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Michael Conant
University of California (Berkeley)

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*Michael Conant**

I. Monopolistic Practices and Combinations

The Restrictive Trade Practices Act of 1956[1] was the first positive anti-monopoly statute in the United Kingdom since the Statute of Monopolies in 1623.[2] Now that the statute has been in effect four years there are sufficient decisions and consent orders to make possible a report on its operation. Since most American readers are unfamiliar with the legal and economic background of the Restrictive Trade Practices Act, the prior common law in this area and the 1948 monopolies investigation statute will be summarized first. This summary is followed by an analysis of the structure of the 1956 Act, of the nine decisions in litigated cases and of the consent orders. The conclusion will evaluate the effectiveness of the act and contrast it with comparable United States statutes.

A. *Common-Law Background*

Prior to 1956, monopolistic practices and combinations in restraint of trade in the United Kingdom were subject to a number of uncoordinated and ineffective controls under the common law.[3] The Statute of Monopolies and the purported common-law prohibition on monopolies applied only where one firm had entire control of an industry and not to firms with limited monopoly power or to cartels.[4] The common-law rule that contracts in restraint of trade were void did not prohibit such agreements but merely impaired their enforcement. The early exemption to this rule for contracts ancillary to the sale of a business which were reasonable[5] was subsequently expanded to exempt most types of

* Associate Professor of Business Law, University of California (Berkeley). — Ed. The author is indebted for assistance to B. M. Stephenson, Esq., and M. N. Ben-Levi, Esq., of London, England, and to Professor Dow Votaw of the University of California. Financial assistance for this research was received from the Social Science Research Council and the Institute of Business and Economic Research of the University of California.

1 4 and 5 Eliz. 2, c. 68 (1956).

2 21 Jac. 1, c. 3 (1623).

3 For more detailed studies of the common law in this area, see Friedmann, Law and Social Change in Contemporary Britain 109-132 (1951); Wilberforce, Campbell & Elles, Law of Restrictive Trade Practices and Monopolies 20-122 (1957); Grunfeld & Yamey, *United Kingdom*, in Friedmann (ed.), Anti-Trust Laws: A Comparative Symposium 340-402 (1956); Frank, The New Industrial Law 201-33 (1950).

4 Churchill, *Monopolies*, 41 L.Q. Rev. 275 (1925); Simpson, *How Far Does the Law of England Forbid Monopoly?* 41 L.Q. Rev. 393 (1925).

5 Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711); Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., [1894] A.C. 535.

direct agreements to fix prices, output or market shares.[6] The tort of conspiracy as a remedy against the predatory practices of trade combinations was rendered ineffective by a ruling that such practices were legal if their primary motive was a business purpose (profits) and not pure malice.[7]

The decline of common-law legal protection to traders coincided with the greatest period of industrial expansion and increased trade. Freedom of contract was extended to include freedom to combine, and when it conflicted with freedom from restraints of trade, the former was given precedence. Professor Friedmann suggests that judges, coming from the same social background as business people and imbued with Benthamite concepts of absolute freedom, thought it was not the function of the law to intervene in market rivalries or combinations.[8] They failed to see that aggregations of market power enabled some firms to destroy the freedom of trade that the common law professed to protect.[9] The result was that in the twentieth century trade associations dominated almost every United Kingdom industry and pursued programs to limit entry and control prices.[10]

[6] See citations in GRUNFELD & YAMEY, *op. cit. supra* note 3, at 349-50. See Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954). Establishing the invalidity of these contracts was limited by the rule of evidence holding inadmissible evidence of actual or probable economic consequences of such an agreement. Mogul S. S. Co. v. McGregor, Gow & Co., [1892] A.C. 25, 45; North West Salt Co. v. Electrolytic Alkali Co., [1914] A.C. 461, 470. Another aid to internal enforcement of trade combinations, although usually unnecessary in light of the weakened common law of restraint of trade, was registration as a trade union (legally enforceable combination) under the Trade Union Act of 1871. Joseph Evans & Co. v. Heathcote, [1918] 1 K.B. 418; CITRINE, TRADE UNION LAW 295-305 (1950).

