

Comments

CONSIDERATION AND CONTROL OF COMMERCIAL CONDITIONS IN RAILROAD RATE REGULATION

THE power to fix railroad rates has been described as the power to convert a wilderness into a city or a city into a wilderness.¹ Before the development of government rate regulation, the uncontrolled managerial policies of the railroads, dictated by self-interest and the exigencies of competition, created a rate structure to which our industrial system has necessarily adjusted itself.² By virtue of its authority to modify this structure—to alter the face of our rate geography—the Interstate Commerce Commission has the incidental power to influence the economic destinies of competing localities. The exercise of this power is of course open to attack as a perversion of the commerce clause of the constitution to effect the control of industrial conditions within the states.³ Perhaps to silence this constitutional objection, as well as to prevent the abuse of rate regulation, the doctrine has developed that the Commission should formulate its rate decisions primarily upon consideration of transportation rather than commercial conditions.⁴ By approving the doctrine and viewing its disregard as reversible error, the Federal Courts

¹ BEALE AND WYMAN, *RAILROAD RATE REGULATION* (2d ed. 1915) 657.

² A. B. STICKNEY, *THE RAILWAY PROBLEM* (1891) c. 6 and 7; JONES AND VANDERBLUE, *RAILROADS, CASES AND SELECTIONS* (1925) c. 8; VANDERBLUE AND BURGESS, *RAILROADS, RATES, SERVICE, MANAGEMENT* (1923) c. 5.

³ Cf. Brief of Intervenors at p. 61 in *Texas & Pacific Ry. v. United States*, 42 F. (2d) 281 (S. D. Tex. 1930); Brief of Appellant at p. 160 *et seq.* in *Ann Arbor R.R. v. United States*, 30 F. (2d) 940 (N. D. Cal. 1928), citing *Hammer v. Dagenhart*, 247 U. S. 251, 38 Sup. Ct. 529 (1918), and *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277 (1908).

⁴ The Commission has endorsed this principle at various times in statements such as the following: "It seems unnecessary here to state that the power has not been lodged with this tribunal to equalize economic advantages, to put one market in competition with another, or to treat all the railroads as part of one great whole." *Ashland Fire Brick Co. v. Southern Ry.*, 22 I. C. C. 115, 121 (1911). "We are really being asked, so far as the immediate situation is concerned to fix such rates for the purpose of giving each refining point what we may deem to be its fair share of the sugar business in the destination territory under consideration, a purpose which considered alone, rather than as a mere incident of other purposes, clearly does not justify the use of this power." *Sugar Cases of 1922*, 81 I. C. C. 448, 472 (1923).

have established it as a judicial limitation upon the scope of the Commission's authority.⁵

The clarification or discard of this limitation seemed to be necessitated by the passage in 1925 of the Hoch-Smith Resolution,⁶ which directed a readjustment of the rate structure of the country "to the end that commodities may freely move." The Commission was ordered to consider "in so far as it is legally possible to do so" the conditions within each industry, the trend in market value of commodities, and particularly the existing agricultural depression. On its face the resolution appeared to be a significant alteration of the Transportation Act of 1920,⁷ a mandate to consider commercial conditions as they had not been considered before. So at least it was interpreted by the Commission in the case of *California Growers' and Shippers' Protective League v. Southern Pacific Ry.*⁸

The first hearing of this case, in which the complainants asked a reduction in rates on deciduous fruits to Eastern markets, was held before the passage of the Hoch-Smith Resolution. The decision of the Commission, rendered after the passage of the Resolution, dismissed the complaint because neither cost nor comparative rate studies disclosed that the rates under attack were unreasonably high. At the second hearing the complainants supplemented this evidence of transportation conditions with elaborate proofs of the decline in the market value of deciduous fruits, decrease or disappearance of profits, and heavy mortgaged indebtedness of producers. Relying considerably on this new evidence of commercial conditions, considered relevant by virtue of the Hoch-Smith Resolution, the Commission reversed its former decision and ordered substantial

⁵ The distinction between commercial and transportation conditions was one of the grounds for reversal in *Anchor Coal Co. v. United States*, 25 F. (2d) 462 (S. D. W. Va. 1928). This decision itself was reversed on other grounds (because the controversy had become moot) in *United States v. Anchor Coal Co.*, 279 U. S. 812, 49 Sup. Ct. 262 (1928). The same distinction was at least partly responsible for the decision of the Supreme Court in *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, 31 Sup. Ct. 288 (1911). Cf. also dissenting opinion of Mr. Justice White in *Interstate Commerce Commission v. Chicago, Rock Island & Pacific Ry.*, 218 U. S. 88, 111, 30 Sup. Ct. 651, 660 (1910); *Interstate Commerce Commission v. Union Pacific R.R.*, 222 U. S. 541, 32 Sup. Ct. 108 (1911).

⁶ 43 STAT. 801 (1925), 49 U. S. C. § 55 (1926). The significance of the resolution is discussed in Robinson, *The Hoch-Smith Resolution and the Future of the Interstate Commerce Commission* (1929) 42 HARV. L. REV. 610. See also WAGNER, *THE HOCH-SMITH RESOLUTION* (1929); LOCKLIN, *RAILROAD REGULATION SINCE 1920* (1928) c. 5.

⁷ 41 STAT. 456 (1920), 49 U. S. C. §§ 1, 27 (1926).

⁸ 100 I. C. C. 79 (first decision, 1925); 129 I. C. C. 25 (second decision, 1927).

reductions in the rates.⁹

This order was recently set aside by the decision of the United States Supreme Court in *Ann Arbor R.R. v. United States*.¹⁰ The Court found that the Commission had erroneously interpreted the Resolution and based its decision upon factors which were still beyond its jurisdiction. In such phrases as "in so far as it might legally do so" and "lawful changes in the rate structure," Mr. Justice Van Devanter found sufficient indication that Congress had intended no change in the "basic law" and in the extent of the Commission's authority. The opinion also suggests that grave constitutional objections might arise from any legislative attempt to increase the consideration of commercial conditions in rate regulation. It is with the present limits of such consideration, which the opinion of Mr. Justice Van Devanter does not attempt to define, that we are first concerned.

A similar problem has been explored in an attempt to discover the part played by "value of service" in the determination of public utility rates.¹¹ It has been there suggested that cost studies establish, not a definite rate, but a zone of reasonableness within which rates may move up or down in accordance with many other factors of public interest, all inadequately described by the terms "value of service" or "commercial conditions." Upon this theory, and without reference to the Hoch-Smith Resolution, the Commission might possibly have reconciled the two decisions in the *California Growers'* case. Whether such an explanation would have been accepted as satisfactory by the Supreme Court can hardly be discovered from an examination of former cases, since the Commission is not prone to admit the consideration accorded commercial conditions in the determination of reasonable rates.

A more fruitful field of inquiry is afforded by cases involving rate relationships between competing producers, markets, or ports. Here the complaint usually contains, not only charges of unreasonableness under Section 1 of the Interstate Commerce Act, but also charges of unjust discrimination or undue prejudice under Section 2 or 3 of the Act.¹² The great discrimination cases of the twentieth century have been really pitched

⁹ 129 I. C. C. 25, 32, 55.

¹⁰ 281 U. S. 658, 50 Sup. Ct. 444 (1930).

¹¹ Edgerton, *Value of Service as a Factor in Rate Making* (1919) 32 HARV. L. REV. 516.

¹² 41 STAT. 479 (1920), 49 U. S. C. § 2 (1928); 41 STAT. 480 (1920), 49 U. S. C. § 3 (1928). Section 2 forbids unjust discrimination and Section 3 undue prejudice. It is only very recently that the Commission has attempted to distinguish between the two terms, and in this paper, as in most of the cases here discussed, they are used interchangeably. The wording of Section 3 is much broader than that of Section 2, and it is consequently the former which is usually involved in the cases here considered.

battles between the Manufacturers' Associations or Chambers of Commerce of competing localities, sometimes widely separated geographically, but inextricably linked economically.

II

The seeds of these cases are sown by two fundamental but conflicting principles of railroad ratemaking—the distance principle and the equalization principle.¹³ According to the first, rates increase with distance, if transportation conditions are similar; but they increase more slowly as the distance increases in order that earnings per ton mile may remain the same. According to the second, rates paid by competing shippers to the same market, or by the same shippers to competing markets, tend to equalize despite distance differences, with the result that earnings per ton-mile are disparate. Equalization usually develops from competition between carriers who are fighting for the same business, or from the desire of one carrier to encourage business on different parts of its line. The result may be “blanket rates”¹⁴ such as enable California fruit growers to reach Eastern markets, or “proportional rates”¹⁵ such as enable the collecting and distributing centers of the Middle West to compete for the same trade, or “import and export” rates¹⁶ such as enable South Atlantic and Gulf ports to share in foreign traffic. Economists defend equalization systems with three main arguments: (1) they promote healthy market competition which reacts to the benefit of the consumer; (2) they prevent port congestion and over-centralization of population; (3) they have worked for a long time and any radical change would be disastrous to commercial interests which have become adjusted to them.¹⁷

Although the Commission has recognized that a rate system which does not adequately reflect distance differences is a poten-

¹³ VANDERBLUE AND BURGESS, *op. cit. supra* note 2, at c. 9 and 10; JONES AND VANDERBLUE, *op. cit. supra* note 2, at c. 9 and 10.

¹⁴ California Growers & Shippers League v. Southern Pacific Ry., *supra* note 8.

¹⁵ Kansas City Transportation Bureau v. Atchison, Topeka & Santa Fe Ry., 16 I. C. C. 195 (1909).

¹⁶ A very recent decision of the Commission, allowing the continuance of import and export rates to South Atlantic and Gulf ports lower than corresponding domestic rates, in order to keep South Atlantic and Gulf ports “more nearly on an equality” with North Atlantic ports, is partly reported in the U. S. Daily, Jan. 7, 1931, at 3363.

¹⁷ See BEALE AND WYMAN, *op. cit. supra* note 1, at § 775; PREFERENTIAL TRANSPORTATION RATES, U. S. TARIFF COMMISSION (1922). See also VANDERBLUE AND BURGESS, *op. cit. supra* note 2, at 156: “After all, considered in the light of the development of railroad rates and industrial centers in the United States, a strict application of the mileage principle appears to be the rate making of desperation.”

tial source of discrimination, it has often approved rate adjustments which have been based on the equalization rather than the distance principle.¹⁸ Sometimes the Commission has frankly adopted the reasoning of the economists; more often it has employed legal circumlocutions. According to one popular form of phraseology, discrimination is not illegal unless it is "undue," and is not undue unless actual damage is proved.¹⁹ Such damage may be negated by showing that the complaining district has been able to meet successfully the competition which the equalization system has developed, or has been compensated for any losses by the opportunities in other fields which equalization has afforded. Even though actual damage has been established, the Commission may sometimes find sufficient justification in the "self-interest" of the carrier, its desire to encourage new business on its own line by "missionary rates," or to meet the rates of other carriers at competitive points, or on competing commodities.²⁰

Despite its frequent approval of equalization policies voluntarily adopted by the railroads, the Commission has often denied that it has the power to take the initiative in prescribing such rate adjustments.²¹ This dual attitude was clearly illustrated in *Maritime Ass'n, Boston Chamber of Commerce v. Ann Arbor R.R.*²² in which Boston attempted to regain a substantial share of the import and export traffic of the Middle West. The complaint attacked as prejudicial and discriminatory a rate structure which, by equalization, deprived Boston of its distance advantages over Gulf and Canadian ports, but reflected, in port

¹⁸ *Supra* note 16; *Galveston Commercial Ass'n v. Alabama & Vicksburg Ry.*, 77 I. C. C. 388 (1923); *Oakland Chamber of Commerce v. Southern Pacific Co.*, 100 I. C. C. 55 (1925).

¹⁹ "This to be sure is not a legal argument but the Commission is always reluctant to disturb any rate adjustment of long standing, and when such disturbances would obviously be followed by disastrous consequences to an important community, this reluctance is increased. In such cases therefore the Commission will ask whether the differential is undue, and if it is not no change will be ordered." BEALE AND WYMAN, *op. cit. supra* note 1, at 744. See also *Newport Mining Co. v. Chicago & North Western Ry.*, 33 I. C. C. 646, 657 (1915); *St. Louis Chamber of Commerce v. Alabama & Vicksburg Ry.*, 98 I. C. C. 29, 32 (1925); *Bradley & Woertz v. Illinois Central R.R.*, 118 I. C. C. 233, 235 (1926).

²⁰ *Mobile Chamber of Commerce v. Mobile & Ohio R.R.*, 57 I. C. C. 554, 559, 560 (1920); *Dutton Lumber Corp. v. New York, New Haven & Hartford R.R.*, 151 I. C. C. 391, 411 (1929); BEALE AND WYMAN, *op. cit. supra* note 1, at § 595.

²¹ But if the carriers have voluntarily equalized some competitive points and not others the Commission may order that the equalization system be extended to include the others. *Cf. Port Arthur Chamber of Commerce and Shipping v. Aberdeen & Rockfish R.R.* (No. 1600, decided Dec. 4, 1930).

²² 95 I. C. C. 539 (first decision, 1925); 126 I. C. C. 199 (second decision, 1927).

differentials, the geographical advantages of New York, Philadelphia and Baltimore. The Commission frankly sympathized with Boston's predicament and regretted the lack of such carrier or water competition as would induce a voluntary equalization of the Eastern ports. It refused, however, to prescribe such an adjustment because consideration of transportation conditions alone, *i.e.*, comparative studies of cost of service and earnings per ton mile, justified the distance differentials then in effect.

Another aspect of the conflict between the distance and equalization principles is illustrated by the case of *Galveston Commercial Ass'n v. Galveston, Harrisburg & San Antonio Ry.*²³ Galveston complained of the export and import rates on traffic to and from Oklahoma through the ports of Galveston and New Orleans, which the railroads had voluntarily equalized despite the distance advantage of Galveston. The Commission found this adjustment unduly prejudicial because it neutralized the geographical advantage of Galveston by affording shippers to and from New Orleans more service for the same rate. An order which prescribed a scale of differentials for the future was attacked on appeal as an abuse of the rate-making power to control commercial conditions. Some support for this charge may be found both in the majority opinion of the Commission, which is largely devoted to a discussion of port conditions, and in the order itself, which exempted petroleum products because of peculiar economic factors controlling their distribution. The Federal court was content to rest the dismissal of the appeal on the main ground that there was sufficient evidence of transportation costs to support the decision;²⁴ the court might have gone further and justified the Commission's discussion of commercial conditions as a necessary inquiry into the damage already effected and the possibilities of relief.

But the fundamental justification for the *Galveston* decision must be sought in the economics of rate equalization. The Commission found, in effect, that the *raison d'être* of port equalization, the promotion of healthy port competition, did not in fact exist, because New Orleans, the beneficiary of the equalization system, already occupied so preeminent a position that, even without equalization, it was assured of the lion's share of Gulf traffic. It is certainly difficult to deny that this is consideration of commercial conditions; but it is more difficult to conceive of an intelligent decision without such consideration. So long as equalization is conceded a legitimate place in our rate structure, the Commission will often be called upon to choose between an approval of equalized rates and insistence upon the strict appli-

²³ 100 I. C. C. 110 (first decision, 1925); 128 I. C. C. 349 (second decision, 1927); 160 I. C. C. 345 (third decision, 1929).

²⁴ *Texas & Pacific Ry. v. United States*, 42 F. (2d) 281 (S. D. Tex. 1930).

cation of the distance principle. In making that primary choice, cost studies can be of little aid. And even if the distance principle be chosen, the Commission may find it necessary to allow some sway to equalization influences lest industrial adjustments be too radically disturbed.²⁵ Whatever be the decision in the particular case, commercial destinies are certain to be affected; and the only guarantee of a wise decision is a thorough evaluation of the economic factors involved.

III

In the discrimination cases which come before the Commission, the problem of control and consideration of commercial conditions does not often appear in the simplified form so far discussed. Usually it is complicated and confused by narrower legal issues concerning the scope of authority conferred by the Interstate Commerce Act²⁶ and the interpretation of changes wrought therein by the Transportation Act of 1920. In the *Boston Chamber of Commerce* case, for example, the Commission not only refused to prescribe equalization of the Eastern ports, but also found its power under Section 3 insufficient to prescribe a differential scale between Boston and Gulf ports, because rates from the Middle West to New England and the Gulf were not controlled by the same carriers. In the *Galveston* case, however, both the Commission and the Federal court overruled the contention of the Texas & Pacific and the Louisiana & Arkansas railways that they were not subject to a finding of undue prejudice since they served only New Orleans and not Galveston.

The basis for the decision in the *Boston Chamber of Commerce* case and the unsuccessful contention of the railroads in the *Galveston* case is known as the doctrine of the *Ashland Fire Brick* case. The rule as then stated by the Commission was: "The test of discrimination is the ability of one of the carriers . . . to put an end to the discrimination by its own act."²⁷ In subsequent cases this has been interpreted to mean that the same carrier must control both the preferential and prejudicial rates, so that it may have the alternative power of terminating the discrimination by either raising the preferential rates or lowering the prejudicial rate.²⁸

²⁵ Thus, in the *Galveston Case*, *supra* note 23, equalization was allowed where the distance to New Orleans did not exceed by more than 25% the distance to Galveston. Equalization was also allowed on petroleum products after the second hearing. 128 I. C. C. 349. *Cf. City of Astoria v. Spokane, Portland, & Seattle Ry.*, 38 I. C. C. 16 (1916); *Inland Empire Shippers League v. Director General*, 59 I. C. C. 321 (1920).

