected. After the *Yarn Spinners* case, the Government stepped in with a scheme to rationalize the cotton industry before any long-term effects of the judgment declaring the price-fixing agreement between the yarn spinners to be illegal could be felt.¹⁷⁶ The decision in the *Blanket Manufacturers* case striking down an agreement not to sell below a minimum price was unlikely to affect competition since, as the court itself found, prices were almost invariably well above the stop-loss point.¹⁷⁷ In the *Doncaster Co-operative* case, the court conceded that whichever way it decided, all co-operative societies that remained members of the Co-operative Union would continue to respect trading boundary agreements, even if specific boundary agreements were held illegal, since overlapping and any other form of competition was contrary to the policy of the Union.¹⁷⁸

Even in those cases where there has been a submission to judgment it is impossible to say there has been a change of heart in the industry. Although

172. *Big Medicine Firms Defy Monopoly Court*, News Chronicle (London), Nov. 5, 1958, p. 3, col. 8; *Restrictive Practices Court; Judgment in the Chemist Federation Case*, 181 PHARMACEUTICAL J. 353, 357 (1958); *Judgment Against the Chemists*, 189 ECONOMIST 536 (1958); *Chemists Wind Up*, 189 ECONOMIST 1104 (1958).

173. See JOHNSON-DAVIES, CONTROL IN RETAIL INDUSTRY (1945).

174. *Auto Pricing Pact Voided in Britain*, N.Y. Times, Dec. 22, 1960, p. 35, col. 1; *The Motor Agreement Goes*, 197 ECONOMIST 1329 (1960).

175. *An Excess of Middlemen*, 197 ECONOMIST 1265 (1960).

176. See note 209 *infra*.

177. L.R. 1 R.P. 208, 255 (1959).

178. L.R. 2 R.P. 105, 126 (1960).

a series of agreements, with the emphasis on price fixing, covering over 95 per cent of the milling industry were given up in May 1959,¹⁷⁹ there had been no hint of any competition by the beginning of this year.¹⁸⁰ Similarly, it is still apparently impossible for the farmer to escape from identical prices for baler and binder twine¹⁸¹ although the price-fixing agreement between all the manufacturers in that industry was abandoned in October 1959.¹⁸²

The act has had an effect on a few industries. The tobacco manufacturers found themselves in a price war for the first time in thirty years after they gave up their price-fixing arrangement.¹⁸³ There have also been bouts of price competition in food,¹⁸⁴ copper,¹⁸⁵ detergents,¹⁸⁶ and petrol,¹⁸⁷ some of which may be attributable to the requirement of registration. But these are exceptions. The overall effect of the act on the economy has not been great, or at least has not noticeably stimulated competition.

One of the chief reasons for this has been the continued prevalence and great importance of trade associations. Covering great areas of British industry, they have been for the most part a force opposed to any increase in competition despite the legal restraints imposed on their activities by the act. In the pharmaceutical business, for instance, the Proprietary Articles Trade Association has long been active.¹⁸⁸ Before 1956 it operated a collective system of resale price maintenance, enforced by the usual weapons, including a black list. To comply with the provisions of the act the black list was abandoned, and to avoid registration the constitution redrafted to exclude any power to make recommendations to members.¹⁸⁹ But these changes have had little effect on its work. The new constitution makes the Association primarily responsible for discouraging price-cutting, and the Resale Price Maintenance Co-ordinating Committee is authorized to track down price-cutters and finance fair trade actions on the behalf of the members.¹⁹⁰ A similar change in letter

179. *Report of the Registrar (1961)*, 30.

180. R. Lamb, *With Teeth in it*, *The Times* (London), Feb. 11, 1961, p. 7 (letter).

181. *Ibid.*

182. *Report of the Registrar (1961)*, 32.

183. *Fighting for Smokers*, 183 *ECONOMIST* 74 (1957).

184. *Prices Unmaintained*, 188 *ECONOMIST* 23 (1958); *Coming Up Slowly*, 189 *ECONOMIST* 1089 (1959); *Cut Price Competition?*, 194 *ECONOMIST* 289 (1960).

185. *Financial Times*, April 13, 1960.

186. *Operation Manufacture*, 185 *ECONOMIST* 1026 (1957).

187. *Pumps and Pence*, *THE OBSERVER*, London, July 3, 1960. The "majors" in this industry have also been troubled by discontent among owners of tied garages. See, for example, the advertisement, *A Matter for the Monopolies Commission*, *The Times*, July 25, 1960, p. 7, cols. 5-7. 93% of all garages are "tied" in England. *ENNAIS & CAMPBELL, MIDDLE EAST ISSUES* 13 (1961). The question has now been referred to the Monopolies Commission. *The Times* (London), September 28, 1960, p. 19, cols. 4-5.