[7] Mogul S.S. Co. v. McGregor, Gow & Co., [1892] A.C. 25. A Lord Justice of Appeal recently described the *Mogul* decision as follows: "This judgment is indeed the Charter of Trade Associations." Right Hon. Sir Henry Slesser in the *Times* (London), Feb. 7, 1955, 9. This is in contrast to the contemporaneous Sherman Antitrust Act of 1890 in the United States, which Mr. Justice Douglas has characterized as "the charter of freedom." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940). For a review of the cases sanctioning commercial boycotts in the United Kingdom, see Sorrell v. Smith, [1925] A.C. 700; Crofter Hand Woven Harris Tweed Co. v. Veitch, [1942] A.C. 435.

[8] FRIEDMANN, LAW AND SOCIAL CHANGE IN CONTEMPORARY BRITAIN 121 (1951); Hunter, *Competition and the Law*, 27 MANCHESTER SCHOOL 52, 56 (1959).

[9] Lewis, *Monopoly and the Law*, 6 MODERN L. REV. 97 (1943).

[10] PEP (Political and Economic Planning), INDUSTRIAL TRADE ASSOCIATIONS (1957).

The period between the two World Wars, one of almost continuous depression in the United Kingdom, saw the further decline of public faith in competition as a regulator of business activity. People generally confused the failure of the enterprise system to provide full employment, a problem of monetary-fiscal policy, with the question of whether the free competitive system would maximize output of the employed, a problem of resource allocation. This social climate favored the increased growth of trade associations and their monopolistic control of industry.

B. *Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948*

The first sign of a reversal of the public attitude of complacency toward monopoly came during World War II. The White Paper on Employment Policy issued by the war-time Coalition Government indicated that the full employment policy required supplemental activity to investigate and act against restrictive agreements and combines detrimental to the country.[11] The Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948 resulted.[12] The 1948 Act cannot be termed a positive anti-monopoly law since it did not prohibit or penalize any monopolistic practice or restrictive agreement. The act created a Monopolies and Restrictive Practices Commission, members to be appointed by the Board of Trade, to make inquiries into industries and trades and report thereon. The Commission reports were to form the basis for possible remedial action by the government. The Board of Trade was empowered to order a Commission investigation of the supply, processing or export of goods of any description if one-third of the supply of such goods in the United Kingdom or a substantial part of the United Kingdom were supplied or processed by one firm, or two or more firms which conducted themselves in any way to prevent or restrict competition. It could also request the Commission to state in its report whether it considered any monopolistic practice that was found to exist was contrary to the public interest. The public interest was defined in section 14 of the act in fairly specific economic terms.[13]

[11] CMD. No. 6527, ¶ 54 (1944).

[12] 11 & 12 Geo. 6, c. 66 (1948). Minor amendments to this act are in the Monopolies and Restrictive Practices Commission Act. 1 & 2 Eliz. 2, c. 51 (1953). For more detailed discussions of the 1948 and 1953 Acts, see GUENAULT & JACKSON, THE CONTROL OF MONOPOLY IN THE UNITED KINGDOM (1960); GRUNFELD & YAMEY, *op. cit. supra* note 3, at 361-402; Meier, *A Critique of the New British Monopoly Act,* 48 MICH. L. REV. 329 (1950); Lewis, *The British Monopolies Act,* 16 MANCHESTER SCHOOL 208 (1949).

[13] Section 14 lists the objectives in determining whether a practice is in the public interest as follows:

"(a) the production, treatment and distribution by the most efficient and economical means of goods of such types and qualities, in such volume and at such prices as will best meet the requirements of home and overseas markets;

"(b) the organisation of industry and trade in such a way that their efficiency is progressively increased and new enterprise is encouraged;

"(c) the fullest use and best distribution of men, materials, and industrial capacity in the United Kingdom; and

"(d) the development of technical improvements and the expansion of existing markets and the opening up of new markets."