²⁶ 24 STAT. 379 (1887), 49 U. S. C. §§ 1, 27 (1928).

²⁷ *Ashland Fire Brick Co. v. Southern Ry.*, *supra* note 4, at 120.

²⁸ *Allen Mfg. Co. v. Alabama & Great Southern R.R.*, 126 I. C. C. 515,

But the determination of whether the same carrier does in fact control both rates is not, in an interlocking system of through routes and joint rates, always free from difficulty. It seems quite definitely established that when traffic from different localities to the same destination is originated by different carriers but delivered by the same carrier, the latter "controls" both rates by virtue of its strategic position.²⁹ When traffic is originated by the same carrier and delivered by different carriers to different destinations, the question of "control" is less certain. This last set-up, resembles somewhat the situation in the *Galveston* case. But the New Orleans carriers originated only part of the traffic between Oklahoma and Galveston, and the Commission found that they were in fact unable to control the rate level to Galveston.³⁰ It was then suggested that a finding of undue prejudice could be based upon the fact that the Missouri & Pacific owned the controlling stock in both the New Orleans and Galveston roads. This solution was also rejected because the Missouri & Pacific did not use its stock ownership to direct the managerial policies of its subsidiaries.³¹

In its final decision, the Commission surmounted all these difficulties by repudiating the doctrine of the *Ashland Fire Brick* case as too narrow an interpretation of Section 3.³² For this about-face there is some equivocal support in the decisions of the Supreme Court. In *St. Louis, South Western Ry. v. United States*,³³ the court approved a finding of undue prejudice against a carrier which served only the preferred locality. The persuasive force of this decision is weakened because the Commission tried to remove the prejudice by using its power under Section 15 to establish maximum rates instead of using its Section 3 power to prescribe rate relationships. In *United States v. Illinois Central R.R.*³⁴ the Supreme Court approved a finding of undue prejudice against a carrier which reached only the complaining locality. This case too may be partly explained away, because the principal defendant was the delivering carrier which controlled both the preferential and prejudicial rates. These decisions certainly support the ground upon which the Federal court disposed of the problem in the *Galveston* case, *i.e.*, that the offending carrier need not reach both the preferred and prejudiced locality; they are not, however, necessarily incon-

518 (1927); *Hallsboro Mfg. Co. v. Atlantic Coast Line R.R.*, 157 I. C. C. 124, 128 (1929).

²⁹ *Lake Dock Coal Cases*, 89 I. C. C. 170, 185 (1924).

³⁰ 128 I. C. C. 349, 381, 160 I. C. C. 345, 356.

³¹ 128 I. C. C. 349, 380. See also the concurring opinion of Commissioner Eastman, 160 I. C. C. 360.

³² 160 I. C. C. 345, 358.

³³ 245 U. S. 136, 38 Sup. Ct. 49 (1917).

³⁴ 263 U. S. 515, 44 Sup. Ct. 189 (1924).

sistent with the proposition that the same carriers must control both the preferential and prejudicial rates.

In place of control of both rates the Commission now seems disposed to accept either participation in both rates or control of only one of the rates. In either case there is lacking the alternative power to remove the discrimination by raising the preferential rate or lowering the prejudicial rate. Thus the order of the Commission in the *Galveston* case apparently operated to force the New Orleans carriers to raise their rates. This is in effect similar to the operation of a minimum rate order. It has accordingly been suggested that necessity for the doctrine of the *Ashland Fire Brick* case existed when the Commission did not have power to establish minimum rates, but that the reason for the rule has been dead since the grant of the minimum rate power in the Transportation Act of 1920.³⁵ Against this argument there is one outstanding authority. The case of *Central Railroad of New Jersey v. United States* involved the question of discrimination in transportation privileges, but the following words of Mr. Justice Brandeis seem equally applicable to rate cases under Section 3: "What Congress sought to prevent by that section as originally enacted was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act of 1920 nor any earlier amendatory legislation has changed in that respect the purpose or scope of Section 3."³⁶

Another problem which often mingles with consideration of commercial conditions is the true "purpose or scope" of the minimum rate making power. That this power may be as effective an instrument as Section 3 in re-making rate geography has been demonstrated by some of the most dramatic cases of the last decade. The *Sugar Cases of 1922*³⁷ developed from the struggle between the Atlantic seaboard, Louisiana and California refiners for the Chicago market. Boston and New York shippers complained of a rate structure which reflected in differentials the distance advantages of their eastern competitors, but neutralized by competitive rates the geographical disadvantages of Louisiana and California competitors. The complainants asked in effect that either the equalization or the distance principle be consistently applied, so that competitors would all enter the Chicago market on an equal footing or would all

³⁵ See concurring opinion of Commissioner Eastman in *Lake Cargo Coal Rates, 1925*, 126 I. C. C. 367, 371 (1927). Commissioner Eastman advocates concurrent use of the power under Section 3 and the minimum rate power when one carrier serves both points but is forced to lower the rates at one of the points because of the competition of other carriers.

³⁶ 257 U. S. 247, 259, 42 Sup. Ct. 80, 83 (1921).

³⁷ 81 I. C. C. 448 (1923).

have the benefit of their geographical advantages. The Commission found that the eastern rates were not so high as to warrant a maximum rate order nor the Louisiana or California rates so low as to be non-compensatory, but that the relationship between the rates was not justified by transportation conditions. There was, however, according to the prevailing philosophy of the Commission, no adequate basis for a finding of undue prejudice under Section 3 because the preferential and prejudicial rates were controlled by different carriers. In lieu of an order under Section 3, dissenting Commissioner Campbell advocated a minimum rate order which would remove the prejudice by raising the Louisiana and California rates. This use of the minimum rate power to cure the evils aimed at in Section 3 the majority rejected as an abuse of rate regulation to control commercial conditions.

The *Salt Cases of 1923*³⁸ present a similar situation with a very different result. Producers in Ohio and New York complained of preferential rates enjoyed by Kansas and Louisiana competitors in the Chicago market. Here again the Commission found that the prejudicial rates were not so high as to be unreasonable nor the preferential rates so low as to be non-compensatory but that the relationship between the two was unjustified by transportation conditions. There was no "adequate basis" for a finding under Section 3 because the rates were controlled by different carriers; nevertheless the prejudice complained of was in fact removed and a differential system effected by prescribing minimum rates from all the competing localities. These orders were defended by the Commission as necessary to prevent a ruinous rate war between the carriers; they were attacked on appeal by Louisiana producers as an abuse of power on the ground that minimum rate orders were justified only when the previous rates were found to be non-compensatory. The Federal court in affirming the decision adopted an even more liberal attitude than the Commission, holding that the minimum rate power could be properly used either to prevent rate wars or to remove discrimination between localities.³⁹ This seems not only a reasonable but even a literal interpretation of Section 15(1) of the Interstate Commerce Act which provides that "whenever . . . the Commission shall be of the opinion that any individual or joint rate . . . is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial . . . the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate . . .

³⁸ 92 I. C. C. 388 (1924).

³⁹ *Jefferson Island Salt Mining Co. v. United States*, 6 F. (2d) 375 (N. D. Ohio 1925).

or the maximum or minimum, or maximum and minimum, to be charged."

The purpose and scope of this Section and its relation to Section 3 were subjected to an acid test in the famous *Lake Cargo Coal Cases of 1925*,⁴⁰ which developed from competition between Ohio and Pennsylvania coal operators on the one hand and Kentucky and West Virginia coal operators on the other. The rates under attack moved coal from the mines to ports on the Great Lakes whence it was transported by water on its way to the markets of the middle west. The northern producers complained that their own rates were too high and those of their southern competitors too low; that the relationship between the rates was unjust and the northern coal industry being ruined in consequence. To the complainants' principal witness was put the following question: "This case then is really a commercial fight between your districts against West Virginia and Kentucky and is not a rate case, is it?" The witness frankly replied, "Any rate case I ever heard of was a commercial fight and this is just like the rest of them."⁴¹

At the first hearing the Commission found that the northern rates were not unreasonably high or the southern rates unreasonably low. Undue prejudice was charged on the ground that the differential system, although involving higher rates to the south did not adequately reflect differences in distance and cost of transportation. Since the rates were not controlled by the same carriers this plea was also refused and the entire complaint dismissed. At the second hearing held after the passage of the Hoch-Smith Resolution, the Commission seemed to lend a more sympathetic ear to the description of depression and unemployment in the northern mines and to comparative cost studies purporting to show that the northern rates were earning more per ton-mile than the southern rates. The result was a maximum rate order which lowered the northern rates, thus increasing the differentials to a point where, in the opinion of the Commission, they adequately reflected differences in transportation costs. But the triumph of the northern operators was not yet assured; the southern carriers immediately tried to reestablish the old differentials by publishing corresponding reductions in the southern rates. At the third hearing the Commission found that the carriers had not justified their reductions by showing that the differentials established by the Commission were unfair and attempted to close the case with a minimum rate order which restored the southern rates to their former level.

⁴⁰ 101 I. C. C. 513 (first decision, 1925); 126 I. C. C. 309 (second decision, 1927); 139 I. C. C. 367 (third decision, 1928).

⁴¹ See 101 I. C. C. 513, 541.

The end was not yet, for the Federal Court in *Anchor Coal Co. v. United States*⁴² set aside the order of the Commission. Judge Parker enthusiastically elaborated the proposition that the Commission had exceeded its powers, "in that its action was based in part at least upon industrial conditions and was essentially an effort to equalize industrial conditions and offset economic advantages through adjustment of rates." The opinion proceeds on the theories that "in competitive adjustments carriers may disregard distance even in substantial degree, so long as the competitor whose geographical location is largely disregarded is not injured thereby;" and that "a rate relationship cannot be injurious to a community, when the rate which that community enjoys is lower than the rate from a competing community with which it is compared." If this last argument be sound it applies as well to all equalized rates and the Commission is left powerless to preserve the benefit of geographical advantages. By such doubtful logic Judge Parker only weakened the force of his argument which seems to rest more firmly upon the ground, often implied though never explicit in the opinion, that the Commission had erred in calling upon its minimum rate making power to pinch hit for Section 3 when the latter was unavailable. Upon this still doubtful point there is no more conclusive authority, for when the *Lake Cargo* controversy reached the Supreme Court the carriers had arrived at a compromise and the case was dismissed as moot.⁴³

The *Lake Cargo Coal* cases developed another issue of interpretation which seems worthy of consideration. The problem concerns Section 1(5) of the Interstate Commerce Act which provides that "All charges made for any service rendered . . . in the transportation of person or property . . . shall be just and reasonable and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." Upon the key words "just and reasonable" Commissioner Taylor, in concurring opinions in the second and third *Lake Cargo* cases, developed a theory of "relative unreasonableness" to justify both the minimum and maximum rate orders which were issued.⁴⁴ The essence of the argument seems to be that the justice of a rate depends not so much upon its reasonableness per se—as approximately determined by cost studies and comparative rate studies—but upon its relationship to other rates on competing traffic; that Section 15(1) is therefore sufficient authorization for the use of maximum and minimum rate orders to establish differentials which adequately reflect geographical advantages. To this application of the theory Com-

⁴² *Supra* note 5.

⁴³ *Ibid.*

⁴⁴ See 126 I. C. C. 309, 365; 139 I. C. C. 367, 403.

missioner Eastman entered a caveat because "the net result . . . is to extend the principles of Section 3 to situations where the same carrier or carriers are not involved."⁴⁵ Comparative rate studies have always been important in determining maximum reasonableness; but Commissioner Eastman distinguishes between their proper consideration as evidence of the "intrinsic unreasonableness" of the rates under attack, and their improper consideration as proof of injustice. Whatever be the merits of this somewhat metaphysical distinction, the doctrine of "relative unreasonableness" appears to be of growing importance in rate regulation.

An example of what Commissioner Eastman considered its proper application is provided by the case of *Chemical Lime Co. v. Bellefonte Central R. R.*⁴⁶ Here the complainants, situated on an independent connection of the Pennsylvania Railroad, paid a joint rate which was higher than the rates enjoyed by competitors situated on the Pennsylvania but within the same general area—the Baltimore rate group. Whether there was "adequate basis" for a finding of undue prejudice is uncertain, for the majority of the Commission evaded the question by finding that "the interstate rates herein assailed . . . are and for the future will be unjust and unreasonable to the extent that they exceed or may exceed those contemporaneously applicable on like commodities to Bellefonte, Pa."—a point on the Pennsylvania line and within the Baltimore Rate Group. The opinion of the Commission makes no pretense of a finding of intrinsic unreasonableness, and Commissioner Eastman in his concurring opinion makes this significant statement: "And in a case like that which is now under consideration, where the complaining community had rates which stood up like a pinnacle in the midst of a prairie land of blanket rates surrounding it for many miles, we are warranted in finding it unjust and unreasonable not to maintain the blanket rates to the complaining community for the future, even if we are unable on the record to determine whether or not those blanket rates in all cases or in any case have the attributes of maximum reasonableness."⁴⁷

Even from this use of "relative unreasonableness" several commissioners dissented because it involved a confusion of Sections 1 and 3.⁴⁸ For this position there is some support in an early Federal case which reversed a similar decision of the Commission because it embodied an ill-considered Section 3 order

⁴⁵ See 139 I. C. C. 395, 396.

⁴⁶ 136 I. C. C. 333 (first decision, 1927); 147 I. C. C. 285 (second decision, 1928).

⁴⁷ See 147 I. C. C. at 288.

⁴⁸ See 136 I. C. C. at 342; 147 I. C. C. at 289.

masquerading under the form of a maximum rate order.⁴⁹ But this seems to be no longer good law, for in *Virginia Ry. v. United States*⁵⁰ the Supreme Court approved the Commissioner's finding that through rates over the Virginian and Chesapeake & Ohio from the New River mining district to the west would be unreasonable to the extent that they exceeded rates over the Norfolk & Western from competing mines in the Outer Crescent district to the same destinations. It seems that the Court might well have found that this was in effect a Section 3 order which was unjustified because the rates were controlled by different carriers; instead the Court dodged the issue by saying: "The finding of reasonableness, like that of undue prejudice, is a determination of fact by a tribunal informed by experience. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it."⁵¹ Again in *Chicago, Rock Island & Pacific Ry. v. United States*⁵² the Supreme Court approved a similar order without any apparent appreciation of the conflict within the Commission. Thus, whether unconsciously or deliberately, the Supreme Court has sustained the partial usurpation of the functions of Section 3 by the doctrine of "relative unreasonableness."

IV

So along three tortuous paths the Commission has been extending during the last decade its power to control rate relationships. By the repudiation of the doctrine of the *Ashland Fire Brick* case it has shown a disposition to escape from the traditional limitations of Section 3; in the use of the minimum rate power, supplemented when necessary by maximum rate orders, it has tried to develop a substitute for the orthodox method of prescribing differentials; by the ingenious device of establishing one rate as the reasonable maximum of another it has effected a convenient means of equalizing the two. All of these developments appear to have ample justification in the broad wording of Section 15(1); but that section, like most amendatory legislation, may be narrowed in scope by an historical, rather than a natural, interpretation.

The Supreme Court has shown little disposition to discuss these problems in the light of their real significance; but happy phrases scattered occasionally through the opinions of the com-

⁴⁹ *Interstate Commerce Commission v. Louisville & Nashville R.R.*, 73 Fed. 409 (C. C. M. D. Tenn., 1896).

⁵⁰ 272 U. S. 658, 47 Sup. Ct. 222 (1926), affirming *Wyoming Coal Co. v. Virginian Ry.*, 98 I. C. C. 488 (1925).

⁵¹ *Supra* note 50 at 665, 47 Sup. Ct. at 225.

⁵² 274 U. S. 29, 47 Sup. Ct. 486 (1927).

missioners reveal an underlying conflict in the philosophy of railroad regulation. Commissioner Campbell, in his dissenting opinion advocating a minimum rate order in the *Sugar Cases of 1922*, elaborated the thesis that since the Transportation Act of 1920 the railroads should be regarded "collectively" rather than "individually;" that it was wasteful to allow western carriers to serve markets which eastern carriers could adequately serve at prices just as low but with greater profits.⁵³ Ex-commissioner Woodlock, on the other hand, has expressed his belief "that competition is a cardinal principle in the whole affair;" that "that which would be unlawful because discriminatory under a 'national' system composed of one carrier, becomes a necessary element of competition under a 'national' system composed of many individual carriers."⁵⁴ It is also in Mr. Woodlock's statement, "Hands off management is the very soul of the law,"⁵⁵ that we find the fundamental objection to minimum rate orders, which control the railroad manager's opportunity to increase his business by shrewdly arranging his rates. So too, the maximum rate order in the second *Lake Cargo* case was regarded by Commissioner Hall, with whom concurred Commissioner Woodlock, as an unwarranted interference with the functions of management, an attempt by the Commission to set itself up as a "special providence" regulating the destinies of men.⁵⁶ But

⁵³ Commissioner Campbell has expressed his liberal philosophy of rate regulation in statements such as the following: "In fixing reasonable minimum rates I think that we must consider in each case whether the rate would be so low as to cast a burden on other traffic; whether it would be lower than necessary for the purposes intended; whether it would be unjustly discriminatory or unduly prejudicial; whether in its effect it would be in consonance with the fundamentals, intendments, and purposes underlying the various provisions of the transportation act, particularly sections 15(a) and 500; and whether under all the circumstances and conditions and in the light of the transportation act as a whole, the rate structure is reasonable, is compatible with the public interest, and accords with established national policies. These are all questions of fact that are within our province." *Sugar Cases of 1922*, *supra* note 4, at 477.