188. For its history, see YAMEY, *THE ECONOMICS OF RESALE PRICE MAINTENANCE* 158 (1954).

189. See especially P.A.T.A. *Quarterly Record*, July 1956, pp. 7, 11-15; *id.*, Oct. 1956, pp. 7, 10-11.

190. At the time the Act was passed the President was reported as having said that the "P.A.T.A. will be able to carry on, with its existing membership framework and with

rather than spirit has overtaken the Motor Trade Association as a result of the 1956 legislation.¹⁹¹

A related and important reason why the act has failed to influence the behavior of industry has been the growth of open-price agreements.¹⁹² These vary in detail, but normally provide that each member of an industry shall report its prices to a central organization, which then disseminates them to all firms in the industry. Many go much further than this, and require that output, costs, inventories, wages and many other matters should be reported. While such plans are not automatically restrictive because members have no obligation to take action on the basis of the information supplied, the exchange of such information makes for a life of quietness.¹⁹³ Many of these agreements have sprung up in the electrical goods industry,¹⁹⁴ the members of which have submitted to judgment before the Restrictive Practices Court in a number of cases.¹⁹⁵ Similarly, the cotton industry,¹⁹⁶ several of whose previous agreements had been condemned by the court, now has many open-price agreements. Agencies running these schemes have been careful not to make any statement which might be mistaken for a recommendation, and counsel have been advising that such agreements are not registrable, since they do not come within the English legal concept of an agreement or arrangement.

On the Country at Large

Although there has been something of a change in the public attitude toward restrictive practices, this attitude is still very different from the Ameri-

the necessary adjustments, the beneficial work it has conducted since its inception sixty years ago." P.A.T.A. Quarterly Record, July 1956, p. 7.

In 1959, for instance, some 988 visits and 893 test purchases were made and 342 letters written on the behalf of members. *Id.*, Jan. 1960, p. 10. The figures for 1960 were 1000 visits, 600 test purchases and 252 letters. *Id.*, Jan. 1961, p. 10.

As a result of these services, the number of members has increased. *Id.*, Apr. 1957, p. 7; *id.*, Jan. 1958. Presidents of the Association have declared themselves delighted with the new act, which has helped to stamp out that "rapacious weed"—the price-cutter. *Id.*, Jan. 1957, p. 10.

191. For a history of the Motor Trade Association, see JOHNSON-DAVIES, *CONTROL IN RETAIL INDUSTRY* (1945). In 1956, the black list and system of private courts were abandoned, but the general restrictive marketing structure of the industry was maintained, although only one agreement was registered. *More Competition or Less?*, 186 *ECONOMIST* 683 (1958).

192. See Heath, *Symposium on Restrictive Practices Legislation: Some Economic Consequences*, 70 *ECON. J.* 474 (1960); Korah, *Open Price Agreements*, 27 *SOL.* 202 (1960); *Restrictions Off the Register*, 195 *ECONOMIST* 267 (1960).

193. See Heath, *supra* note 192.

194. See *Restrictions Off the Register*, 195 *ECONOMIST* 267, 268 (1960).

195. *E.g.*, British Radio Valve Manufacturers' Association's Agreement. See note 128 *supra*.

Any price changes initiated by A.E.I. are at once reflected in the prices of other firms in the industry in the case of fluorescent tubes. *The Financial Times*, Sept. 1, 1960.

196. *Price Schemes in Lancashire*, 195 *ECONOMIST* 1364 (1960).

can commitment to competition as a political ideal.¹⁹⁷ The public is undoubtedly more sensitive to restrictive practices than it used to be,¹⁹⁸ and it has shown the same aversion to the behavior revealed by the Restrictive Practices Court that it did to the disclosures of the Monopolies and Restrictive Practices Commission.¹⁹⁹ But as a whole it is still not heavily committed to cutting back restrictive practices.

Moreover, the Government has shown no more than a superficial interest in continuing the campaign against restrictive practices. When the Restrictive Practices Court began delivering its opinions, the Government seemed almost embarrassed by the creature it had brought into being. The *Yarn Spinners* decision apparently came as a surprise to the Cabinet,²⁰⁰ which found itself under fire from the opposition for allowing the judges to decide such important questions²⁰¹ and from the cotton industry for allowing the Registrar to bring the case.²⁰² When as a result of the decision the price of yarn began to fall,²⁰³ the government felt compelled to introduce a scheme to rationalize the cotton industry.²⁰⁴ Furthermore, although the Conservatives denationalized the iron and steel industry in the name of free enterprise in 1953, they nevertheless left in being the Iron and Steel Board²⁰⁵ which may fix prices in the industry and performs many of the functions of a regulatory agency. These activities are specifically exempted from the provisions of the 1956 Act.²⁰⁶ It has even been disclosed that the Government, in the guise of the Post Office, is a member of some of the notorious market sharing agreements in the telecommunications equipment industry, and the effect of its membership has been to cover the agreements with crown privilege, thereby making them nonregistrable.²⁰⁷

197. For the place of the Sherman Act in American social history, see THEORELLI, *THE FEDERAL ANTITRUST POLICY* (1954). For a more general summary up to the present day, see Rostow, *British and American Experience with Legislation Against Restraints of Competition*, 23 *MODERN L. REV.* 477 (1960).

198. In a similar vein, the first attempts have been made to bring consumers together, Consumers' Association, and to publish magazines analyzing consumer goods, *Which?*

199. The responsible press has continued its opposition to restrictive practices. *E.g.*, *Next Question*, 196 *ECONOMIST* 497 (1960); *Editorial*, *The Times*, February 1, 1961, p. 13, col. 2.

200. *The Guardian*, Manchester, January 27, 1959, p. 14, col. 1.

201. See allegation by the former Labour Attorney-General in the House of Commons that the Government was shirking its responsibility when it "pushes it off on the judges." *The Guardian*, Manchester, Jan. 30, 1959, p. 18, col. 2.