⁵⁴ Wall St. J., Sept. 26, 1930, at 1 (articles by Mr. Woodlock when no longer a member of the Commission). He went on to say: "Furthermore in one or two other parts of the law, particularly in Section 15(4) which protects the carrier in its long haul it is necessary to remember that if reliance is to be placed upon private enterprise operating competitive carriers, incentives necessary to private enterprise, conditions necessary to keep these incentives in full play must be preserved as fully as possible. We cannot have a successful hybrid between private enterprise and government operation—it must be one thing or the other." See also Commissioner Woodlock's dissenting opinion in *Duluth Chamber of Commerce v. Chicago & North Western Ry.*, 156 I. C. C. 156, 170 (1929).

⁵⁵ Wall St. J., Sept. 24, 1930, at 1.

⁵⁶ 126 I. C. C. 374, 386. "The essence of the transportation act is regulation and not management. That act was not a general reform act giving us powers to redistribute the business or wealth of individuals or

to Commissioner Taylor, who approved of the order, it seemed "unthinkable . . . that the right of any commodity, or of any locality to enjoy any of its advantages of transportation conditions or geographical position should be left to the whim or self-interest of either the carrier or carriers providing the transportation facilities."⁵⁷ Thus between those who favor all or any of the liberalizing tendencies here discussed and those who quite consistently oppose them,⁵⁸ there appears a fault-line which separates the individualist from the collectivist, the advocates of less-interference with railroad management from the friends of closer regulation.

It is perhaps through the distinction thus developed between the sphere of management and the sphere of regulation that the various elements of the problem of commercial conditions are most sharply focussed.⁵⁹ Certainly it must be conceded that commercial factors play no small part in the railroad manager's determination of his rates. He is of course interested in allocating his charges so that each commodity will bear its share of the costs of operation. But even should he accept this as a sole criterion, the presence of overhead as well as "out-of-pocket" costs necessitates a wide margin of error. Furthermore he must always remain conscious that his rates cannot be profitable unless they "move the traffic;" that lower rates may be more profitable because more traffic will move under them. He may even find it worthwhile to initiate "missionary" rates, with the hope of encouraging infant industries which will be able to sustain higher rates in the future. So "what the traffic will bear" becomes a question of equal importance with what the traffic costs. Each element is a limitation upon the other and the resulting rate is a compromise between the two. Even more is this apparent in the determination of rate relationships be-

of producing regions, in accordance with whatever social, economic, or sectional views might at a given time command a majority of votes in this commission." *Ibid.* 390.

⁵⁷ 139 I. C. C. 403, 405.

⁵⁸ Commissioners Woodlock and Hall also dissented in the Galveston case, *supra* note 23, 128 I. C. C. 399, 402, 160 I. C. C. 362; and Commissioner Woodlock dissented in the Chemical Lime Case, *supra* note 46, 136 I. C. C. at 342.

⁵⁹ "We recognize that there is a proper sphere of managerial discretion and enterprise, and so long as corporate action stays within that sphere we have nothing to do with the carriers and those who voice their policies and translate them into action. We are not a general manager of the railroads, or of any of them. We have neither the inclination, the wisdom, nor the power to make or regulate rates for the purpose of determining whether goods shall be bought or sold, produced, manufactured, or consumed, in one section or locality, or by one set of persons or another. Such has been the settled policy of the commission from its creation in 1887 to the present day." Lake Cargo Coal, 139 I. C. C. at 391 (majority opinion, 1928).

tween competing commodities or localities. Here the railroad manager must make his choice between the distance and equalization principles; decide whether to provide his shippers with an artificial entry to distant markets, or whether to confine them to their natural markets, where they have geographical advantages over their competitors. Even should he adopt the latter policy, the resulting differentials will probably reflect to some extent equalizing influences, as witness the blanket and group rates in effect throughout the country. So the decisions of the railroad manager are formulated in part at least upon consideration of commercial conditions and have no small effect upon economic destinies.

The Interstate Commerce Commission can hardly be expected to blindfold itself to the circle of influence thus established between commercial conditions and the rate system which it must regulate. In so far as the spheres of management and regulation overlap, the latter cannot be entirely divorced from commercial considerations. It is rather the extent to which this overlapping is desirable or necessary that is the real point of controversy. When the Commission undertakes, for example, to move rates up or down within the "zone of reasonableness" it may well be contended that it is usurping the traditional functions of management. But it must also be remembered that the "zone of reasonableness" is uncertain territory, discovered not only by cost studies but also by comparison with other rates which have themselves been influenced by commercial conditions. It is recognition of this essential inter-dependency of the rate structure that is responsible for the development of the doctrine of "relative unreasonableness" and similar tendencies toward greater control of rate relationships. This greater control means less freedom for the railroad manager to arrange rates in accordance with his own interests in commercial conditions. It means also more opportunity for the Commission to modify rate geography and to exercise its discretion in determining the relative limits of the equalization and distance principles. Thus in the march of legal formulae here described may be discerned a significant trend toward greater consideration and control of commercial conditions in railroad rate regulation.

SCOPE OF THE JURISDICTION OF THE FEDERAL TRADE
COMMISSION OVER FALSE AND MISLEADING ADVERTISING

THE vast expansion of modern advertising¹ has been accompanied by two results which tend somewhat to countervail its undoubted benefits. It has minimized the personal relationship in trade, and it has sought to create new demands, generally for non-essential commodities; and both of these developments have aggravated the inducements to, and the opportunities for, deception in the presentation of merchandise.² In its effort to abate this growing evil, the Associated Advertising Clubs of the World sought the assistance of the Federal Trade Commission one year after its inception in 1914.³ The immediate response was not enthusiastic, but during the past decade the number of cases before the Commission involving false advertising has steadily increased, until, in 1928-1929, they constituted 85% of the total.⁴ This remarkable development is clearly indicative of

¹ See GOODALL, *ADVERTISING: A STUDY OF A MODERN BUSINESS POWER* (1914) 73ff; CHERINGTON, *ADVERTISING AS A BUSINESS FORCE* (1913) 537.

² PUBLIC REGULATION OF COMPETITIVE PRACTICES (National Industrial Conference Board, 1925) 19. See also CHASE AND SCHLINK, *YOUR MONEY'S WORTH* (1927) c. 1. In the following discussion references to "advertising" will necessarily include "branding," "labeling," etc. The cases discuss all indiscriminately and for present purposes there appears to be no valuable distinction.

³ The Federal Trade Commission Act was passed September 16, 1914. 38 STAT. 717 (1914), 15 U. S. C. § 41 (1926). Section 5, with which this comment is solely concerned, declares in part:

"Unfair methods of competition in commerce are declared unlawful.

"The Commission is empowered and directed to prevent persons, partnerships or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

"Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method . . . and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, etc. a complaint stating its charges . . . and containing a notice of a hearing. . . . If upon such hearing the Commission shall be of the opinion that the method of competition in question is prohibited by this subdivision . . . it shall make a report in writing in which it shall state its findings as to the facts and shall issue . . . an order . . . to cease and desist.

"If such person fails, etc. or neglects to obey such order . . . the Commission may apply to the circuit court of appeals. . . . The findings of the Commission as to facts, if supported by testimony shall be conclusive."

⁴ Virtually no complaints were issued until 1918. In the fiscal year ending June 30, 1918, only 6% of the proceedings before the Commission concerned misrepresentations; the following years the proportion increased to 14%, 25%, 38%, 40%, 47%, 56% and in 1925 had reached 70%. The same approximate proportions apply to the cases settled by stipulation, *i. e.*, by

the relative significance which attaches, in the minds of the Commissioners, to this form of unfair competition.

While the broad surveillance over deceptive representations has undoubtedly proved salutary, it has by no means met with unanimous approval. Some legal writers have questioned the Commission's jurisdiction in the field.⁵ Others have contended that to undertake the function of censorship is to detract in time and expense from the major task, which is generally designated: the maintenance of open competition.⁶ Both of these objections are voiced in a recent adjudication by the Circuit Court of Appeals of the Sixth Circuit,⁷ which, at least by dicta, has very definitely depreciated the Commission's power in respect of advertising. An order had been issued against the petitioner to desist representing its product "Marmola" as a scientific thyroid cure for obesity and to refrain from advertising it at all unless the statement were added that it was unsafe unless taken under a physician's supervision.⁸ In reversing the order the court found no issue as to its therapeutic effect, but only as to its authenticity and safety, and concluded that the terms "scientific" and "safe" were but matters of opinion. It was further held that the Commission's jurisdiction does not extend to a trade practice resulting in no injury to competitors, that here the only possible competitors were the medical profession and other manufacturers of patent remedies on the "index purgatorius," and that "the machinery was [not] intended to give governmental aid to the protection of this kind of trade and commerce."⁹ It is most improbable that the court intended to indorse the type of advertisement involved.¹⁰ The true basis of the deci-

agreement before the issuance of a complaint. See ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION (1929) 62, 159. Of course by virtue of the additional powers granted it the Commission performs functions other than the enforcement by trial and order of the Clayton Act and Section 5 of the Trade Commission Act. See Trade Commission Act, *supra* note 3, at §§ 6, 7, 8; FREUND, GROWTH OF AMERICAN ADMINISTRATIVE LAW (1923) 76. Although it is thus impossible to determine precisely to what extent the Commission's time and expense is consumed by advertising, the increase in the significance of this method of competition is manifest.

⁵ Rublee, *The Original Plan and Early History of the Federal Trade Commission* (1926) 11 PROC. ACAD. POL. SCI. 666, 669; Levy, *A Decade of the Federal Trade Commission* (1925) 11 VA. L. REV. 278, 283, 291. See also dissenting opinion of Denison, J., in *Silver Co. v. Federal Trade Commission*, 289 Fed. 985, 992 (C. C. A. 6th, 1923).

⁶ Watkins, *The Federal Trade Commission, A Critical Survey* (1926) 40 QUARTERLY J. ECON. 561, 582; Soule, *What is Unfair Competition* (July 1, 1925) 43 NEW REPUBLIC 146, 147; Comment (1919) 88 CENT. L. J. 425.

⁷ *Raladam Co. v. Federal Trade Commission*, 42 F. (2d) 430 (C. C. A. 6th, 1930).

⁸ 12 F. T. C. D. 363 (1929).

⁹ *Supra* note 7, at 437.

¹⁰ See, concerning the proprietary "Marmola," CHASE AND SCHLINK, *op.*

sion appears rather to have been another judicial attempt to curtail the Commission's jurisdiction.¹¹ The case, therefore, prompts a consideration of the role assumed by the Commission in this field and the limitations imposed thereupon by the courts.

The statement of the court to the effect that the Commission's jurisdiction did not extend beyond a "fair relationship" to the anti-trust acts¹² would obviously preclude any control over advertising, and quite possibly reflects the predominant sentiment in the Senate during the discussion of the Trade Commission Act.¹³ The latter was conceived, in conjunction with the Clayton Act, during a period of agitation, on the one side for a more rigid enforcement of the Sherman Law, on the other for greater leniency in its interpretation.¹⁴ Attempts by the court to solve the problem by the "rule of reason" had proved unsatisfactory;¹⁵ and the Commission was to be a substitute, more prophylactic than curative, and to a considerable extent unhampered by legalistic precedent in its treatment of restraints upon trade.

cit. supra note 2, at 127; NOSTRUMS AND QUACKERY (American Medical Association, 2d ed. 1912) vol. 1, p. 388. Even if the Commission's finding were equivocal, the court's decision would effect many other cases of patent remedies and treatments which have recently been investigated and condemned. See ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION (1928) Complaints No. 1486, 1487, 1507, 1513, 1528; *Ibid.* (1929) Complaints No. 1563, 1564, 1572, 1577, 1591, 1596, 1609, 1615, 1671, 1673, 1677, 1680.

¹¹ It is upon this point of jurisdiction that the Supreme Court has granted a review. U. S. Daily, Nov. 4, 1930, at 2703.

¹² "The conclusion was reached [in the Silver case, *supra* note 5] that the Commission came into being as an aid to the enforcement of the general governmental anti-trust and anti-monopoly policy, and that its lawful jurisdiction did not go beyond the limits of fair relationship to that policy. . . . This court, as now constituted, is prepared to and does adopt the general view there stated, as to the foundation of the Commission's jurisdiction." Denison, J., in the Raladam case, *supra* note 7, at 435, 456.

¹³ In the platforms of both major political parties for 1912, and in President Wilson's address to Congress in 1914, the establishment of a trade commission was urged as an expedient agency for the enforcement of the Anti-trust laws, both the Sherman Act [26 STAT. 209 (1890), 15 U. S. C. §§ 1, 2, 3 (1926)] and the contemplated Clayton Act [38 STAT. 730 (1914), 15 U. S. C. § 12 (1927)]. See Daish, *The Federal Trade Commission* (1914) 24 YALE L. J. 43; Levy, *op. cit. supra* note 5, at 21, 196. And prior to the passage of the Act much of the discussion in the Senate stressed the function of the prospective Commission in dealing with monopolistic tendencies. See 51 CONG. REC. 10376, 11089, 11094, 11380, 11528, 12022 (1914); Rublee, *op. cit. supra* note 5, at 668.

¹⁴ See JONES, THE TRUST PROBLEM IN THE UNITED STATES (1921) 334 *et seq.*; HENDERSON, THE FEDERAL TRADE COMMISSION (1924) c. 1; Friedman, *The Trust Problem In the Light of Some Recent Decisions* (1915) 24 YALE L. J. 488; Hayes, *What the Sherman Anti-Trust Act Has Accomplished* (1913) 47 AM. L. REV. 697, 709.

¹⁵ Levy, *The Clayton Law—An Imperfect Supplement To The Sherman Law* (1916) 3 VA. L. REV. 411, 414, 415. And see 51 CONG. REC. 11086, 11092, 11108, 11236 (1914).

Furthermore the Supreme Court, in one of its first pronouncements on the powers of the new body, seemed disposed to restrict it to monopolistic tendencies and common law unfair competition.¹⁶

On the other hand, it seems clear that public concern in the legislation of 1914 was based on a desire, not merely for active competition but also for the enforcement of higher standards of commercial practice within that competition.¹⁷ Consequently, through the obfuscations of the Senate debates there appears ample evidence of the deliberate use of broad language to cover practices far removed from monopolistic tendencies.¹⁸ The term "unfair methods of competition" had never been judicially construed, and at least theoretically was limited only by the "public interest" clause.¹⁹ It cannot be supposed that the sponsors of the act were unmindful of the tremendous importance of advertising as a competitive device and a source of unfair practices. Equally manifest was the desirability of some new agency to supplement the inadequate protection from misrepresentations afforded by statute and common law. The civil remedies of a small consumer, as, for example, in deceit or upon a warranty, are not only impractical but generally abortive,²⁰ while in the absence of "palming off," trade mark infringement, disparagement, or some other invasion of a property right, it is probable that a trade competitor could get no relief.²¹ Moreover the stat-

¹⁶ Federal Trade Commission v. Gratz, 253 U. S. 421, 40 Sup. Ct. 572 (1920). See, however, the dissent of Mr. Justice Brandeis. *Ibid.* 435, 436, 40 Sup. Ct. at 577, 578.

¹⁷ See PUBLIC REGULATION OF COMPETITIVE PRACTICES, *supra* note 2, at 46. See also Watkins, *op. cit. supra* note 6, at 565, where it is suggested that one of the sources of agitation for the new legislation was those who believed that "the old policy appeared to be designed too much for the protection of competitors, actual and potential, and not enough for the protection of the customers."

¹⁸ See HENDERSON, *op. cit. supra* note 14, at 37, 38; Seligson, *Trade Regulation* (1923) 9 A. B. A. J. 698; Montague, *Unfair Methods of Competition* (1915) 25 YALE L. J. 20, 29. It is significant that the term "competition in commerce the purpose of which is to stifle . . . competition," suggested during the debates, was not adopted, HENDERSON, *op. cit. supra* note 14, at 35, and that in discussing "unfair methods" the examples frequently used were cases of false advertising, 51 CONG. REC. 11105 (1914).

¹⁹ See Federal Trade Commission v. Beechnut Packing Co., 257 U. S. 441, 453, 42 Sup. Ct. 150, 154 (1921); Hankin, *The Jurisdiction of the Federal Trade Commission* (1924) 12 CALIF. L. REV. 179, 180; Gallagher, *The Federal Trade Commission* (1915) 10 ILL. L. REV. 31, 32.

²⁰ Handler, *False and Misleading Advertising* (1929) 39 YALE L. J. 22, 23ff. And see CHAPMAN, *THE LAW ON ADVERTISING* (1929) 24 *et seq*; BISHOP, *ADVERTISING AND THE LAW* (1928) 68.

²¹ Handler, *op. cit. supra* note 20, at 34ff. For the general nature of unfair competition under the common law and the extension of its principles in the United States, see NIMS, *UNFAIR COMPETITION* (3d ed. 1929) 6ff., 36; Haines, *Efforts To Define Unfair Competition* (1919) 29 YALE L. J. 1;

utes penalizing false and misleading statements concerning goods have been limited in effect by specific terms²² or by the reluctance of both courts and juries to attack business ethics by criminal methods.²³ As a result there remained a vast amount of advertising virtually secure from civil or criminal attack, and censurable only by private association of manufacturers, publishers and advertisers.²⁴

Note (1929) 29 COL. L. REV. 45; Note (1925) 38 HARV. L. REV. 370. The case of *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281 (C. C. A. 6th, 1900), apparently established the rule that misbranding or false advertising affords no ground for a civil suit by an honest competitor when the only injury shown is the general injury to the entire trade. Accord: *Ely-Norris Safe Co. v. Mosler Safe Co.*, 273 U. S. 132, 47 Sup. Ct. 314 (1927). And see *Armstrong Cork Co. v. Ringwalt Linoleum Works*, 240 Fed. 1022 (C. C. A. 3d, 1917). But cf. *Rogers, Predatory Price Cutting As Unfair Competition* (1913) 27 HARV. L. REV. 139, 141, and cases cited in notes 51, 52, 53 of Prof. Handler's article, *supra* note 20. The Commission's lack of jurisdiction over intrastate business perhaps prompted the attempt of L. Hand, J., to extend this common law rule in the *Ely-Norris* case. 7 F. (2d) 603 (C. C. A. 2d, 1925).

²² Under the National Pure Food and Drugs Act [34 STAT. 768 (1906), 21 U. S. C. § 1 (1926)] and a subsequent amendment [37 STAT. 416 (1912), 21 U. S. C. § 10 (1926)] false statements concerning ingredients, preparation, and curative qualities became indictable. But both this and similar statutes concerning particular commodities, such as the Packers and Stockyard Act [42 STAT. 159 (1921), 7 U. S. C. § 181 (1926)] apply only to labels and pamphlets physically connected with the article. The statutory crime of using the mails to defraud [Federal Criminal Code § 215; 35 STAT. 1130 (1909), 18 U. S. C. § 338 (1926)] and the power of the Post Office Department to issue fraud orders [17 STAT. 322, 323 (1872), 39 U. S. C. §§ 259, 732 (1926)] are, of course, restricted to mailed circulars. The latter remedy, however, has not been exercised to the limit of its potentiality, and where available is much to be preferred to action by the Commission, not only because it is more expeditious but because the courts have been disposed to respect the Postmaster's discretion. See *Leach v. Carlile*, 258 U. S. 138, 42 Sup. Ct. 227 (1922).

²³ HENDERSON, *op. cit. supra* note 14, at 236; Haines, *op. cit. supra* note 21, at 20. The Printer's Ink Model Statute adopted now by the majority of states would seem to be comprehensive in its terminology. See CHAPMAN, *op. cit. supra* note 20, at 29; Comment (1927) 36 YALE L. J. 1155; Legislation (1930) 43 HARV. L. REV. 945; Current Legislation (1917) 17 COL. L. REV. 258. Actually, however, prosecutions under such legislation have been limited largely to cases of "palming off" and grossly fraudulent statements of pure fact. Of course the effect of the statute as a moral and persuasive force in the hands of the Better Business Bureaus is inestimable. See Handler, *op. cit. supra* note 20, at 32, 34. "In so far as these laws [the Model Statutes] apply to 'patent medicine' advertising copy they are to all intents and purposes a dead letter." Cramp, *Truth In Advertising Drug Products* (1920) 10 AM. J. PUB. HEALTH 783, 788.

²⁴ The work of Better Business Bureaus affiliated with the Associated Advertising Clubs of the World and representing practically every phase of commerce is far more widespread and probably more valuable than that of the Commission. See PUBLIC REGULATION OF COMPETITIVE PRACTICES, *supra* note 2, at 234; Handler, *op. cit. supra* note 20, at 45ff; TRADE PRAC-

It is not surprising, therefore, that the Commission, under the broad authorization of the statute, conceived it to be one of its functions to supplement the existing agencies in the field. In accordance with the rule established in the *Gratz* case,²⁵ however, it remained for the courts to determine whether the term "unfair methods" included deceptive advertising resulting in injury, not to an individual competitor but to an entire trade. In *Sears Roebuck Co. v. Federal Trade Commission*,²⁶ the first case to be appealed, the Circuit Court of the Seventh Circuit partially sustained an order condemning offers of combination sales which were at the same time deceptive and disparaging; but the decision was based largely on the latter element. The reluctance to permit a power of censorship, however, was clearly revealed by another Circuit Court two years later in the case of *Winsted Hosiery Co. v. Federal Trade Commission*.²⁷ Here the respondent had been ordered to desist from selling as "wool," "merino," or "worsted" goods of which the principal, and frequently the only, constituent was cotton. The practice had become widespread throughout the trade. While admitting the possible de-

TICE CONFERENCE, PUBLISHERS OF PERIODICALS (1928). A perusal of ACCURACY AND FAIR PLAY IN THE REPRESENTATION OF MERCHANDISE, published monthly in New York City since 1925, and of the New York Bureau's quarterly report reveals the scope of their influence.

Many trade associations have also adopted stringent, if unenforceable, codes of honesty in advertising. See JONES, TRADE ASSOCIATION ACTIVITIES AND THE LAW (1922) 34 *et seq.* In addition may be mentioned the publisher's codes, the National Association of Credit Men, and in the field of patent medicine, the American Medical Association. See *Raladam* case, *supra* note 7, at 436, 437.

²⁵ *Supra* note 16. See also *Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568, 43 Sup. Ct. 210 (1923); *Federal Trade Commission v. Sinclair Refining Co.*, 261 U. S. 463, 43 Sup. Ct. 450 (1923).

²⁶ 258 Fed. 307 (C. C. A. 7th, 1919). See Note (1919) 8 CALIF. L. REV. 48; (1919) 29 YALE L. J. 125. The petitioner had adopted the policy of combination orders as a war time profiteering practice. Obviously wavering between a conviction that the practice was unfair and a reluctance to exceed common law precedents, the court involved itself in the following obvious paradox: "On the face of this statute the legislative intent is apparent. The Commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The Commissioners representing the government as *parens patriae* are to exercise their common sense as informed by their knowledge of the general idea of unfair trade at common law and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common law cases. But the restraining order of the Commission is merely provisional. The trader is entitled to his day in court, and there the same principles and tests that have been applied under the common law or under statutes . . . are expected by Congress to control." 258 Fed. at 311. See Comment (1919) 88 CENT. L. J. 425.

²⁷ 272 Fed. 957 (C. C. A. 2d, 1921).

ception of consumers, the court nevertheless held that the Commission "was not a censor of commercial morals generally" and that the practice was "in no way connected with unfair competition, but is like any other misdescription or misbranding of products."²⁸ The Supreme Court, however, reinstated the order on the ground that although retailers were perhaps no longer deceived, yet the tendency of the practice would be to injure the public and to divert trade from honest manufacturers; accordingly it was ruled to be within the purview of the statute.²⁹ Henceforth the Commission's broad jurisdiction over such advertising has been repeatedly upheld in cases involving false statements as to quality or ingredients, geographical source and the like.³⁰

On the other hand, the courts, displaying a natural apprehension toward a body invested with such wide and indefinite authority,³¹ have tempered the power thus acknowledged by a steady vigilance, which in effect has allayed all fears of an arbitrary discretion in the Commission. In apparent contradiction to the wording of the Act, the "public interest" prerequisite has been reviewed as a justiciable fact.³² Moreover, although the statute

²⁸ *Ibid.* 960, 961.

²⁹ 258 U. S. 483, 42 Sup. Ct. 384 (1922); (1921-22) 20 MICH. L. REV. 122, 919.

³⁰ *Quality and Ingredients*: Federal Trade Commission v. Kay, 35 F. (2d) 160 (C. C. A. 7th, 1929); Masland Duraleather Co. v. Federal Trade Commission, 34 F. (2d) 733 (C. C. A. 3d, 1929); Indiana Quartered Oak Co. v. Federal Trade Commission, 26 F. (2d) 340 (C. C. A. 2d, 1928), *certiorari* denied, 258 U. S. 623 (1928); Sea Island Thread Co. v. Federal Trade Commission, 22 F. (2d) 1019 (C. C. A. 2d, 1927); Proctor & Gamble Co. v. Federal Trade Commission, 11 F. (2d) 47 (C. C. A. 6th, 1926), *certiorari* denied, 273 U. S. 717, 718 (1926); Guarantee Veterinary Co. v. Federal Trade Commission, 285 Fed. 853 (C. C. A. 2d, 1922); Royal Baking Powder Co. v. Federal Trade Commission, 281 Fed. 744 (C. C. A. 2d, 1922). *Geographical Source*: Bradley v. Federal Trade Commission, 31 F. (2d) 569 (C. C. A. 2d, 1929). *Trade Status*: Pure Silk Hosiery Mills v. Federal Trade Commission, 3 F. (2d) 105 (C. C. A. 7th, 1924). *Second-Hand Goods Sold For Firsts*: Fox Film Corp. v. Federal Trade Commission, 296 Fed. 353 (C. C. A. 2d, 1924); (1924) 33 YALE L. J. 885.

³¹ "They [the words 'unfair methods of competition'] suggest an ethical criterion rather than one dependent on expert knowledge or experience, and the spirit of American institutions has not been friendly to the creation of a class of administrative or political specialists upon questions of ethics." HENDERSON, *op. cit. supra* note 14, at 99. And, of course, the theoretically anomalous situation of a single body officiating as both prosecutor and judge must have a very definite psychological effect as regards the confidence in which such a body is held.

³² Federal Trade Commission v. Klesner, 280 U. S. 19, 50 Sup. Ct. 1 (1929), noted in (1930) 28 MICH. L. REV. 923; (1930) 30 COL. L. REV. 270; Ostermoor v. Federal Trade Commission, 16 F. (2d) 962 (C. C. A. 2d, 1927), noted in Comment (1927) 36 YALE L. J. 1155; Bene & Sons v. Federal Trade Commission, 299 Fed. 468 (C. C. A. 2d, 1924); Silver Co. v. Federal Trade Commission, *supra* note 5. The wording of the Trade

interest.³⁹ With respect to the subject of this comment, however, the various limitations hitherto imposed seem primarily based on the "public interest" clause. Given its obvious construction, this provision implies that a governmental agency is not expected to initiate proceedings in a petty competitive controversy.⁴⁰ As a corollary it has been questioned whether, in the absence of countervailing circumstances, the Commission should ever act where a statute covers the unfair practice or where there is adequate civil or equitable remedy; in this view many orders appear unwise.⁴¹ It has been said that a substantial part of the public must be misled.⁴² In no case, however, does the reversal of an order appear to have been grounded solely on the paucity of the consumers of the commodity or service advertised. The restriction would seem rather to refer to the degree of deception and to deny the Commission's right to ban

³⁹ See, for example, the Sinclair case, *supra* note 25, where the court, finding the practice involved not to be opposed to the public interest, concluded that it was not unfair. In view of the probable inclusion of the broad concept of public interest in any determination of unfairness, this confusion is not unnatural. Properly construed, however, the "public interest" clause of the statute presents a narrower issue: granting the unfairness of the practice, is the public concern therein *sufficient* to warrant a proceeding. See (1930) 30 COL. L. REV. 270. The negative effect of the clause is to secure the Commission from attack for failure to issue a complaint upon application.

⁴⁰ Federal Trade Commission v. Klesner, *supra* note 32; Silver Co. v. Federal Trade Commission, *supra* note 5. A prognostication of this limitation, even before the "public interest" clause was inserted, was voiced during the Senate debate. 51 CONG. REC. 11109 (1914).

⁴¹ In Lighthouse Rug Co. v. Federal Trade Commission, 35 F. (2d) 163 (C. C. A. 7th, 1929); Federal Trade Commission v. Balme, 23 F. (2d) 615 (C. C. A. 2d, 1928); Juvenile Shoe Co. v. Federal Trade Co., 289 Fed. 57 (C. C. A. 9th, 1923), orders issued where other remedy existed were upheld on appeal, the court ignoring the question of public interest in proceedings under such circumstances. The legal or equitable remedy, besides being available, would seem far more efficacious: it provides for damages to the injured competitor and for an immediate cessation of the practice. If there be countervailing circumstances, such as the comparative weakness of the complainant or the prevalence of the practice throughout a trade, they should be inserted in the report. HENDERSON, *op. cit. supra* note 14, at 168, 228; *cf.* PUBLIC REGULATION OF COMPETITIVE PRACTICES, *supra* note 2, at 149. The Commission's practice in this respect has been to some extent ameliorated by a conference ruling to the effect that it will not "entertain proceedings . . . where the alleged violation of law is a purely private controversy, redressable in the courts, except where such practices substantially tend to suppress competition as affecting the public." ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION (1925) 111. See also Rulings 46, 58, 74 in 1 F. T. C. D. 548, 554, 560.

⁴² See Ostermoor v. Federal Trade Commission, *supra* note 32, at 964; Silver Co. v. Federal Trade Commission, *supra* note 5, at 1001; Chicago Portrait Co. v. Federal Trade Commission, 4 F. (2d) 759, 763 (C. C. A. 7th, 1924).

"puffing" where the "average" consumer is not misled.⁴³ Finally a recent case holds apparently that where the product offered for sale is actually superior to that denoted by the label or advertisement, the latter is not opposed to the public interest.⁴⁴ On the other hand, the ruling that prior cessation of the condemned practice is no bar to a desist order⁴⁵ seems unfortunate, for at least where there is no reasonable prospect of repetition, a proceeding is totally devoid of public interest. To some extent this has been ameliorated by conference rulings of the Commission itself.⁴⁶ It becomes apparent that the essence of the public interest requirement has never been clearly and comprehensively demonstrated by the courts. But as a general conclusion, it may be stated that in the absence of other ground for reversal, the Commission's preliminary discretion in the selection of cases will be sustained.⁴⁷

In the *Raladam* case, the court, by requiring proof of the ex-

⁴³ This was undoubtedly the basis of the decision in the Ostermoor case, *supra* note 32, and, while its application to that case may be doubted, seems a justifiable limitation in general. Cf. *Handler, op. cit. supra* note 20, at 30, 44. For examples of proceedings against advertisements that could be called deceptive only by stretching the imagination, see *Federal Trade Commission v. Geneva Watch Co.*, 6 F. T. C. D. 452 (1923); *Federal Trade Commission v. Universal Battery Service Co.*, 2 F. T. C. D. 99 (1919).

⁴⁴ *Berkey & Gay Furniture Co. v. Federal Trade Commission, supra* note 33. The situation in this case was foreshadowed in the Senate discussion. See 51 CONG. REC. 11106 (1914).

⁴⁵ *Sears Roebuck & Co. v. Federal Trade Commission, supra* note 26 (Alschuler, J., dissenting on this point); *Fox Film Corp. v. Federal Trade Commission, supra* note 30 (where the ruling was probably justified on ground that acts complained of were necessarily isolated and sporadic); *Guarantee Veterinary Co. v. Federal Trade Commission, supra* note 30. But cf. *Silver Co. v. Federal Trade Commission, supra* note 5, at 992.

⁴⁶ Conference Rulings 57 and 65, 1 F. T. C. D. 554, 556, declaring in effect that where the use of a simulating name has been discontinued and assurance received that it would not be resumed, it is not in the public interest to issue a complaint.

⁴⁷ See *Moir v. Federal Trade Commission*, 12 F. (2d) 22, 28 (C. C. A. 1st, 1926). Quite obviously if a wrong has been remedied by the Commission's intervention, courts would be reluctant to reestablish the unfair practice simply because it was of small consequence. Nor would such a case ordinarily be appealed if the moral turpitude is clear or if the correction of the practice would effect no appreciable loss. In fact, these cases of small consequence are largely disposed of by a mere notice to the transgressor. *Peycke, The Federal Trade Commission (1922)* 7 MINN. L. REV. 11. Commissioner W. E. Humphrey estimates that 85% of the cases before the Commission undergo this summary disposition. *Humphrey, op. cit. supra* note 37.

Where a business is inherently small, as in the case of a retail store with only community patronage, it is probably advisable that the Commission not act. But where the business, though small, is potentially large and perhaps may increase by the use of an unfair method, as in the case of a manufacturer, then the Commission might well intervene at the start to prevent injury.

istence of honest competitors, has devised a further restriction upon the Commission's control of advertising. In the course of the decision, Denison, J., said:

"The general law of unfair competition uses the misleading of the ultimate retail purchaser as *evidence* of the primarily vital fact, injury to the lawful dealer; the Commission uses this ultimate presumed injury to the final user as *itself* the vital fact. The result is . . . a pro tanto censorship by the Commission of all advertising."⁴⁸

Parenthetically it should be noted that the court has not controverted by affirmative evidence the formal findings of the Commission that there were legitimate competitors.⁴⁹ On the other hand, by sanctioning the advertisement in question it would seem to have barred itself from assuming the non-existence of equally lawful competitors.

But even granting that the bulk of the competitors were unworthy of protection⁵⁰ (*quaere* of the physicians), to base a decision on that fact, while admitting the ill-effects of the practice on the public, is to adhere rigidly to the common law concept of unfair competition as an invasion of competitors' property rights.⁵¹ It is very definitely to imply that the primary emphasis of the Commission's function is still the protection to competitors rather than the maintenance of a plane of commercial practice for the benefit of consumers. That a different emphasis was contemplated is revealed by parts of the Senate debates on the Commission Bill,⁵² by the insertion of the "public interest" clause, and by the absence of any provision enabling private competitors to prosecute a complaint. The same conclusion is compelled by the frequent judicial pronouncements stressing the fraud against the public as the evil primarily to be cured.⁵³ In accord with these views the Commission, in its legal

⁴⁸ *Raladam Co. v. Federal Trade Commission*, *supra* note 7, at 436.

⁴⁹ *Federal Trade Commission v. Raladam Co.*, 12 F. T. C. D. 363, 368 (1929).

⁵⁰ See CHASE AND SCHLINK, *op. cit. supra* note 2, at 49; Cramp, *op. cit. supra* note 23, at 789.

⁵¹ See note 21 *supra*. But *cf.* NIMS, *op. cit. supra* note 21, at 27. "The doctrine of unfair competition is probably lodged upon the theory of the protection of the public whose rights are infringed or jeopardized by the confusion of goods produced by unfair methods of trade, as well as upon the rights of a complainant to enjoy the good will of a trade built up by his efforts and sought to be taken from him by unfair methods." *Cole Co. v. American Cement & Oil Co.*, 130 Fed. 703, 705 (C. C. A. 7th, 1904).