202. See letter of Thornton, *The Times* (London), Jan. 30, 1959, p. 8.

203. *Yarn Prices Fall*, 190 *ECONOMIST* 513 (1959).

204. See *Another Scheme for Lancashire*, 191 *ECONOMIST* (1959); *A Funeral or Cure?*, 191 *ECONOMIST* 441 (1959); Cotton Industry Act, 1959, 7 & 8 Eliz. 2, c. 48.

205. Iron and Steel Act, 1953, 1 & 2 Eliz. 2, c. 15; see *Steel and Free Enterprise*, 164 *ECONOMIST* 296, 298 (1952).

206. The Act, § 7(1).

207. *Next Question*, 196 *ECONOMIST* 497 (1960). Crown Privilege, *inter alia*, implies the presumption that the Crown is not bound by a statute. WADE & PHILLIPS, *CONSTITUTIONAL LAW* 648 (6th ed., Wade ed. 1960). There is nothing to rebut this presumption in the 1956 Act.

Government activity in the field of mergers has been equally disconcerting and it has shown little interest in maintaining competitive structures for industries.²⁰⁸ It actually arranged a series of mergers among aircraft manufacturers, so that there are today only two major firms.²⁰⁹ Some members of the Cabinet have, admittedly, expressed alarm about the recent rash of mergers, but they invariably contend that the Monopolies Commission is more than adequate to handle the situation.²¹⁰ This contention is misleading. The Commission cannot act until invited to do so by the Board of Trade, its reports have never appeared within two years after the date of reference, and whether it has power to order the dissolution of any merged company into its component parts is doubtful.²¹¹ On the whole, then, the Government has appeared more interested in maintaining good relations with industry than in promoting any serious degree of competition in the country.

That the act has had little impact either on the economy or the mentality of the business community should not be attributed to the Restrictive Practices Court. Although the judges of the court have continued to phrase their judgments in traditional terms,²¹² they have acquitted themselves well as arbiters of the public interest.²¹³ Their analyses of long term public policy, eco-

208. Rees-Mogg, *Why the Government Warmes to Mergers*, The Sunday Times (London), Sept. 4, 1960.

209. *The Aircraft Mergers*, 194 ECONOMIST 220 (1960).

210. So in the recent Press Merger crisis the Government originally expressed its confidence that the Commission was fully capable of coping with the situation. Speech of Mandling, President of Board of Trade, in House of Commons, February 7, 1961, reported in The Times (London), Feb. 8, 1961, p. 4, col. 7. But this view was apparently abandoned, and a Royal Commission established to investigate the press. *New Royal Commission on the Press*, The Times (London), Feb. 10, 1961, p. 12, cols. 1-2.

211. See note 245 *infra*.

212. See Chemist's Fed'n, L.R. 1 R.P. 75, 103 (1958) (Devlin, J.):

[W]e have to consider the fundamental question whether it is contrary to the public interest that sales of medicines should be effected only through chemists. . . . [W]e are not, in our view, in any way required to answer this question as a matter of policy. We are not to consider whether competition in the sale of medicines is desirable or undesirable, whether drug stores are a suitable outlet for them or whether chemists should have a monopoly, or whether the Chemists' Federation is a good or bad thing. Such questions of general policy are settled by the Act. . . . Our task is the ordinary task of a court of law to take the words of the Act according to their proper construction and see if, upon the facts proved, the case falls within them.

For an analysis of the cases in traditional terms, see Lloyd, *Symposium on Restrictive Practices Legislation: The Lawyer's Point of View*, 70 Econ. J. 467 (1960).

213. See the choice the court made between making 20,000 workmen unemployed, and having excess capacity reduced in the cotton industry. Yarn Spinners, L.R. 1 R.P. 118, 196 (1959). The judges sitting on the court while talking in traditional terms have also shown great dexterity in avoiding the traditional approach to interpretation. See especially the rejection of the argument in *English Bakers* that the agreement was not registrable because the trade association had no power to enforce its recommendation. L.R. 1 R.P. 387, 456-57 (1959).

conomic theories and accounting principles have been impressive. The fears expressed at the time the act was framed that they would become embroiled in politics have proved groundless,²¹⁴ although their predispositions have occasionally become obvious.²¹⁵ Basically they have assumed that the act embodied a presumption in favor of competition²¹⁶ and, with minor exceptions,²¹⁷ have firmly carried through the presumption.

The more disappointing aspect of the judiciary's work has been in those areas which the act put in the hands of the ordinary courts, namely registration,²¹⁸ resale price maintenance,²¹⁹ and appeals from the Restrictive Practices Court on points of law.²²⁰ In the cases decided under these provisions, the

214. The fears were expressed in *The Times* (London), Apr. 11, 1956, p. 11, col. 2, cited in *Speech of Fletcher*, 551 H.C. DEB. (5th ser.) 423 (1956).

One of the isolated criticisms of the judges is reported in *The Times* (London), Jan. 27, 1959, p. 8, cols. 1-2. In discussing the *Yarn Spinners* decision, Sir Alfred Roberts, Secretary of the Cardroom Amalgamation said: "It is none of their business. I think it is deplorable that this comment [more mills closing down] should be made in giving what one would have regarded as legal judgment."