⁵² See 51 CONG. REC. 11102, 11103, 11105, 11108, 11178, 11533. See also HENDERSON, *op. cit. supra* note 14, at 35; Gallagher, *op. cit. supra* note 19, at 35, 42; *supra* note 17.

⁵³ See in particular *Federal Trade Commission v. Kay*, *supra* note 30,

activities, has very clearly leaned toward the protection of customers. It is true that in the great majority of cases, injury to honest competitors is reasonably presumed. Nevertheless complaints have repeatedly been issued where the deceptive practice permeated the trade and where consequently no injury to direct competitors was demonstrable.⁵⁴ In the *Winsted* case⁵⁵ jurisdiction in such cases was upheld. And more recently the Commission has instituted proceedings where the competitors in the trade were of negligible significance;⁵⁶ indeed in some cases all reference to them is omitted from the findings of fact.⁵⁷

Moreover a logical application of the court's hypothesis would lead to anomalous results. It imports, for example, that although by the statute proceedings are to be instituted in the public interest, yet where the public alone is injured by a fraudulent practice, the Commission is not authorized to intervene. Again, if the deception is prevalent throughout an entire trade, it becomes impregnable; but when one honest competitor enters the field, the Commission's jurisdiction is established. Finally, compliance with the court's rule would compel the Commission in every case to try the legitimacy of the activities of competitors.⁵⁸ It cannot be supposed that such incongruities were intended. Rather would it seem that the "unfair methods" referred to in the Trade Commission Act include any policy of sales promotion which tends to deceive the public.⁵⁹

The true source of the court's decision, it is thought, is a lingering conviction that the Commission is evading the purpose of its creation, and a reluctance to extend its power of censorship to the limitless field of patent remedy advertisements. Admittedly the Commission has been undertaking an excessive vol-

at 162; Federal Trade Commission v. Klesner, *supra* note 32, at 27, 50 Sup. Ct. at 3, 4; Royal Baking Powder Co. v. Federal Trade Commission, *supra* note 30, at 753. In the Kay case the respondent was ordered to desist advertising as radium a product found to possess no radioactive property. The court found no difficulty in "protecting" the sources of true radium, which are probably medical centers and physicians. In the Raladam case, however, the court did not believe physicians to be genuine competitors in commerce. No basic difference is discernible between the two cases.

⁵⁴ See PUBLIC REGULATIONS OF COMPETITIVE PRACTICES, *supra* note 2, at 114. Trades in which misleading terms in advertising were prevalent and against which the Commission has acted include manufacturers of textiles, soap, varnish, and furniture.

⁵⁵ *Supra* note 29.

⁵⁶ See *supra* note 10.

⁵⁷ See for example Federal Trade Commission v. Marsay School of Beauty Culture, 12 F. T. C. D. 303 (1929).

⁵⁸ Upon this point the Department of Justice seems to have based its petition for a review. U. S. Daily, Nov. 4, 1930, at 2705.

⁵⁹ In line with this argument are the views of former Commissioner Gaskill of the Trade Commission. See Gaskill, *op. cit. supra* note 35, at 677ff. See also WASSERMAN, *op. cit. supra* note 37, at 126.

ume of work.⁶⁰ Some limitation is necessary. But it is difficult, in view of the varied suggestions of legal writers, to determine precisely in what direction this limitation should be effected.⁶¹ In any event it may be questioned whether this is not an administrative problem peculiarly within the discretion of the Commission itself. Restrictive rulings already adopted⁶² and the establishment of a separate committee for false advertising⁶³ should considerably expedite proceedings in this field. Beyond that, if the Commission has stressed advertising to the neglect of combinations and other practices allegedly in restraint of trade, it accords with the current trend of economic thought, which modifies the "open competition" fetish and substitutes tolerance for suspicion of business methods.⁶⁴

The patent remedy lure is an admitted evil. That a new governmental scourge is not superfluous is clear. There seems no reason why an administrative body, whose charter is broad and whose advantages are manifold, should not be exploited to the limits of its usefulness.

⁶⁰ See TOULMIN, *op. cit. supra* note 37, at c. 6; PUBLIC REGULATION OF COMPETITIVE PRACTICES, *supra* note 2, at 219; Soule, *op. cit. supra* note 6, at 147. There was no lack of trepidation during the Senate discussion as to the wide scope and volume of the Commission's work and the resultant expense. See 51 CONG. REC. 11181, 11300 (1914). It is noteworthy that from 1925 to 1929 there was a consistent decline in the number of complaints pending at the beginning of each fiscal year. During the fiscal year 1928-1929, however, there occurred a sharp rise in the number of complaints docketed, with the result that the complaints pending at the end of that fiscal year exceeded the totals of the previous three years. See ANNUAL REPORT (1929) 115.

⁶¹ In at least one view, the Commission, by its extra-legal investigations, has usurped the functions of already existing governmental departments. TOULMIN, *op. cit. supra* note 37, at c. 3. The same writer has criticized the trade practice conferences. *Ibid.* 28. See also BUSINESS WEEK (April 30, 1930) 5. It is frequently suggested that the Commission should refrain from independent prosecutions of Sherman Act violators, and at most perform the function of a Master in Chancery for the Attorney General in such cases. Watkins, *op. cit. supra* note 6, at 583; Lynde, *The Federal Trade Commission and Its Relation To The Courts* (1916) 63 ANN. AM. ACAD. POL. & SOC. SCI. 24, 35. And of course it is very generally, and most justifiably, urged that greater discretion in the selection of advertising cases be employed. PUBLIC REGULATION OF COMPETITIVE PRACTICES, *supra* note 2, at 98, 115, 119ff.

⁶² See ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION (1929) 159; *supra* notes 41 and 46.

⁶³ This special subdivision of three attorneys was created by order of the Commission in 1929. ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION (1929) 55.

⁶⁴ See EDDY, *THE NEW COMPETITION* (7th ed. 1920) c. 4, 8; Watkins, *op. cit. supra* note 6, at 569.

ACTUAL AND NOTORIOUS POSSESSION IN ADVERSE POSSESSION

As the population of the United States has grown, it has become of progressively increasing importance to develop the natural resources and other advantages of wild lands. Such lands have, consequently, been the subject of frequent litigation, in the course of which reliance has often been placed on the doctrine of adverse possession for the purpose of asserting title.¹ The resulting development of this branch of property law has not been unattended by confusion in respect to the requirement that the possessory acts be actual and notorious. Some of the difficulties encountered are thrown into particularly bold relief when the landowner has no actual knowledge of the acts upon which the adverse claim is premised.

The legal aspects of the problem, in its bearing upon wild lands, were recently illustrated by the case of *Murray v. Bousquet*,² which was an action to quiet title and enjoin trespass on a piece of property claimed by inclosure and the pasturing of cattle. The land was part of a valley lying in a wild and mountainous region, used only for pasturage and visited only by hunters and herdsman. In deciding for the defendant holder of the record title, who lived in Chicago and had no knowledge of the use that had been made of his property, the Supreme Court of Washington gave particular weight to the lack of notoriety of the plaintiff's possession, which it held insufficient to support a presumption of notice to the owner. In the view of the court, to decide otherwise "would be to announce a rule under which a man might be disseised without his knowledge, and the statute of limitations would run against him when he had no reason to believe that his seisin had been interrupted."

The case appeared against a background of Washington decisions that left it an open question which of two somewhat opposing standards would be employed in determining the degree of notoriety necessary to adverse possession. On the one hand, it had been decided that the possessory acts may vary with the nature of the ground, and that where every use has been made of the property of which it is susceptible, more will not be required,³ it being sufficient if the claim be evidenced by such acts

¹ *Miller v. Chicago Mill & Lumber Co.*, 140 Ark. 639, 215 S. W. 900 (1919); *Carrere v. City of New Orleans*, 162 La. 981, 111 So. 393 (1926); *Central Maine Power Co. v. Rollins*, 126 Me. 299, 138 Atl. 170 (1927); *Doctor v. Turner*, 231 N. W. 115 (Mich. 1930); *Dead River Fishing & Hunting Club v. Stovall*, 147 Miss. 385, 113 So. 336 (1927); *Andrus v. Hutchinson*, 17 F. (2d) 472 (C. C. A. 5th, 1927).

² 154 Wash. 42, 280 Pac. 955 (1929).

³ *Grays Harbor Commercial Co. v. McCulloch*, 113 Wash. 203, 193 Pac. 709 (1920); *Alexander v. Bennett*, 91 Wash. 688, 158 Pac. 534 (1916).

as the owner would perform;⁴ and on the other, that the face and appearance of the ground must have been completely changed, so as to inform a casual observer that possession had been taken.⁵

Inasmuch as the first mentioned tests would seem to demand a result opposite to that reached in the principal case, it becomes pertinent to inquire *first*, whether in point of fact the application of these tests generally leads to such opposite result; *second*, if not, whether the lack of actual notice, emphasized in the opinion, accounts for the unwillingness of the court to apply the tests; *third*, if this be found improbable, what other factors may have controlled the decision.

The two divergent views implicit in the language of the earlier Washington decisions are expressions of two different methods of approach that prevail in the United States. The traditional statement of one is taken from the declaration of the United States Supreme Court in *Ewing v. Burnet* that acts of ownership are evidence of adverse possession "if the jury shall think that the property was not susceptible of a more strict or definite possession," and that "neither actual occupation, cultivation, or residence, are necessary to constitute actual possession when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim."⁶

The other view is well expressed by the Virginia court⁷ in *Taylor's Divisees v. Burnside's*, where *Ewing v. Burnet* is expressly limited to its facts, and the conclusion is reached that "wild and uncultivated lands cannot be made the subjects of adversary possession while they remain completely in a state of nature." It follows that if the claimant has not accomplished some change of condition, "it is in vain for him to say, that he has had all the possession of which the property was then sus-

Thus, town lots, being laid out for the purpose of erecting dwellings, are not susceptible of adverse possession by clearing, grading, fencing and gardening, *Peoples Savings Bank v. Bufford*, 90 Wash. 204, 155 Pac. 1068 (1916); *a fortiori* where no fencing, *Smith v. Chambers*, 112 Wash. 600, 192 Pac. 891 (1920), whereas similar acts on other than town lots have been considered sufficient, *Jackman v. Germain*, 96 Wash. 415, 165 Pac. 78 (1917); *Lawrence v. Mitchell*, 140 Wash. 355, 248 Pac. 882 (1926).

⁴ *Bellingham Bay Land Co. v. Dibble*, 4 Wash. 764, 31 Pac. 30 (1892).

⁵ *Flint v. Long*, 12 Wash. 342, 41 Pac. 49 (1895).

⁶ 11 Pet. 41, 53 (U. S. 1837).

⁷ Although in *Dawson v. Watkins*, 41 Va. 259 (1843), this jurisdiction seemed about to adopt the tests suggested by the United States Supreme Court.

ceptible; for that would lead to constructive possession, which is only attributable to the rightful owner."⁸

It may be supposed that these doctrines are not necessarily opposed to each other; and it is granted that in most cases involving land in settled districts, the same results are reached under both. But it will be found that they generally lead to opposite results in cases concerned with wild lands.⁹ This conclusion holds true as applied to the facts of the principal case, for under the *Ewing v. Burnet* tests the pasturing and fencing of land unsuited for other purposes has been held a sufficient possession,¹⁰ whereas in cases where these tests have not been applied, it has been held to the contrary.¹¹ It seems, therefore,

⁸ 42 Va. 165, 198 (1844). This doctrine has been consistently followed. *Overton's Heirs v. Davisson*, 42 Va. 211 (1844); *Koiner v. Rankin's Heirs*, 52 Va. 420 (1854); *Turpin v. Saunders*, 73 Va. 27 (1879); *Harman v. Ratcliff*, 93 Va. 249, 24 S. E. 1023 (1896); *Austin v. Minor*, 107 Va. 101, 57 S. E. 609 (1907); *City of Richmond v. Jones*, 111 Va. 214, 68 S. E. 181 (1910); *Whealton & Wisherd v. Doughty*, 112 Va. 649, 72 S. E. 112 (1911); *Craig-Giles Iron Co. v. Wickline*, 126 Va. 223, 101 S. E. 225 (1919).

⁹ Compare the following cases: (a) *Timbering*—*Clement v. Perry*, 34 Iowa 564 (1872), with *Parker v. Parker*, 1 Allen 245 (Mass. 1861), *Bailey v. Irby*, 2 Nott & McC. 343 (S. C. 1820), *Smith v. Morrow*, 30 Ky. 442 (1832), *Wilson v. Stivers*, 34 Ky. 634 (1836). (b) *Hunting or fishing*—*Illinois Steel Co. v. Bilot*, 109 Wis. 418, 85 N. W. 402 (1901), with *Leavenworth v. Reeves*, 106 Miss. 722, 64 So. 660 (1914), *Dead River Fishing & Hunting Co. v. Stovall*, *supra* note 1, *Austin v. Minor*, *supra* note 8. (c) *Hunting or fishing and grazing, fencing, or timbering*—*Gore v. Todd*, 150 Md. 285, 133 Atl. 126 (1926), *Gunby v. Quinn*, 156 Md. 123, 142 Atl. 910 (1928), *Baum v. Currituck Shooting Club*, 96 N. C. 310, 2 S. E. 673 (1887), *Gray's Harbor Commercial Co. v. McCulloch*, *supra* note 3, with *Philbin v. Carr*, 75 Ind. App. 560, 129 N. E. 19, (1920), 162 N. E. 247 (1928). (d) *Grazing and haying or timbering*—*Dice v. Brown*, 98 Iowa 297, 67 N. W. 253 (1896), with *Whealton & Wisherd v. Doughty*, *supra* note 8, *McCook v. Crawford*, 114 Ga. 337, 40 S. E. 225 (1901). (e) *Grazing, inclosure, and building*—*Seavey v. Williams*, 97 Ore. 310, 191 Pac. 779 (1920), with *Chilton v. White*, 72 W. Va. 545, 78 S. E. 1048 (1913). (f) *Paying taxes and grazing or timbering and other miscellaneous, isolated acts*—*Menkens v. Ovenhouse*, 22 Mo. 70 (1855), *McCaughn v. Young*, 85 Miss. 277, 37 So. 839 (1904), *Bellingham Bay Land Co. v. Dibble*, *supra* note 4, with *Taylor's Divisees v. Burnsides*, *supra* note 8, *Brown v. Rose*, 48 Iowa 231 (1878), 55 Iowa 734, 7 N. W. 133 (1881).

¹⁰ *Bloodsworth v. Murray*, 138 Md. 631, 114 Atl. 575 (1921). See also *Lantry v. Parker*, 37 Neb. 353, 55 N. W. 962 (1893); *Moore v. Curtis*, 169 N. C. 74, 85 S. E. 132 (1915).

¹¹ *Pray v. Pierce*, 7 Tyng 381 (Mass. 1811); *Trotter v. Newton*, 71 Va. 582 (1877). When courts have held, without the aid of the *Ewing v. Burnet* tests, that adverse possession was established by grazing and inclosure, it will usually be found that they have been controlled by statutes of the New York type, which make express provision for adverse possession by substantial inclosure. The California statute, which is of this type, further provides that when the adverse claim is founded upon a written instrument or upon a court decree or judgment, pasturage shall be

that the decision in the principal case cannot be explained as a consequence upon the normal application of the *Ewing v. Burnet* rules.

It may now be asked to what extent the court was influenced to reject these rules in the principal case by the fact of the owner's non-residence²² resulting in his actual ignorance of the adverse claim.

sufficient, though the land be uninclosed. CAL. CODES OF CIV. PROC. (Deering, 1923) § 325. Where the claim is not founded on a written instrument, however, and the statute consequently does not apply, it is held to the contrary. *Kern County Land Co. v. Nighbert*, 75 Cal. App. 103, 241 Pac. 915 (1925).

There are a number of Texas cases in which grazing and inclosure have been held sufficient without reference to the *Ewing v. Burnet* tests. *Cantagrel v. Von Lupin*, 58 Tex. 570 (1883); *Harris v. Bryson*, 34 Tex. Civ. App. 532, 80 S. W. 105 (1904); *Loring v. Jackson*, 43 Tex. Civ. App. 306, 95 S. W. 19 (1906); *Hardy Oil Co. v. Burnham*, 58 Tex. Civ. App. 285, 124 S. W. 221 (1909), 147 S. W. 330 (Tex. Civ. App. 1912); *Appel v. Childress*, 53 Tex. Civ. App. 607, 116 S. W. 129 (1909); *Hermann v. Fenn*, 61 Tex. Civ. App. 283, 129 S. W. 1139 (1910); *Unknown Heirs v. Robbins*, 152 S. W. 210 (Tex. Civ. App. 1912); *Griswold v. Comer*, 161 S. W. 423 (Tex. Civ. App. 1913); *Randolph v. Lewis*, 163 S. W. 647 (Tex. Civ. App. 1913), *aff'd*, 210 S. W. 795 (Tex. Comm. App. 1919). Texas has not adopted the New York statute. But the statutes under which the above cases were decided require either a written and duly registered memorandum of title, or a registered deed. TEX. REV. CIV. STAT. (1925) arts. 5509-5510. The fact that an adverse claim is founded on a registered muniment of title contributes to the element of notoriety, *Griswold v. Comer*, *supra*, and this may have influenced the Texas courts to sanction a possession of the character in question.

A few statements will be found in other jurisdictions to the effect that less notorious and less frequent acts will be required to constitute actual possession when they are performed under color of title. *Draper v. Shoot*, 25 Mo. 197 (1857); *Turner v. Hall*, 60 Mo. 271 (1875); *Woods v. Montevallo Coal & Transportation Co.*, 84 Ala. 560, 3 So. 475 (1887); *Baker v. DeArmijo*, 17 N. M. 383, 128 Pac. 73 (1912); *State v. Morgan*, 75 W. Va. 92, 83 S. E. 288 (1914); *Franklin v. Snow*, 195 Ala. 569, 71 So. 93 (1916); *SEDGWICK & WAIT, TRIAL OF TITLE TO LAND* (2d ed. 1886) 641; *WOOD, LIMITATIONS OF ACTIONS* (4th ed. 1916) 1250, and cases cited. But this does not appear to be the general view. *Coburn v. Hollis*, 3 Metc. 125 (Mass. 1841); *Ege v. Medlar*, 82 Pa. 86 (1876); *Keefe v. Bramhall*, 14 D. C. 551 (1885); *Mervin v. Morris*, 71 Conn. 555, 42 Atl. 855 (1899); *Sharp v. Shenandoah Furnace Co.*, 100 Va. 27, 40 S. E. 103 (1901).

A dictum in *Moran v. Moseley*, 164 S. W. 1093 (Tex. Civ. App. 1914), suggests that, even in the absence of recorded title, Texas courts would hold that adverse possession might be established by grazing and inclosure, provided this be the use to which the land should be best adapted. It is consequently uncertain whether these courts have held such acts sufficient, in the cases cited, because the factor of recorded title was present, or because they have been inclined to favor the *Ewing v. Burnet* tests.

¹² Residence of the owner in the vicinity apparently goes to prove actual knowledge or to aid the presumption of knowledge. *Melvin v. Proprietors of Locks and Canals*, 16 Pick. 137 (Mass. 1834); *Leeper v. Baker*, 68 Mo. 400 (1878); *Whitaker v. Erie Shooting Club*, 102 Mich. 454, 60 N. W.

The language in which the court expressed reliance on this fact first occurs in *Proprietors of the Kennebeck Purchase v. Springer*, where, in deciding that marking boundaries and cutting grass did not constitute sufficient possession, it was said:

"To constitute a disseisin of the owner of uncultivated lands by the entry and occupation of a party not claiming title to the land, the occupation must be of that nature and notoriety, that the owner may be presumed to know that there is a possession of the land adverse to his title; otherwise a man may be disseised without his knowledge, and the statute of limitations may run against him while he has no ground to believe that his seisin has been interrupted."¹³

Somewhat similar expressions will be found in *Pray v. Pierce*;¹⁴ but when the same court was subsequently urged to place an interpretation upon them which would require actual notice to the owner, it stated:

"It was said that there cannot be a disseisin without notice, and that as the mortgagor and mortgagee were out of the Commonwealth, they would not be disseised; but acts of notoriety, such as building a fence around the land or erecting buildings upon it, are notice to all the world."¹⁵

It is thus evident both from the context in which this language originally appeared, and from the early interpretation it received, that actual notice was not contemplated. On the contrary, it has become a generally accepted principle that a presumption of notice is sufficient,¹⁶ and that the presumption will be supported by possession of such character as to apprise the public in general,¹⁷ the community in the vicinity of the land in question,¹⁸ a stranger coming upon it,¹⁹ or the owner should

983 (1894); *Ambrose v. Huntington*, 34 Ore. 484, 56 Pac. 513 (1899); *O'Banion v. Simpson*, 44 Nev. 188, 191 Pac. 1083 (1920). But non-residence does not defeat the presumption of knowledge. *Worthley v. Burbanks*, 146 Ind. 534, 45 N. E. 779 (1896); *Baber v. Baber*, 121 Va. 740, 94 S. E. 209 (1917); *Wilson v. Storthz*, 117 Ark. 418, 175 S. W. 45 (1915); *Miller v. Chicago Mill & Lumber Co.*, *supra* note 1; *Harrison v. Speer*, 94 Fla. 937, 114 So. 515 (1927). However, for a statement emphasizing this factor very much as in the main case, see *Bethum v. Turner*, 1 Me. 111 (1820).

¹³ 4 Tyng 416, 419 (Mass. 1808).

¹⁴ *Supra* note 11, at 383.

¹⁵ *Poignard v. Smith*, 6 Pick. 172, 177 (Mass. 1828).

¹⁶ TIFFANY REAL PROPERTY (2d ed. 1920) § 501; (1911) 11 COL. L. REV. 673.

¹⁷ *Truesdale v. Ford*, 37 Ill. 210 (1865); *Frazer v. Seureau*, 60 Tex. Civ. App. 416, 128 S. W. 649 (1910).

¹⁸ *Morrison v. Kelly*, 22 Ill. 610 (1859); *Russell v. Mandell*, 73 Ill. 136 (1874); *Worthley v. Burbanks*, *supra* note 12; *Harrison v. Speer*, *supra* note 12.

¹⁹ *Eureka Mining & Smelting Co. v. Way*, 11 Nev. 171 (1876).

he visit the premises.²⁰

In view of the foregoing, it is clear that a man may be disseised without his knowledge. But inasmuch as statements to the contrary are not infrequently encountered, it seems that they must almost of necessity carry a meaning more nearly in accordance with established principles than is suggested by a literal interpretation.

Adverse possession demands a possession which shall be actual and notorious. Since *actual* refers to the physical character of the possession, and *notorious* to the attention it attracts, the rule on its face requires two distinct elements. Moreover, they are in fact distinct. A mere claim, a possession entirely constructive, a trespass, will not set the statute in motion, though known to the owner,²¹ for what is required to be notorious is an actual possession. But due to the close connection between these elements in respect to the physical basis on which they rest, their presence in a given case is usually determined by the same criterion—namely, the sufficiency of the possession to raise a presumption of notice.²² The result is that it often appears uncertain from the application of the test by the courts whether the physical character of the acts alleged to constitute possession is under consideration, or their notoriety.

It will be noticed, furthermore, that statements that one may not be disseised without his knowledge are usually employed in deciding against a party who predicates his possession on acts of a very equivocal nature.²³

These circumstances afford ground for the supposition that the real objection in such cases is not the want of actual notice to the owner, but the lack of an actual possession on the part of the adverse claimant. It seems, therefore, that the fear of the courts that a man may be disseised without his knowledge, is really a fear that he may be disseised by acts which would be inoperative to interrupt his possession even if he knew of them, and insufficient to support the presumption of notice if

²⁰ *Roberts v. Richards*, 84 Me. 1, 24 Atl. 425 (1891); *Whitaker v. Erie Shooting Club*, *supra* note 12; *Adams v. Clapp*, 87 Me. 316, 32 Atl. 911 (1895); *Worthley v. Burbanks*, *supra* note 12; *Brown v. Hartford*, 173 Mo. 183, 73 S. W. 140 (1903); *Earle Improvement Co. v. Chatfield*, 81 Ark. 296, 99 S. W. 84 (1907); *Norwood v. Mayo*, 153 Ark. 620, 241 S. W. 7 (1922).

²¹ *Slater v. Jepherson*, 6 Cush. 129 (Mass. 1850); *Parker v. Parker*, *supra* note 9. See also *Peoples Savings Bank v. Bufford*, *supra* note 3.

²² *TIFFANY*, *op. cit. supra* note 16.

²³ *Hapgood v. Burt*, 4 Vt. 155 (1832); *Royall v. Lisle*, 15 Ga. 545 (1854); *Whitehead v. Foley*, 28 Tex. 268 (1858); *Fuentes v. McDonald*, 85 Tex. 132, 20 S. W. 43 (1892); *Dawson v. Watkins*, *supra* note 7; *Taylor's Divisees v. Burnside's*, *Koiner v. Rankin's Heirs*, *Turpin v. Saunders*, *Harmar v. Ratcliff*, *City of Richmond v. Jones*, all *supra* note 8.

he did not.²⁴

If this analysis be correct, it follows that the lack of actual notice can hardly have been the sole reason for the unwillingness of the court to apply the *Ewing v. Burnet* tests in the principal case. It is believed, however, that the underlying reason may be found in the history of the tests themselves.

A study of the origin of the doctrine that the user of land as far as its character permits and as the owner would use it, satisfies the requirement of an actual and notorious possession, will show that before *Ewing v. Burnet* there were very few statements in cases dealing with adverse possession that could be said even to suggest such a doctrine. These few occur where either the possessory acts involved do not appear,²⁵ or the question of whether they constituted a possession was not under consideration by the court,²⁶ or the possession was so unequivocal in character as to afford scant justification for the expressions used.²⁷ The strongest support that could be claimed for the doctrine before *Ewing v. Burnet* will be found in *Simpson v. Blount*²⁸ and *Prescott v. Nevers*,²⁹ both of which are concerned with wild lands of which there was no permanent improvement. *Simpson v. Blount* contains the statement that "exercising that dominion over the thing, taking that use and profit, which it is capable of yielding in its present state, is a possession. It is all that can be done until the subject can be changed." In *Prescott v. Nevers* it was held that wild lands were in the possession of a claimant who had paid taxes, timbered, and cut hay upon them, under color of title, such being all the use of which the land was capable in its then state. The statement taken from the *Simpson* case, however, was unnecessary to the decision,³⁰ which was against the party setting up adverse possession; and

²⁴ See the wording of the phrase as it appears in *Trimble v. Smith*, 7 Ky. 257 (1815); *Bethum v. Turner*, *supra* note 12; *Bailey v. Irby*, *supra* note 9; *Musick v. Barney*, 49 Mo. 458 (1872); *Gentile v. Kennedy*, 8 N. M. 347, 45 Pac. 879 (1896).

²⁵ *Clark v. Lane*, 2 N. J. L. 397 (1807).

²⁶ *Mercer v. Watson*, 1 Watts 330 (Pa. 1833).

²⁷ *Tucker v. White*, 1 N. J. L. 94 (1791) (building, inclosure, clearing); *Boston Mill Corp. v. Bulfinch*, 6 Tyng 229 (Mass. 1810) (building); *Bryan v. Atwater*, 3 Day 181 (Conn. 1811) (building and residence), quoted with approval in *French v. Pearce*, 8 Conn. 439 (1831) (where the possessory were under the eye of the owner; *Sterling v. Drew*, 5 Mart. (N. S.) 203 (La. 1826) (maintaining cemetery); *LaFrombois v. Jackson*, 8 Cowen 589 (N. Y. 1826) (residence); *Melvin v. Proprietors of Locks & Canals*, *supra* note 12. (building, inclosure, cultivation).

²⁸ 14 N. C. 34 (1831).

²⁹ Fed. Cas. No. 11390 (C. C. Me. 1827).

³⁰ In *Green v. Harman*, 15 N. C. 158 (1833), the court referred to this dictum as "an exception founded on necessity and so considered at the time," and added, "it is safest to require an actual occupation, such as residence or cultivation."

the decision in the *Prescott* case was supported on another ground which was considered sufficient in itself. On the other hand, the doctrine in question, particularly in its application to wild lands, has been expressly repudiated a number of times.³¹

The actual decision in *Ewing v. Burnet*³² will be found to afford the doctrine no more support than the earlier decisions, for in that case the owner in fact knew of the acts (taking gravel) by which it was held the adverse claimant had established his possession. The requirement of notoriety, being intended for the purpose of placing the means of knowledge within the owner's reach, is completely satisfied when the fact of actual knowledge has been established.³³ And as notoriety is usually evidenced by the same facts that go to prove actual possession, the practical effect of actual notice is to sanction a possession which is not only less notorious, but also, within limits, less actual than would otherwise be required.

It is apparent, therefore, that the doctrine under discussion, which has since been widely accepted,³⁴ rested originally on a very slender foundation of adjudicated cases. Though announced in most of the states admitted to the Union after the decision of *Ewing v. Burnet*, in 1837,³⁵ it has rarely been coun-

³¹ *Bailey v. Irby*, *supra* note 9; *White v. Reid*, 2 Nott & McC. 534 (S. C. 1820); *Proprietors of the Kennebec Purchase v. Laboree*, 2 Me. 275 (1823); *Jackson v. Warford*, 7 Wend. 62 (N. Y. 1831); *Smith v. Morrow*, *Wilson v. Stivers*, both *supra* note 9.

³² It is from the language of the Supreme Court in this case that the doctrine has derived chief impetus.

³³ *Cook v. Babcock*, 11 Cush. 206 (Mass. 1853); *McAuliff v. Parker*, 10 Wash. 141 (1894); *Burnside v. Doolittle*, 24 S. W. (2d) 1011 (Mo. 1930); *McCaughn v. Young*, *Leavenworth v. Reeves*, both *supra* note 9.

³⁴ See cases comprising the first members of the groups *supra* note 9, and cases cited *supra* note 10; also the following: *Farley v. Smith*, 39 Ala. 38 (1863); *Brumagim v. Bradshaw*, 39 Cal. 24 (1870); *Trask v. Success Mining Co.*, 28 Idaho 483, 155 Pac. 288 (1916); *Russell v. Mandell*, *supra* note 18; *Johns v. McKibben*, 156 Ill. 71, 40 N. E. 449 (1895); *Burns v. Curran*, 282 Ill. 476, 118 N. E. 750 (1918); *Dyer v. Eldridge*, 136 Ind. 654, 36 N. E. 522 (1893); *Worthley v. Burbanks*, *supra* note 12; *Tolley v. Thomas*, 46 Ind. App. 559, 93 N. E. 181 (1910); *Hitt v. Carr*, 62 Ind. App. 80, 109 N. E. 456 (1916); *Langworthy v. Myers*, 4 Iowa 18 (1856); *Booth & Graham v. Small & Small*, 25 Iowa 177 (1868); *Colvin v. McCune*, 39 Iowa 502 (1874); *Guinn v. Spillman*, 52 Kan. 496, 35 Pac. 13 (1893); *Whitaker v. Erie Shooting Club*, *supra* note 12; *Sage v. Morosick*, 69 Minn. 167, 71 N. W. 930 (1897); *Yard v. Ocean Beach Ass'n*, 49 N. J. Eq. 306, 24 Atl. 729 (1892); *McCaskill v. Pegram Farm & Lumber Co.*, 169 N. C. 24, 85 S. E. 39 (1915); *Cass v. Richardson*, 42 Tenn. 28 (1865); *Moran v. Moseley*, *supra* note 11; *Merrill v. Tobin*, 30 Fed. 738 (C. C. N. D. Iowa 1887); *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239 (1891); *Clithero v. Fenner*, 122 Wis. 356, 99 N. W. 1027 (1904); *cf. Town of New Shorham v. Ball*, 14 R. I. 566 (1884). All of the above are concerned with land in the state of nature or in sparsely settled regions.

³⁵ See *supra* note 34.

tenanced (with the noteworthy exception of North Carolina)³⁶ in the jurisdictions established before that date.³⁷ Where the doctrine has been accepted, the result is not only that there has been a tendency to relax the requirements for the adverse possession of wild lands to a certain extent, but also that difficulties have been encountered in its practical application.

The difficulties arise when the acts of the adverse claimant are few and unlikely to attract attention, and it becomes necessary to press the doctrine toward its logical extreme. Thus, in a number of cases the courts have been able to hold, without doing violence to previous pronouncements, that there was no adverse possession, either because the land was capable of more complete enjoyment,³⁸ or because the contrary had not been shown³⁹; in other cases, nevertheless, where the land was of practically no use, the very courts that have been most ready to apply the doctrine, have been forced to repudiate it.⁴⁰

By passing *sub silentio* over the doctrine evolved from *Ewing v. Burnet*, it is believed that the court in the principal case properly disregarded a rule which appears unsound when applied to wild lands. If the language of the decision may be understood as having reference to the lack of actual possession, it is believed that it strikes directly at the weakest element in the plaintiff's case. While frontier conditions existed, the courts may not have been without justification in adopting a liberal attitude toward the rules of adverse possession, for the benefit

³⁶ With no more foundation than the dictum in *Simpson v. Blount*, *supra* note 28, a doctrine developed there independently of *Ewing v. Burnet*, in substance that taking the ordinary use and profit which land is capable of yielding in its condition at the time is a sufficient possession to set the statute of limitations in motion. It has been consistently applied to wild land cases in North Carolina. *Tredwell v. Reddick*, 23 N. C. 56 (1840); *Baum v. Currituck Shooting Club*, *supra* note 9; *Berry v. McPherson*, 153 N. C. 4, 68 S. E. 892 (1910); *Coxe v. Carpenter*, 157 N. C. 557, 73 S. E. 113 (1911); *Locklear v. Savage*, 159 N. C. 236, 74 S. E. 347 (1912); *McCaskill v. Pegram Farm & Lumber Co.*, *supra* note 34; *Moore v. Curtis*, *supra* note 10. In other jurisdictions it is occasionally cited in support of *Ewing v. Burnet*. See *Booth & Graham v. Small & Small*, *Colvin v. McCune*, *Guinn v. Spillman*, all *supra* note 34; *cf. Dyer v. Eldridge*, *supra* note 34. The doctrine seems to represent a departure from the traditional view expressed at an earlier date in *Grant v. Winborne*, 3 N. C. 56 (1798).

³⁷ Particularly in its application to wild lands, but see *Gore v. Todd*, *Gunby v. Quinn*, *Menkens v. Ovenhouse*, all *supra* note 9; *Bloodsworth v. Murray*, *supra* note 10; *Yard v. Ocean Beach Ass'n*, *Cass v. Richardson*, both *supra* note 34.

³⁸ *Loffin v. Cobb*, 46 N. C. 406 (1854); *Gildehaus v. Whiting*, 39 Kan. 706, 18 Pac. 916 (1888).