215. For instance, Diplock, J. appears less wedded to competition than some of his brethren. See his discussion in *Black Bolt and Nut Ass'n*, L.R. 2 R.P. 50, 89 (1960) that price-fixing which saved the buyers from "going shopping" was in the public interest. Note also his decision in the same case (at 97) that price discriminations in favor of large buyers were contrary to the public interest.

It is of course possible that the learned judge did not concur in the judgment he read, see note 121 *supra*. Some credence is lent to this view by the pro-competitive tone of his judgment in *Motor Vehicles*, [1961] 1 W.L.R. 92.

216. *Yarn Spinners*, L.R. 1 R.P. 118, 189 (1959) (Devlin, J.). See also *Scottish Bakers*, L.R. 1 R.P. 347, 376 (1959) (Lord Cameron); *Blanket Mfrs.*, L.R. 1 R.P. 208, 254 (1959) (Upjohn, J.).

217. See *Water-Tube Boilermakers*, L.R. 1 R.P. 285 (1959); *Black Bolt and Nut*, L.R. 1 R.P. 50 (1960).

218. The only registration point argued out in front of the high court was particularly unsatisfactory. In *Austin Motor Co.*, L.R. 1 R.P. 6 (Ch. 1957), Upjohn, J. refused to declare registrable a list of bipartite supply contracts which had been drafted to replace a series of registrable tripartite restrictive trading agreements. The learned judge noted, "While every agreement must be read in the light of surrounding circumstances, those circumstances cannot be invoked to alter the true interpretation of a document, or two or more documents, whose operation is clear and unambiguous." *Id.* at 19. By defining these agreements as supply contracts, the judge found he was able to avoid deciding whether the new activities amounted to an arrangement.

219. The high court is charged with hearing cases under section twenty-five of the Act, whereby a supplier may enforce his resale price against a retailer taking with notice. Even here they have managed to preserve the traditional judicial approach to statutory interpretation, so that there has been considerable litigation concerning the meaning of "notice." See *County Labs., Ltd. v. J. Mindel, Ltd.*, L.R. 1 R.P. 1 (Ch. 1957); *Goodyear Tyre & Rubber Co. (Great Britain) v. Lancashire Batteries, Ltd.*, L.R. 1 R.P. 22 (Ch. & C.A. 1958); *Dunlop Rubber Co. Ltd. v. Longlife Battery Depot*, L.R. 1 R.P. 65 (Ch. 1958). See generally Korah, *Resale Price Maintenance and the Restrictive Trade Practices Act, 1956*, 24 MOD. L. REV. 219 (1961).

220. In the only appeal taken from the Restrictive Practices Court, the Court of Appeal refused to declare registrable an agreement between blanket manufacturers that none of

judges have apparently felt inhibited by the traditional approach, and have given legalistic decisions, some of which have hampered the overall effectiveness of the act.

THE FUTURE OF THE 1956 ACT

The Restrictive Trade Practices Act has almost completed its task. All the major types of registered practices have now been tested to determine whether they are in the public interest, and within a few months there will probably be only a handful of active agreements left on the Register.

The only circumstances in which the court might have further important functions to fulfill would be if the Registrar were to adopt a stronger policy towards registration. A beginning has been made in tracking down unregistered agreements,²²¹ and this might well be accelerated. Another step in this direction would be the bringing of a test case designed to overrule the *Austin* decision.²²² Just as pressing is the need to test what has been going on behind the facade of some trade associations²²³ and many open-price agreements.²²⁴

There is also room for a more vigorous use of the Monopolies Commission which, although its powers are still considerable, has been left with practically no work since 1956. The existence of a Register of Restrictive Agreements and a court to investigate them has overshadowed the restrictionism in in-

them would agree to the breaking of a contract of supply, without consulting their trade association. Although the object of the resolution was to stop price cutting, the Court of Appeal approached it solely as a question of interpretation. Finding that section six called only for the registration of agreements concerning restrictions *to be* applied, they deduced that this limited its application to cases where parties were about to enter a contract and did not cover restrictions affecting rights and obligations under a completed contract. *Blanket Mfrs.*, L.R. 1 R.P. 271 (C.A. 1959); see Ison, *Restrictive Trade Practices—The Danger Sign*, 23 MODERN L. REV. 202 (1960).

221. Some 250 agreements have been registered after an inquiry from the Registrar. See *Report of the Registrar (1961)*, 6.

222. See note 218 *supra*.

While this case stands it is impossible to believe that the courts would require registration of unenforceable or gentlemen's agreements. But the act was intended to achieve just that. See Speech of Thorneycroft, 549 H.C. DEB. (5th ser.) 2097 (1956). The American court presented with a similar situation would almost certainly have found a registrable tripartite arrangement. In addition, in such circumstances it might have found an implied agreement to fix prices horizontally either among wholesalers or retailers. See *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911). There are some precedents which might persuade an English court to adopt this latter solution. See *Clarke v. Dunraven*, [1897] A.C. 59.

223. See notes 188-91 *supra*. Note Johnson-Davies, *Trade Associations and the Restrictive Practices Act*, 3 BRIT. J. AD. L. 12 (1956) for an analysis of how far Trade Associations may go under the 1956 Act without requiring its activities to be registered.