³⁹ *Pullen v. Hopkins*, *Clarke & Co.*, 69 Tenn. 741 (1878); *Washburn v. Cutter*, 17 Minn. 361 (1871); *Ozark Land Co. v. Leonard*, 20 Fed. 881 (C. C. E. D. Ark. 1884).

⁴⁰ *Brown v. Rose*, *Philbin v. Carr*, both *supra* note 9.

of the settler who had made improvements in good faith.⁴¹ But frontier conditions have passed. Moreover, the facts of some of the cases suggest that a liberal policy of this kind would not infrequently operate in support of dishonest claims, prompted by the enhancement in value of hitherto unimproved lands.⁴² Under such circumstances, there is less excuse for departing from the strict requirements of the doctrine.

DOES THE SHERMAN ACT PROHIBIT THE ADOPTION OF STANDARD CONTRACTS AND ARBITRATION AGREEMENTS BY TRADE CONFERENCES?

It has been said that the law relating to restraints upon trade is a "branch of the law which has at all times been peculiarly susceptible to influence from current views of public policy."¹ A characteristic of recent industrial progress has been a movement toward (1) standardization, as evidenced by Mr. Hoover's activities as Secretary of Commerce;² (2) arbitration, as evidenced by the concurrent efforts of both the National Commissioners on Uniform Statutes and the American Arbitration Association to draft and have passed uniform laws for the purpose of giving efficacy to agreements to submit controversies to arbitration;³ and (3) self-regulation, or the elimination of trade abuses by concerted action, often, though not invariably, in the form of trade practice conferences under the auspices of the Federal Trade Commission.⁴ Yet a recent decision of the United States

⁴¹ See *Philbin v. Carr*, *supra* note 9, at 576, 129 N. E. at 25.

⁴² *Clark v. Wilson*, 174 Ark. 669, 297 S. W. 1008 (1927); *Miller v. Chicago Mill & Lumber Co.*, *Doctor v. Turner*, *Andrus v. Hutchinson*, all *supra* note 1; *Hardy Oil Co. v. Burnham*, *supra* note 11.

¹ *Attwood v. Lamont*, [1920] 3 K. B. 571, 581.

² TRADE ASSOCIATION ACTIVITIES (Dep't of Comm. 1927) 3, 4, 108, 109, 114-115. "The advantages of the standard contract form arise partly from its inherent fairness both to the owner and to the contractor and from the workability of its provisions, which reduce disputes and delays to a minimum, and to the fact that it is well known to architects, builders, and the public. Neither party has to employ a lawyer to find out whether a 'joker' is hidden somewhere in fine print. The essentials of each contract can be filled in with a minimum effort." *Ibid.* 163.

The attitude of the Department of Commerce is shared by the National Industrial Conference Board. See TRADE ASSOCIATIONS—THEIR ECONOMIC SIGNIFICANCE AND LEGAL STATUS (published by the National Industrial Conference Board, 1925) 275-278. And by text-writers as well. KIRSH, TRADE ASSOCIATIONS—THE LEGAL ASPECTS (1928) 208.

³ For the text of the two draft statutes, see STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930) 983, 977. See also 47 A. B. A. REP. 295 (1922).

⁴ DUNN, THE FEDERAL ANTI-TRUST LAW (1930) 42-43; HENDERSON, THE FEDERAL TRADE COMMISSION (1924) 243-244; PUBLIC REGULATION OF COM-

Supreme Court, *Paramount Famous Lasky Corporation v. United States*,⁵ wherein all three devices of standardization, arbitration, and self-regulation were involved, has placed the stigma of illegality upon each, in granting an injunction against the continued use of arbitration under the Standard Exhibition Contract in vogue in the moving picture industry.

The Supreme Court has repeatedly admonished the bar that "each case arising under the Sherman Act must be determined upon the particular facts disclosed by the Record, that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied."⁶ Yet in the *Paramount* case, the statement of facts is so meagre, and so barren of reference to the evils at which the condemned restraint was aimed,⁷ that it is difficult to assign a limit to the implications of the case, and well-nigh impossible to render intelligent advice on the legality of any contemplated similar agreement.⁸

The Record discloses that the motion picture industry as represented by the producers and distributors on the one hand, and the exhibitors or theatre owners on the other, had been confronted in 1921 with conditions bordering on chaos. This drastic condition appeared to be due chiefly to (1) the increasing complexity of the necessary terms of contracts for the lease of pictures for exhibition purposes, (2) the somewhat bewildering diversity of the obligations imposed upon the exhibitors,⁹ (3)

PETITIVE PRACTICES (published by the National Industrial Conference Board 1929) 224 *et seq.*

⁵ 51 Sup. Ct. 42 (U. S. 1930).

⁶ *Maple Flooring Manufacturers Ass'n. v. United States*, 268 U. S. 563, 579, 45 Sup. Ct. 578, 583 (1925).

⁷ It has generally been deemed relevant, in cases under the Sherman Act, to inquire whether there was or was not in the agreement assailed as illegal any "main lawful purpose to subserve which partial restraint is permitted." *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 283 (C. C. A. 6th, 1898), modified and affirmed, 175 U. S. 211, 20 Sup. Ct. 96 (1899).

⁸ Prof. Beale has observed that "parties contemplating a commercial dealing consult a lawyer a hundred times in advance of action for every time they consult him, after the contract is made and broken, to represent them in litigation. What business men need is a rule of law which a lawyer can give them when they consult him and upon which they can act with ease and certainty." Beale, *What Law Governs the Validity of a Contract* (1910) 23 HARV. L. REV. 1, 264.

⁹ It must not be assumed that a motion picture exhibition contract merely obligates the exhibitor to pay rent. He is required to take care of the film while in his possession, and to pay for loss or damage according to the replacement value; if he has contracted for a subsequent "run" of a picture, he must refrain from advertising it until the first "run," at another exhibitor's house is completed; he must exhibit the picture at the theater

the frequency with which breaches were committed and forfeitures declared simply as a result of either (a) failure of the exhibitors to read and follow instructions for the forwarding of films or (b) inability to accept and exhibit a film because of a conflict of play-dates, resulting from the fact that the non-uniform contracts allowed distributors to fix dates arbitrarily without consulting exhibitors. "Dark houses" following hard on the heels of these disputes caused losses to exhibitors and producers. The distributors, seeking to protect themselves from exhibitors, many of whom held both their theater and their equipment on lease, and hence were judgment proof, exacted advance deposits as a protective device. The exhibitors, resenting the stigma upon their collective integrity and protesting against the added financial burden, suggested arbitration as an alternative to advance deposits and standardization as a remedy for breaches of contract which were so often unintentional.¹⁰ Considerable progress toward the attainment of these aims was made from 1921 to 1926, and in 1927 it was further facilitated by the Federal Trade Commissions calling a trade practice conference at which all branches of the industry were represented and needed modifications in the existing standard contract were fully and frankly discussed.¹¹ Paradoxically enough, it was this standard contract as modified under the auspices of the Federal Trade Commission which precipitated the *Paramount* suit by the Department of Justice, and the decision of Mr. Justice McReynolds wherein he seemingly refuses to apply the rule of reason in upholding the Government's contention that the adoption of the standard contract with the arbitration feature was, despite motive and auspices, an unlawful restraint upon interstate trade within the meaning of the Sherman Act.

The language of the opinion leaves in doubt just what was decided in the case. Read in the light of other leading cases

named in the contract and at no other, for an unlawful re-exhibition will amount to a violation of the copyright law, and may render the distributor liable to some other exhibitor if the latter has been assured that a picture contracted for will not be exhibited under circumstances of time and place likely to impair its value to him; he must forward the film after use to the next exhibitor entitled to it in time to permit the next exhibition to occur when scheduled, or if the contract so requires he must return the film to the distributors' Exchange; and he must adhere to the schedule of play-dates which has been so arranged by the distributor as to meet the requirements of all exhibitors having rights in the film for enjoyment *sciatim*. It is this concatenation of rights in a particular film which renders the prompt settlement of disputes imperative, and which caused the arbitration features to be adopted as the best means to this end.

¹⁰ The appellants' brief points out 29 different provisions in the standard contract for which the exhibitors were responsible. pp. 40-43.

¹¹ See TRADE PRACTICE CONFERENCES (ed. of July 1, 1929) 83-133; ANN. REP. FED. TR. COMM. (1929) 6-8.

under the Sherman Act, the decision, so far from abandoning permanently the rule of reason, as some observers have been led to fear,¹² probably does nothing more than reflect an individual prejudice against the rule on the part of the author of the opinion. Indeed it may be that *quot homines tot sententiae* has become the only permissible generalization in this field of the law. If, as seems probable, all the Court intended was to affirm the action of the lower court ruling the arbitration clause of the standard exhibition contract illegal, the trade associations have been subjected to only a temporary set-back. The guarded opinion of the lower court indicated that with the proper machinery, adequately protecting all interests, arbitration might be established in an industry.¹³ The Court, on the other hand, may have intended to hold that while standardization, arbitration, and trade practice conferences are each separately lawful, their combination is not, upon the principle that, *mutatis mutandis*, a charge of conspiracy can no more be refuted by "dismembering it and viewing its separate acts"¹⁴ than a faggot can "be destroyed by taking up each item of conduct separately and breaking the stick."¹⁵ If the language of Mr. Justice McReynolds be taken literally, it is open to question whether the decision prohibits only those standard contract clauses embodying compulsory arbitration or standard contracts in general. At any rate the severely practical result of the opinion is that a vast deal of the constructive work to which trade associations have been devoting their energies for the past decade has been jeopardized, and their opportunities for good seriously impaired as to the future.

In declaring it to be manifest that the standard form of contract and rules of arbitration adopted by a trade association are not a "normal and usual agreement in aid of trade and commerce"¹⁶ the decision ignores the wide-spread use of standard

¹² See an article by David Lawrence in the New York Evening Sun, Nov. 28, 1930, at 8.

¹³ *United States v. Paramount Famous Lasky Corp.*, 34 F. (2d) 984, 989 (S. D. N. Y. 1929). It has been pointed out elsewhere that the lack of impartiality in the arbitration system established in the movie industry has been a constant source of complaint on the part of exhibitors. See Comment (1929) 39 YALE L. J. 884.

¹⁴ *United States v. Patten*, 226 U. S. 525, 544, 33 Sup. Ct. 141, 145 (1913)

¹⁵ *Edwards v. Chile Copper Co.*, 270 U. S. 452, 455, 46 Sup. Ct. 345, 346 (1926).

¹⁶ "The fact that the Standard Exhibition Contract and Rules of Arbitration were evolved after six years of discussion and experimentation does not show that they were either normal or reasonable regulations. That the arrangement existing between the parties cannot be classed among 'those normal and usual agreements in aid of trade and commerce' spoken of in *Eastern States Lumber Ass'n v. United States*, [234 U. S. 600, 612 34 Sup. Ct. 951, 954 (1914)] is manifest. Certainly it is unusual and we

contracts by a score of trade associations¹⁷ and the untold number of contracts which have been cast in the standard mould. Approximately a million contracts in the movie industry alone¹⁸ are affected by this decision. The producers face not only triple damage suits for a violation of the Sherman Act¹⁹ but possible repudiation of contractual obligations by the exhibitors on the ground of illegality.²⁰ Indeed, even before the decision of the Supreme Court in the *Paramount* case, the illegality of the Standard Exhibition Contract was raised as a defense by an exhibitor seeking to escape liability for his refusal to accept the number of pictures which he had agreed to take under such a standard contract.²¹ In this case the Federal District Court of Colorado, basing its decision on the lower court holding in the *Paramount* case, took the view that only the arbitration clause was illegal, and held that, since under the doctrine of divisibility of contract the arbitration clause might be eliminated from consideration,²² its illegality could not serve as a defense to a general action on the contract. The court held further that the Standard contract was intrinsically valid and could not be avoided by the incidental participation of one of the parties in a combination in restraint of trade. Under this view the producer would be protected against collateral attack on the contract,²³ although still compelled

think it necessarily and directly tends to destroy the kind of competition to which the public has long looked for protection. *United States v. American Oil Co.*, [262 U. S. 371, 390 43 Sup. Ct. 607, 611 (1923)]." *Paramount Famous Lasky Corp. v. United States*, *supra* note 5, at 45.

¹⁷ Among the trade associations which have adopted standard contracts, many of which include provision for arbitration, are: Ass'n of American Wood Pulp Importers, American Spice Trade Ass'n, National Commercial Fixtures Manufacturers' Ass'n, National Ass'n of Granite Industries, National Wholesale Grocers' Ass'n, American Boiler Manufacturers' Ass'n, Knit Goods Manufacturers' Ass'n, National Wholesale Dry Goods Ass'n, Linseed Ass'n, National Ass'n of Builders' Exchanges, National Ass'n of Master Plumbers, National Ass'n of Sheet Metal Contractors of the United States, National Electrical Contractors' Ass'n of the United States, National Ass'n of Marble Dealers, Building Granite Quarries Ass'n, Building Trades Employers' Ass'n of the City of New York, Actors' Equity Ass'n, Rubber Exchange of New York, Southern Sash, Door and Millwork Manufacturers' Ass'n, Cordage Institute.

¹⁸ *United States v. Paramount Famous Lasky Corp.*, *supra* note 13, at 985.

¹⁹ *Majestic Theatres Co. v. United Artists Corp.*, 43 F. (2d) 991 (D. Conn. 1930).

²⁰ *Columbia Pictures Corp. v. Be-Metallic Inv. Co.*, 42 F. (2d) 873 (D. Colo. 1930).

²¹ *Ibid.*

²² ANSON, *CONTRACTS* (Corbin's ed. 1919) § 261. "Where you cannot sever the illegal from the legal part of a covenant the contract is altogether void, but where you can sever them . . . you may reject the bad part and retain the good."

²³ *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431

to face a direct attack under the Sherman Act for trade association activities. But if it may be inferred from the language of Mr. Justice McReynolds in the *Paramount* case that the entire Standard Exhibition Contract is illegal as being in restraint of trade an avenue is open through which unscrupulous exhibitors may crawl from under their contractual obligations.²⁴

That the legal limits of concerted action are set so narrowly comes as a surprise. Relying almost solely on *Eastern States Retail Lumber Dealers' Ass'n v. United States*²⁵ Mr. Justice McReynolds ignores the later and more liberal ruling in the *Chicago Board of Trade Case*,²⁶ in the *Cement Manufacturers' Case*²⁷ and in the *Maple Flooring case*.²⁸ If the true construction of the statute is such that its terms are violated by the elimination through concerted action of unfair or fraudulent trade practices, to the extent and reprehensibility, even to the existence, of which the statute compels the court to close its eyes, then the prompt amendment of that statute becomes an imperative public necessity. The injury to the public by the adoption of the standard form of contract by trade associations is, all things considered, less manifest than the opinion of the Court would have us believe.²⁹ Surely when a court in effect condemns a device devoted to trade improvement, upon the ground that the device—in this case an agreement to offer standard forms of contracts only³⁰—impairs the freedom to do harm which would otherwise

(1902); *Wilder Manufacturing Co. v. Corn Products Refining Co.*, 236 U. S. 165, 35 Sup. Ct. 398 (1915); *Small Co. v. Lamborn & Co.*, 267 U. S. 248, 45 Sup. Ct. 300 (1925).

²⁴ *Continental Wall Paper Co v. Voight*, 212 U. S. 227, 29 Sup. Ct. 280 (1909).

²⁵ 234 U. S. 600, 34 Sup. Ct. 951 (1914).

²⁶ 246 U. S. 231, 38 Sup. Ct. 242 (1918). In this case the Court said: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." *Ibid.* 238, 38 Sup. Ct. at 244.

²⁷ 268 U. S. 588, 45 Sup. Ct. 586 (1925).

²⁸ *Supra* note 6.

²⁹ *Supra* notes 16 and 17. See LLEWELLYN, *THE EFFECT OF LEGAL INSTITUTIONS UPON ECONOMICS* (1925) 15 AM. ECON. REV. 665, 675. "The standardized contract with arbitration is thus a shining engine of control for any highly specialized going concern within, and partly independent of that greater going concern, the state."

³⁰ Standardization is ineffective unless there exist means of making

exist, the Court is mistaking shadow for substance and is conferring upon the public an illusory and deceptive benefaction.³¹

The logic of Mr. Justice McReynolds' language if followed to a rigorous conclusion would make the Federal Trade Commission party to illegal conspiracies and combinations in restraint of trade. The opinion is devoid of any language affording a basis for speculation as to how the ends desired by Federal Trade Commission conferences can be attained by lawful means. It might well prove most satisfactory if Congress were to accord statutory recognition to the trade practice conference, which is at present an extra-legal institution,³² and either establish a strong presumption of reasonableness and hence legality in joint action taken pursuant to such a conference, or give protection to participants therein against treble damage suits. The existing dilemma whereby business men must incur either the hostility of the Federal Trade Commission if they decline to participate, or an avalanche of treble damage suits, as well as a criminal prosecution, if they do participate, is a hardship which should not be permitted to endure.³³

standard forms prevail, and that can only be done by not contracting with persons who decline to use them. The Supreme Court having banned the means, would seem to have outlawed standardization itself as well. The dictum in its favor in *Maple Flooring Manufacturers Ass'n v. United States*, *supra* note 6, at 582, 45 Sup. Ct. at 584, would seem to be overruled. The same applies to the observation of Judge Grubb in *United States v. Aileen Coal Co.*, S. D. N. Y. 1917, charge to the jury (Rec. p. 2300), and of Judge L. Hand in *United States v. Atlantic Terra Cotta*, S. D. N. Y., 1921, in passing sentence (*ibid.*). As to the legality of standardization under state laws, see *State v. Carondelet Planing Mill Co.*, 309 Mo. 353, 274 S. W. 780 (1925); *Berensen v. H. G. Vogel Co.*, 253 Mass. 185, 148 N. E. 450 (1925), *certiorari* denied, 269 U. S. 577, 46 Sup. Ct. 103 (1926).

³¹ The Court's finding of a public injury in concerted actions which have nothing to do with the quality or the price of the product but only with mechanical details affecting activities behind the scenes, and before the public's participation began, is hard to sustain.

³² See DUNN, *op. cit. supra* note 4.

³³ It is particularly unfortunate that the opinion in the principal case fails to mention the Federal Trade Commission's responsibility in the premises.

DETERMINATION OF THE VALIDITY OF MUNICIPAL ORDINANCES

THE development of the municipal corporation as a unit of government has been marked by a large volume of litigation chiefly concerned with the relation of the state to its local units in various overlapping spheres of regulation. The problem of defining this relation has usually arisen when those who desire to override a municipal ordinance, in their search for a weapon with which to attack its validity, have found available state statutes on the same subject and have sought to establish that the objectionable ordinance was inconsistent therewith. The whole issue is thus phrased in terms of a "conflict" of governmental powers¹ and its solution is sought in a determination of the limits of "power" granted to the municipality by the constitution or legislature of the state. As a result the comparative effectiveness of the ordinance as a regulatory measure, which from a practical standpoint ought be determinative of its propriety, is rarely expressly considered.

Two recent cases, although reaching opposite conclusions on the issue of validity, are equally illustrative of the concealment behind abstractions of the problem of efficacy in regulation. In *Shelton v. the City of Shelton*² an ordinance which made unlawful within city limits the sale of any milk that was not pasteurized or obtained from tuberculin-tested cows was held invalid on the ground that it was in "conflict" with a state statute which provided for the sale of several other grades of milk in addition to those permitted by the ordinance. In *Robia Holding Corporation v. the Mayor of New York*³ an ordinance providing for the levy of tolls upon a proposed bridge between Manhattan and Queens was opposed on the ground that according to the accepted law of the state the power to levy tolls was the prerogative of the sovereign state and could only be exercised by the legislature. The court held that the ordinance was not in "conflict" with the general law because the power to levy tolls had been implicitly delegated to the city when

¹ "The authority of the state is supreme in every part of it, and in all public undertakings the state is the proprietor. For convenience of local administration, the state has been divided into municipalities, in each of which are to be found local officers exercising a certain measure of authority, but in that which they do they are but the agents of the state, without power to do a single act beyond the boundaries set by the state acting through its legislature." *Ryan v. City of New York*, 177 N. Y. 271, 273, 69 N. E. 599, 600 (1904). Cf. *State v. Williams*, 68 Conn. 131, 35 Atl. 421 (1896); *City of Newport v. Horton*, 22 R. I. 196, 47 Atl. 312 (1900); 1 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 98.

² 150 Atl. 811 (Conn. 1930).

³ 246 N. Y. Supp. 210 (App. Div. 1st Dep't 1930).

the legislature authorized it, in its charter, to build bridges and to regulate the use of its streets.

The general rule cited in these cases is that when a "conflict" exists between an ordinance and an act of the state legislature, the former must yield⁴ unless there is room for concurrent jurisdiction, and that even under these circumstances the ordinance must be consistent with the general law.⁵ When first promulgated this rule undoubtedly provided for effective regulation of most of the situations which demanded attention, but as the municipalities developed in importance it became increasingly apparent that statewide legislation could not deal effectively with all local problems. Attempts were made to remedy this deficiency without depriving the legislature of its ultimate regulatory control. These attempts took the form of a classification of cities in terms of the degree of local autonomy,⁶ and of state constitutional amendments directed against specific abuses in municipal legislation.⁷ Such means, however, proved inadequate and it became necessary to make exceptions to the accepted general rule.

It was first said that ordinances were valid which were passed by virtue of specific grants of power conferred upon a municipality by its charter or by other legislation, even if they were technically "inconsistent" with state statutes. The category of these special grants was then extended to include the "police power" and the "general welfare" clauses of the city charters. Thus, although the state law provided for the licensing of pool rooms, an ordinance prohibiting them was held valid because it was passed under a provision of the charter which authorized the city to "restrain or prohibit poolrooms."⁸ Similarly, ordinances giving ambulances and fire engines traffic preferences which violated the State Motor Vehicle Act were upheld as within the valid exercise of the city's police power.⁹ Moreover,

⁴ Van Buren v. Wells, 53 Ark. 368, 14 S. W. 38 (1890); Town of Livingston v. Scruggs, 18 Ala. App. 527, 93 So. 224 (1922); Polsky v. Walsh, 220 App. Div. 559, 222 N. Y. Supp. 120 (1st Dep't 1927); Shelton v. City of Shelton, *supra* note 2.

⁵ Rossberg v. State, 111 Md. 394, 74 Atl. 581 (1909); Village of Struthers v. Sekol, 108 Ohio St. 263, 140 N. E. 519 (1923); (1927) 15 CALIF. L. REV. 345. See also cases cited *supra* note 4.

⁶ DODD, STATE GOVERNMENT (2d ed. 1928) 392-397.

⁷ MCBAIN, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE (1916) 29-63.

⁸ Corinth v. Crittenden, 94 Miss. 41, 47 So. 525 (1908). Accord: Carey v. Guest, 78 Mont. 415, 258 Pac. 236 (1927) (traffic regulations); *cf.* City of Morgansfield v. Walten, 202 Ky. 641, 261 S. W. 12 (1924) (repeal of grant renders ordinance nugatory).

⁹ State v. Brown, 142 Md. 27, 119 Atl. 684 (1922). *Cf.* Elsnor Bros. v. Hawkins, 113 Va. 47, 73 S. E. 479 (1912) (sale of firearms by pawnbrokers).

the broad control over municipal affairs¹⁰ conferred upon certain cities by the many states which grant "freehold" or "home rule" charters¹¹ was in fact extended by judicial sanction of specific measures. Thus where a city charter contained a complete scheme for the letting of municipal contracts, provisions of the state law as to surety bonds were held to be inapplicable,¹² and when a charter conferred upon a city the power to regulate public utilities, insofar as such regulation was necessary for the enforcement of local police measures, the state railroad commission was held to be without jurisdiction over the placing of grade crossings and similar matters.¹³

A further elaboration of the general rule has been necessitated in those situations where a statute, though providing adequate regulation throughout most of the state, is not effective in dealing with certain local exigencies.¹⁴ Under such circumstances it has been almost uniformly held that ordinances are valid which impose regulations and penalties "in addition" to those provided for by the general law.¹⁵ Thus where a state

¹⁰ The meaning of "municipal affairs" is, of course, not fixed, but fluctuates with every change in municipal conditions. See *Helmer v. Superior Court*, 48 Cal. App. 140, 141, 191 Pac. 1001 (1920). Problems formerly local rapidly develop to such an extent that they can no longer be effectively regulated by the municipality. For example, a short time ago, the regulation of traffic on the streets was considered a purely municipal affair, but the expansion of motor traffic and its present wide range have removed it from the scope of local control and made it imperative that the regulation thereof be uniform throughout the state. *Cf. Ex parte Daniels*, 183 Cal. 636, 192 Pac. 442 (1920); *Scheiderman v. Sesanstein*, 112 Ohio St. 80, 167 N. E. 158 (1929); *McQuillin, MUNICIPAL CORPORATIONS* (2d ed. 1928) § 683; *Comment* (1928) 16 CALIF. L. REV. 336.

¹¹ Arizona, California, Colorado, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Washington, Wisconsin.

¹² *Loop Lumber Co. v. Van Loben Sels*, 173 Cal. 228, 159 Pac. 600 (1916).

¹³ *City of Los Angeles v. Central Trust Co.*, 173 Cal. 323, 159 Pac. 1169 (1916).

¹⁴ Such exigencies might well arise where the population is disproportionately distributed throughout the state. Thus Milwaukee, the only large city in Wisconsin, is seven times the size of the next largest community and the people of the state live, for the most part, in towns and villages of less than twenty-five thousand inhabitants. Further complications from the point of view of effective city regulations are suggested by the fact that in 1929 one third of the members of both houses of the legislature gave their occupations as farmers. See (1929) 18 NAT. MUN. REV. 737.

¹⁵ *Standard Chemical Oil Co. v. Troy*, 201 Ala. 89, 77 So. 383 (1917); *Lamar & Smith v. Stroud*, 5 S. W. (2d) 824 (Tex. Civ. App. 1928) (street crossing); *Flynn v. Bledsoe Co.*, 92 Cal. App. 145, 267 Pac. 387 (1928) (parking); *Ex parte Iverson*, 199 Cal. 582, 250 Pac. 681 (1926) (liquor prescriptions under the prohibition law); *Keats v. Board of Police Commissioners of Providence*, 42 R. I. 240, 107 Atl. 74 (1919) (provision for punishment of police officers on conviction of crime by "reprimand, forfeiture of pay, reduction in rank, or dismissal from force" held consistent

Motor Vehicle Act provided that automobiles should be operated with reasonable care while passing street cars, an ordinance was upheld which required all automobiles to be stopped within ten feet of the rear of the street car.¹⁶ The scope of this qualification has usually, however, been limited¹⁷ by the requirement that additional regulations must be "consistent" with the policy of the statute.¹⁸ Thus the "additional regulation" doctrine did not save the ordinance involved in the *Shelton* case;¹⁹ yet it has been held that, despite a statute requiring only that all milk be pasteurized, a city may demand that all milk sold within its limits must be pasteurized therein.²⁰ Moreover, the requirement of consistency has been enforced at the expense of a local ordinance when it was apparent that the general intention of the legislature was opposed to that of the municipal corporation, even though the statute was silent on the particular point mentioned in the ordinance.²¹ Yet some courts have held that the

with statute prohibiting ordinances from imposing any penalty on acts punishable as crimes). *Contra*: *State v. Eubanks*, 154 N. C. 628, 70 S. E. 466 (1911) (fire inspection). But *cf.* *State v. Frederic*, 28 Idaho 709, 155 Pac. 977 (1916).

¹⁶ *Mann v. Scott*, 180 Cal. 550, 182 Pac. 281 (1919).

¹⁷ Even ordinances which provide for less stringent regulation and impose lesser penalties than statutes are often held valid. Here again the way in which the courts approach the problem involves them in unnecessarily intricate reasoning. They hold that the lower standards set up by the ordinance do not constitute a conflict with the statute, nor are they an invitation to disregard its more exacting standards, because they are merely indicative of an intention on the part of the city to be responsible only for the enforcement of those standards which it deems necessary, and in no way inhibit the legislature from going further should it desire to do so. *St. Louis v. de Lassus*, 205 Mo. 578, 104 S. W. 12 (1907); *St. Louis v. Scheer*, 235 Mo. 721, 139 S. W. 434 (1911); *Adler v. Martini*, 179 Ala. 97, 59 So. 597 (1912). *Cf.* *Malette v. City of Spokane*, 77 Wash. 205, 137 Pac. 496 (1913) (ordinance prescribing same regulations as statute held valid).

¹⁸ *Chicago v. Union Ice Cream Mfg. Co.*, 252 Ill. 311, 96 N. E. 872 (1911); *Milwaukee v. Childs Co.*, 195 Wis. 148, 217 N. W. 703 (1928). Even when the purpose of the ordinance and of the statute is clearly the same, a technical divergence such as a variation in the method of obtaining a license will sometimes be held to constitute a "conflict." *St. Louis v. Tielkemeyer*, 226 Mo. 130, 125 S. W. 1123 (1910).

¹⁹ *Cf.* *Town of Randolph v. Gee*, 199 Iowa 181, 201 N. W. 567 (1925).

²⁰ *Witt v. Klimm*, 97 Cal. App. 131, 274 Pac. 1039 (1929).

²¹ *City of Baton Rouge v. Weis*, 141 La. 99, 74 So. 709 (1917). *Contra*: *Village of Struthers v. Sokol*, *supra* note 5. Where a city was granted express power to pass inspection ordinances, an ordinance which imposed a duty on the receiver of intoxicating liquor to offer it for inspection and pay a fee thereon was held inconsistent with the state prohibition statute forbidding the manufacture and sale of intoxicating liquors but allowing the possession of small quantities for social purposes. The ground of the decision was that the charter authority to pass inspection ordinances was intended to apply only to those passed to ensure quality of product for the consumer. *Wood v. Markstein*, 196 Ala. 209, 72 So. 41 (1916).

only way in which the legislature can prohibit city ordinances in any field of regulation is to occupy that field so completely by its own laws that there remains no further room for legislation therein.²²

It would appear, therefore, that the force of the general rule as to "conflict" has been materially weakened by the qualifications to which it has been subjected and the variance in their interpretation. Attempts to define "conflict" have revealed the completely academic nature of the term. It has been said that there is no "conflict" unless one law grants authority to do an act which another law forbids²³ and, again, that the test is whether one law can be violated without infringing the other.²⁴ These definitions are of little value, since their terms have been satisfied in many cases in which "conflict" has been held not to exist. This is true of most cases in which ordinances have set up traffic regulations which authorize violations of the State Motor Vehicle Act. An ordinance has even been held valid which prohibited the sale of fire-arms by pawnbrokers despite a statute which expressly provided for the licensing of such sales.²⁵

Any attempt at the construction of a new rule to serve as a basis for prediction must prove futile if founded merely upon a categorical exegesis of the cases. But an examination of the subject from the point of view of the purpose for which "conflicting" legislation has been passed, namely, to secure effective regulation, discloses a certain uniformity of result. It usually becomes apparent that if the ordinance is the more efficient regulatory measure, no "conflict" is found; whereas, if the statute is more likely to function effectively, a "conflict" will be declared to exist. In the *Robia* case, for example, in which two judges dissented, both opinions apply the general rule, the minority finding a "conflict" and the majority finding none. The majority cites no authority and from a purely legal standpoint has much the weaker argument. Yet granting the desirability of a bridge between the boroughs of Manhattan and Queens and the unlikelihood that any agency other than the City of New York would attempt its construction, and recognizing that under the provisions of the Greater New York Charter the securities necessary to finance such a work can not be issued unless the

²² *In re Mingo*, 190 Cal. 769, 214 Pac. 850 (1923). For example, when a state indicates its intention completely to abolish a given practice, the field of legislation on that subject has been held to be so fully occupied by the state that the city is powerless to pass upon it, even to facilitate the suppression of the practice which is proscribed. *In re Simmons*, 71 Cal. App. 522, 235 Pac. 1029 (1923).

²³ *Village of Struthers v. Sokol*, *supra* note 5, at 268, 140 N. E. at 521.

²⁴ *City of Crawfordsville v. Jackson*, 170 N. E. 850, 851 (Ind. 1930).

²⁵ *Elsner Bros. v. Hawkins*, *supra* note 9.

bridge be revenue-producing, it would seem that the ordinance was well adapted to accomplish its purpose. That considerations such as these, although unexpressed, should not have exerted considerable influence upon the actual decision, seems inconceivable.

In the field of public utility control, however, it is felt that effective regulation can best be accomplished by the state. Here, the courts have held that city charters are subject to control by the legislature.²⁶ The abolition of a franchise granted to a municipality, in order to make way for a utility incorporated by the state, was early allowed,²⁷ and after the creation of public service commissions these bodies also were in many cases permitted to alter the provisions of municipal franchises.²⁸

In all these cases the courts have continued to obscure the main issue by speaking in terms of "powers" and of "conflict."²⁹ Even though their decisions may reflect an awareness of issues more practical than conceptual the written emphasis of their opinions has persistently tended to minimize the really significant factors of the controversies. For the question is not how to reconcile the conflicting demands of two separate agencies of government; it is the more practical problem of how best to serve the public interest by means of the most effective regulation.³⁰

²⁶ *People v. Mayor of New York*, 32 Barb. 102 (N. Y. Sup. Ct. 1860).

²⁷ *East Hartford v. Hartford Bridge Co.*, 10 How. 511 (U. S. 1850); cf. *City of Trenton v. New Jersey*, 262 U. S. 182, 43 Sup. Ct. 534 (1923).

²⁸ See *Southern Utilities Co. v. City of Palatka*, 268 U. S. 232, 233, 45 Sup. Ct. 488 (1925).

²⁹ The courts in public utility cases do not rely so directly upon the general rule as to "conflict," although in one case a court escaped finding a "conflict" by holding that the subsequent creation of a Public Service Commission was within the purview of a condition in the franchise granted by the city that the company's rules should always be consistent with state laws. *Puget Sound Traction, Light, & Power Co. v. Reynolds*, 244 U. S. 574, 37 Sup. Ct. 705 (1917). They base these decisions upon technical reasoning as to withdrawal of agency, a criticism of which may be found in Richard J. Smith, *The Judicial Interpretation of Public Utility Franchises* (1930) 39 YALE L. J. 957, 970-972. There is somewhat more justification here for the use of purely legal concepts than there is in most of the cases involving technical "conflict" because of the serious question of the constitutional provision against the impairment of contract rights which is inseparable from any attempt at alteration of a franchise by the state legislature. Yet in discussing such a constitutional question it would be desirable to have a straightforward approach from the viewpoint of expediency comparable to that of Mr. Chief Justice Taft in *Dayton-Goose Creek Ry. v. United States*, 263 U. S. 456, 44 Sup. Ct. 169 (1924).

³⁰ A study of the cases in which the courts find a technical conflict when the ordinance, though efficient as a regulatory measure, is manifestly unreasonable, would prove of interest.