224. See notes 192-96 *supra*; cf. *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923) (American precedents). The analysis of some of the "open price agreements" would seem to show they are similar to the arrangements condemned in these cases, and go further than the behavior allowed in *Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563 (1925).

dustries controlled by monopolies or oligopolies, where competition may easily be avoided without resort to agreements. It is illogical, however, to concentrate all efforts on discouraging obvious anticompetitive behavior in industries which have many small producers, when those which are run by large firms are allowed to choose their own pattern of competition. If the procedure of the Commission were to be streamlined, it might well prove an effective companion to the Restrictive Practices Court.

FURTHER LEGISLATION

Increased attention to registration and to the Monopolies Commission would only be of temporary importance. If the work begun in 1956 is to be carried to its logical conclusion, more legislation will be necessary. The strength of such legislation will depend largely on the attitude of influential public opinion towards restrictive practices. As has already been seen, the 1956 Act in no way represented the wholehearted belief in competition which the American antitrust laws are alleged to represent. Indeed, each of the enumerated gateways reflects a conscious effort to temper the commitment to competition which the authors of the bill claimed for it.

There is now, however, sufficient interest in seeing British industry become more dynamic for it to be no longer naïve to believe that further legislation may be passed.²²⁵ The liberal elements in the Conservative Party have come to realize that if the market is not to be allowed to be the arbiter of price, then the arguments in favor of state planning or outright nationalization are infinitely stronger. Some such feeling was afoot in 1956, when the Government spokesmen claimed that the Cabinet was wedded to the free enterprise society.²²⁶ But even if the present Government does not act to strengthen the monopolies and restrictive practices legislation, support for such a move may not be lacking, for recent Fabian writings have suggested that the Labour Party should come out in favor of a strong antitrust law.²²⁷

Agreements Between Competitors

The 1956 Act should be amended to require every trade association and similar organization which distributes trade statistics to register its constitution or articles together with a description of its activities. No doubt many of these would be found to be in no way contrary to the public interest, and

225. For recent surveys of the competitive nature of British Industry see Burn, *Retro-spect*, in 2 *THE STRUCTURE OF BRITISH INDUSTRY* 415 (Burn ed. 1958) ; FRANKEL, *BRITISH AND AMERICAN MANUFACTURING PRODUCTIVITY* 75, 116 (1957).

The lack of competitive bidding has already done great harm to the export trade which is so vital to the British economy. See MIDDLETON, *THESE ARE THE BRITISH* 199 (1957).

226. See Speech of Thorneycroft, 549 H.C. DEB. (5th ser.) (1956) ; Speech of Kilmuir, 198 H.L. DEB. (5th ser.) 21 (1956).

227. HUTBER, *WANTED—A MONOPOLY POLICY* (Fabian Society Research series, No. 219, 1960).

others to do a great deal of unobjectionable work. Such a change however, would give the court an admirable opportunity to survey the very core of the competitive structure of British industry. Moreover, as the High Court has shown itself reluctant to adopt any but a traditional approach to the determination of points of registration, such questions should be transferred to the Restrictive Practices Court.

Other activities which discourage competition between firms in the same industry are also in need of legislative remedy. In the United States, if a company chooses to trade in different corporate forms, the antitrust laws may require the different members to maintain an element of active competition.²²⁸ The English law goes to the other extreme. Not only does it exempt from registration agreements between related companies from registration,²²⁹ but by its definition of "interrelated bodies corporate" it allows the establishment of a company which may be the subsidiary of two other corporations. Hence any two companies which have a registrable restrictive agreement, but for some reason have no wish to see it appear on the Register, may avoid the necessity of publicity by establishing a joint subsidiary.

Another glaring omission from the present British legislation is the absence of any provision equivalent to section eight of the Clayton Act,²³⁰ although the practice of interlocking directorates is very common in the United Kingdom. Through the five major commercial banks, many leading industrial concerns are related; and frequently several firms in the same industry will have common directors.²³¹ It has been calculated, for instance, that when the steel industry was nationalized in 1951 all its major firms were linked through the board of the Westminster Bank.²³²

Finally, there seems to be little rationality in limiting the operation of the requirement of registration to agreements relating to goods. The American antitrust laws have found no serious difficulty in adapting themselves to the problem of agreements relating to services.²³³ No doubt the real objection which the government felt in 1956 to making any such extension was that it might encompass the activities of trade unions, but it should not be impossible to draft legislation designed to secure the registration of restrictive agreements in services provided by business, while excluding workmen's agreements.

228. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 33 (1955).

229. Restrictive Trade Practices Act, 1956, § 8(9).

230. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 116 (1955).

231. Sandelson, *The Confidence Trick*, in *THE ESTABLISHMENT* 129 (Thomas ed. 1959).

232. AARONOVITCH, *MONOPOLY, A STUDY OF BRITISH MONOPOLY COMPETITION* 32 (1955).

233. See, e.g., *Transamerica Corp. v. Board of Governors*, 206 F.2d 163 (3d Cir. 1953) (banking); *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953) (investment banking); *Associated Press v. United States*, 326 U.S. 1 (1945) (news); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953) (advertising); *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898) (railway services); *Radovich v. National Football League*, 352 U.S. 445 (1957) (professional football).

Resale Price Maintenance

The American case of *Dr. Miles Medical Co. v. John D. Park & Sons*, decided in 1911, held that individual resale price maintenance could amount to a conspiracy in restraint of trade, and was therefore illegal under both the Sherman Act and the common law.²³⁴ Legislation to establish this rule was contemplated by the Labour Government in 1951, but the idea was shelved by the Conservatives when they regained power. In 1956, as a *quid pro quo* for accepting the establishment of the new court, industry obtained section twenty-five, which gave manufacturers the power to enforce the prices of all their goods, branded or not, against retailers who took with notice.²³⁵ In some industries, particularly those which involve an oligopoly, this section has meant that the overall effect of the act has been anticompetitive,²³⁶ and great possibilities for misuse of the provision exist.²³⁷ There has therefore been strong pressure, with which the Labour Party is associated,²³⁸ for the repeal of the provision. The Council on Prices, Productivity and Income has asked for the situation to be reviewed;²³⁹ and the responsible press has joined in this demand.²⁴⁰ The President of the Board of Trade has now appointed a committee to analyze the desirability of repealing the section,²⁴¹ and it seems at least possible that a bill will soon be introduced to outlaw fair trade,²⁴² or to oblige each firm to justify its policy before the Restrictive Practices Court.

234. 220 U.S. 373 (1911). Even an individual refusal to deal, used to enforce a fair trade scheme, is fraught with danger. *United States v. Parke-Davis & Co.*, 362 U.S. 29 (1960). In fact, Congress has passed laws, *Miller-Tydings Resale Price Maintenance Act*, 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958); *McGuire Amendment*, 66 Stat. 631 (1952), 15 U.S.C. § 45 (1958), to enable the States to pass fair trade laws for their own jurisdiction. The majority have done so, and in such states the position of individual resale price maintenance is normally very similar to English Law under the Act. All forms of collective price fixing, however, remain illegal.

235. *More Competition or Less?*, 186 *ECONOMIST* 683 (1958); *The Commission and the Court*, 186 *ECONOMIST* 777 (1958).

236. See, e.g., *Monopolies and Restrictive Practices Commission, Report on the Supply and Export of Pneumatic Tyres*, ¶ 497 (1955) where it was recommended that all resale price maintenance be declared illegal in that industry. In fact the tyre industry has made full use of § 25 since 1956. See, e.g., *Goodyear Tyre & Rubber Co. v. Lancashire Batteries Ltd.*, L.R. 1 R.P. 22 (C.A. 1958); *Dunlop Rubber Co. v. Longlife Battery Depot*, L.R. 1 R.P. 65 (Ch. 1958).

237. The wording of § 25 allows an injunction to cover all goods traded in by the supplier. Thus an injunction brought by a conglomerate monopoly might have a pronounced effect on the retailing activities of a trader in all areas. For the alarming diversity of some conglomerate enterprises in England, see description of the Beecham Group in *AARONOVITCH*, *MONOPOLY* 9 (1955).

238. See Interview with Gaitskell, *The Director*, Apr., 1959.

239. Council on Prices, Productivity and Income, *First Report*, 48 (1958).

240. The campaign in the press was most marked at the end of 1959 and the beginning of 1960. See *The Times* (London), Dec. 28, 1959, p. 7; *Resolutions for the Chancellor*, 194 *ECONOMIST* 9 (1960); *Cut-Price Competition*, 194 *ECONOMIST* 289 (1960).

241. Statement by President of the Board of Trade, March 17, 1960.

242. *Is it Goodbye to Fixed Prices in the Shops?*, *Sunday Times* (London), Sept. 4, 1960.

The Structure of Industry

If English law is to take a balanced approach to stimulating competition, then much more attention will have to be paid to the size of firms in any one industry.²⁴³ The 1956 legislation was brought into being without enough thought being given to the problems of competition in industries where an oligopoly or monopoly situation made the registration and investigation process meaningless. Under the 1948 Act it was possible to examine oligopolies or monopolies, and this power is still vested in the reconstructed Monopolies Commission; but as has already been seen the Commission has been largely neglected since 1956. Even if it were activated it would need new legislation to make its recommendations more effective. This could be done by giving them the force of judicial decisions. The functions of the Commission might even be transferred to the Restrictive Practices Court whose ability to handle such questions is already proved. In this way the political pressures intended to persuade the Government not to accept the recommendations of the Commission, which have sometimes been successful in the past, would be avoided.²⁴⁴ Nor would it be unreasonable to give the body charged with this jurisdiction the powers of divorcement and dissolution, which are at present unavailable,²⁴⁵ for they may provide the only effective method of restoring competition in a monopoly situation.²⁴⁶

Similarly, little thought was given in 1956 to the effect of mergers. Opposition M.P.'s,²⁴⁷ and some industrial leaders²⁴⁸ pointed out that mergers might actually be encouraged by the registration provision in the act, but the

243. Until recently, little research had been done on the structure of British Industry. In the last few years, much has been done to remedy this. See, e.g., EVELY & LITTLE, *CONCENTRATION IN BRITISH INDUSTRY* (1960); Hart, *Business Concentration in the United Kingdom*, 123 *JOURNAL OF THE ROYAL STATISTICAL SOCIETY* 50 (1960).

244. Under existing legislation, Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, § 10, the Board of Trade or other "competent authority" has the power to accept or reject recommendations of the Commission. Thus, for instance, recommendations concerning aggregated rebates in Monopolies and Restrictive Practices Commission, *Report on the Supply of Electric Lamps*, paras. 292-93 (1951) were not accepted by the Government. See *The Times* (London), May 20, 1952, p. 6; BOARD OF TRADE: MONOPOLIES AND RESTRICTIVE PRACTICES ANNUAL REPORT 6 (1952).

245. In Cairns, *Monopolies and Restrictive Practices*, *LAW AND OPINION IN ENGLAND IN THE 20TH CENTURY* (Ginsberg ed. 1959) it is suggested at 183 that dissolution can be recommended by the Commission. But, even if this were done it would seem that the "competent authority" would have no legal power to implement it. See Monopolies and Restrictive Practices (Inquiry and Control) Act, § 10, 1948.

246. American courts have the power of divestiture after a violation of either § 1 or § 2 of the Sherman Act or § 7 of the Clayton Act. In fact it has been used sparingly. See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 355 (1955).

247. Speech of Jay, 549 H.C. DEB. (5th ser.) (1956); Speech of Padley, 549 H.C. DEB. (5th ser.) 1908 (1956). See also the Amendment at the Committee Stage, 551 H.C. DEB. (5th ser.) 2105 (1956).

248. E.g., Lord Chandos, Chairman of A.E.I., cited in *Court Report*, 191 *ECONOMIST* 355 (1959).

Government apparently took the traditional English view that amalgamations only took place because of economies of scale.²⁴⁹ That this is sometimes true cannot be doubted;²⁵⁰ indeed many British industries are overburdened with too many small firms²⁵¹ which have been kept in being by the use of restrictive practices. But it is also true that many mergers have taken place without effecting economies of scale in production,²⁵² and have only resulted in eliminating competition.²⁵³ Moreover, parties to restrictive agreements have often chosen to resort to mergers rather than face the prospect of competition when their agreement has been threatened with being held against the public interest.²⁵⁴ The need for remedial legislation here is urgent; and no better precedent could be found than section seven of the Clayton Act.²⁵⁵

Enforcement

It may be desirable to set up an entirely independent enforcement agency to deal with both monopolies and restrictive practices. At the moment the Board of Trade is responsible for referring industries to the Monopolies Com-

249. *E.g.*, Kilroy, *Tasks and Methods of the Monopolies Commission*, 22 MANCHESTER SCHOOL 37 (1953). In conjunction with this the view is frequently advanced that the English market may be smaller and there may be room for only one firm large enough to exploit the economies of scale. For a persuasive rejection of this view see FRANKEL, BRITISH AND AMERICAN MANUFACTURING PRODUCTIVITY 69, 80 (1957). Only in one of the industries examined by the Monopolies Commission was the largest producer found to have the lowest costs. Jewkes, *supra* note 73, at 18.

250. For a useful analysis of the reasons leading to mergers, see Comment, 68 YALE L.J. 1627 (1959).

251. See BOWEN, BRITAIN'S INDUSTRIAL SURVIVAL 89 (1947); D.S.I.R., REPORT ON THE SHIPBUILDING INDUSTRY (1960) (specific example).

252. *E.g.*, When Austin and Nuffield merged into the British Motor Corporation, to control half the output of motor cars, the two divisions continued to operate as independent companies. The retention of premerger corporate structures is a frequent aspect of mergers in the United Kingdom. See, for instance, the reports of projected mergers in the radio and tobacco industries. The Times (London), Oct. 29, 1960, p. 6.

253. *E.g.*, Courtaulds and British Celanese amalgamated in 1957 to give them 85% of the rayon industry. See Jewkes, *British Monopoly Policy 1944-56*, 1 J. OF LAW AND ECON. 1, 14 (1958).

The final outcome of the Daily Herald take-over battle, described note 210 *supra*, was a victory for Mr. King of the Daily Mirror. He said the main objective of his bid was to "eliminate the more absurd forms of cut-throat competition in a field where it must be evident there is ample scope for real economies." *Press Chain Sale in London Likely*, The New York Times, Feb. 25, 1961, p. 2, col. 4.

254. The most notorious examples are Cables, see MOON, BUSINESS MERGERS AND TAKE OVER BIDS 20 (1959), and Copper, *Mounting Criticism of the Restrictive Practices Act*, The Times (London), Apr. 29, 1959, p. 20.

The movement has, however, been much broader than that. See Manchester Guardian Review of Industry, Mar. 1958; *Court Report*, 191 ECONOMIST 355 (1959); *Impact of the Restrictive Practices Court*, The Times (London), Aug. 30, 1960; *Mergers in 1960*, 197 ECONOMIST 1417 (1960).

255. See *How Big is Wrong?*, 198 ECONOMIST 579 (1961). For the working of the "new" § 7, see note 250 *supra*.

mission, for initiating investigations into the success of earlier undertakings by industry to reform, and for general supervision of the Department of the Registrar of Restrictive Trading Agreements. The Monopolies Commission has wide primary and secondary investigating power, but it is powerless to move without the consent of the Board of Trade. The Registrar is responsible for supervising registration, preparing cases before the court, and seeing that undertakings given to the court are adhered to. He may now also be required to keep watch on the behavior of industries whose restrictive agreements are found not to be contrary to the public interest.²⁵⁶ While there is no evidence that this three-fold division is working badly, a unified command, severed from the Board of Trade, has much to commend it. Particularly beneficial would be the opportunity to develop a departmental attitude different from the normal civil service reluctance to curb the activities of industry.²⁵⁷

To the American reader many of these recommendations must appear to be a logical necessity. This is far less obvious to the average English observer. But with the growing demand in England for greater competition in industry, the similarity of the two economies may well make the American solutions the guide to further English legislation.²⁵⁸

EPILOGUE

Although the influence of the 1956 Act has not been as pronounced as its authors had hoped, the principle has nevertheless been established that even in England legal sanctions may be used to stimulate competition. There should now be less objection to giving judges the power to adjudicate other problems of a politico-economic nature. If control of the trade practices of corporations is entrusted to the judiciary it is arguable that the judiciary should be put in the same position with regard to the Trade Unions which at the moment are

256. [1960] 1 W.L.R. 884. The price agreement in that case was held to be in the public interest, because, *inter alia*, the prices were reasonable, but the Court said if the prices fixed by the Association were ever to become unreasonable, then the Registrar would be entitled to reopen the case (at 909). This seems to put a greater burden of supervision on the Registrar's Department than was intended by the act.

For other policing problems, see *Yarn Spinners*, L.R. 2 R.P. 103 (1960). Allowing a restriction of little economic importance, after the parties earlier agreements have been struck down. The same questions are raised by the power of the Board of Trade, on the recommendation of the Registrar, to strike an agreement of no economic significance from the Register. See *Report of the Registrar (1961)*, para. 35, Appendix B.

257. Although the antitrust division of the Department of Justice and the Federal Trade Commission present a divided approach to antitrust enforcement, there is no doubt their attitude to businessmen is very different from the Department of Commerce. The British Act leaves basic enforcement to the Board of Trade, the equivalent of the Department of Commerce. On the attitude of the Board of Trade towards industry, see note 89 *supra*.

258. For a contrast between the factors leading to differing types of pro-competitive legislation, see FREIDMANN, *A COMPARATIVE ANALYSIS IN ANTI-TRUST LAWS* 519 (Freidmann ed. 1956).

almost outside the law;²⁵⁹ and there is already political support for such a move.²⁶⁰

But the precedent of the Restrictive Practices Court may project itself even beyond judicial supervision of matters relating to the economy. The English legal tradition has been hostile to the development of administrative law.²⁶¹ It has been assumed that the responsible system of government made active judicial supervision of the executive superfluous.²⁶² But in recent years there has been a growing disillusion with the ability of Parliament to supervise the Executive.²⁶³ One view favors adopting the Scandinavian Ombudsman—an independent public official to whom complaints about executive behavior might be addressed.²⁶⁴ But it is equally arguable that the courts might be invited back into these areas, which were previously thought of as exclusively political, now that it has been shown that English judges are not incapable of handling such problems.²⁶⁵

Indeed, it is even possible that a new spirit is afoot in the whole legal attitude in England. The narrow concept²⁶⁶ of the role of law, lawyers, and the judiciary may be passing. Viscount Kilmuir, the Lord Chancellor, has expressed this new spirit:

The law is not to be compared to a veritable antique to be taken down, dusted, admired and put back on the shelf; rather it is like an old but still vigorous tree—firmly rooted in history; but still putting out new shoots, taking new grafts and from time to time dropping dead wood. That process has been going on, is going on now and will continue.

After all, law is not an end in itself. It is a means whereby the State can develop and regulate in an orderly and just manner the social system which it desires. It follows that, as the social problems of the day are constantly changing, the law must adapt itself to meet them.²⁶⁷

Lawyers in the early years in the United States claimed they had inherited the spirit of the common law. But they did more than inherit it; they pro-

259. The Trade Disputes Act, 1906, 6 Edw. 7, c. 47.

260. THE INNS OF COURT CONSERVATION AND UNIONIST SOC'Y, A GIANT'S STRENGTH ch. 6 (1958).

261. See DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION ch. 1 (1959).

262. E.g., DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 328 (10th ed. 1959).

263. Steet, *Administrative Law*, in 1960 CONFERENCE OF BRITISH, CANADIAN AND AMERICAN LAW TEACHERS 2.

264. Blom-Cooper, *An Ombudsman in Britain?*, [1960] PUBLIC LAW 145.

265. See Davis, *The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence*, 61 COLUM. L. REV. 201 (1961).

266. For a contrast between the English and American attitudes, see Goodhart, *The New York Court of Appeals and the House of Lords*, in GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 268, 280 (1931); GOWER & PRICE, *The Profession and Practice of the Law in England*, 20 MODERN L. REV. 317 (1957); *Legal Lights*, 196 ECONOMIST 806 (1960).

267. Kilmuir, *The State, The Citizen and The Law*, 73 L.Q. REV. 172, 173 (1957).

tected it from the passive attitude which it took on in England, and they adapted it to serve the society of a modern country. It now seems that some of the spirit of the American common law is to be used to regenerate its aging relative.²⁶⁸

268. For another appeal for a more dynamic approach on the part of the English judges, see Lawson, *The Academic Lawyer as Jurist*, 5 THE JOURNAL OF THE SOCIETY OF PUBLIC TEACHERS OF LAW 182 (1960).