Pursuant to reference by the Board of Trade, the Commission made twenty industry reports[14] between 1950 and 1957, the year the new Restrictive Practices Court took over a large part of its tasks. In sixteen of the industries, the Commission found monopoly conditions contrary to the public interest.[15] Enforcement of the 1948 Act was left to the Board of Trade in such cases as it thought the Commission's recommendations should be implemented. In most cases this involved negotiation with the firms and trade associations to secure commitments from them to discontinue the objectionable practices. No method of policing such commitments was provided in the act. In fact, a supplementary investigation of compliance with the recommendations in the Imported Timber report showed that, for two of the three major types of timber, new restrictive arrangements had been adopted to replace the old.[16] In only one case, dental goods, was a statutory order issued. Agreements to withhold supplies from dealers where this may limit the number of dealers or secure the maintenance of resale prices was made unlawful.[17]

The Commission was asked to make one general report on collective discrimination.[18] The report concerned those practices

14 See Great Britain, Monopolies and Restrictive Practices Commission, *Reports on:* Supply of Dental Goods (1950), Supply of Cast Iron Rainwater Goods (1951), Supply of Electric Lamps (1951), Supply of Insulated Electric Wires and Cables (1952), Supply of Insulin (1952), Supply and Export of Matches and Supply of Match-Making Machinery (1953), Supply of Imported Timber (1953), Process of Calico Printing (1954), Supply of Buildings in the Greater London Area (1954), Supply and Export of Certain Semi-Manufactures of Copper and Copper-Based Alloys (1955), Supply and Export of Pneumatic Tyres (1955), Supply of Sand and Gravel in Central Scotland (1956), Supply of Hard Fibre Cordage (1956), Supply of Certain Rubber Footwear (1956), Supply of Linoleum (1956), Supply of Certain Industrial and Medical Gases (1956), Supply of Electronic Valves and Cathode Ray Tubes (1956), Supply of Tea (1956), Supply of Standard Metal Windows and Doors (1956), Supply and Export of Electrical and Allied Machinery and Plant (1956).

15 For a detailed analysis of the first nine reports, see Grunfeld & Yamey, *op. cit. supra* note 3, at 377-84; for surveys of all twenty reports, see GUENAULT & JACKSON, *op. cit. supra* note 12, at 65-134; Jewkes, *British Monopoly Policy* 1944-1956, 1 J.L. & ECON. 1 (1958). See Cohen, *The Reports of the Commission on Monopolies and Restrictive Practices,* 63 ECON. J. 196 (1953); Guenault & Jackson, *British Monopoly Legislation in Practice,* 20 CAN. J. ECON. & POL. SCI. 195 (1954); Howard, *British Monopoly Policy: A Current Analysis,* 62 J. POL. ECON. 296 (1954); Hunter, *The Monopolies Commission and Economic Welfare,* 23 MANCHESTER SCHOOL 22 (1955); Hunter, *The Monopolies Commission and Price Fixing,* 66 ECON. J. 587 (1956); Kilroy, *The Task and Methods of the Monopolies Commission,* 22 MANCHESTER SCHOOL 37 (1954).

16 Great Britain, Monopolies Commission, *Imported Timber: Report on Whether and to What Extent the Recommendation of the Commission Has Been Complied With* (1958).

17 This order is reprinted in WILBERFORCE, CAMPBELL, & ELLES, *op. cit. supra* note 3, at 614-16.

18 Great Britain, Monopolies and Restrictive Practices Commission, *Collective Discrimination — A Report on Exclusive Dealing, Collective Boycotts, Aggregated Rebates and Other Discriminatory Trade Practices,* CMD. No. 9504 (1955). See Yamey, *The First*

found most often in the individual industry reports and recommended by the Commission to be against the public interest. They included collective agreements to engage in exclusive dealing or buying, collective action to maintain or enforce resale prices, and aggregated rebates. A majority of seven of the ten members concluded that all of these practices were against the public interest. Exempting four exceptional situations, the majority recommended that these practices should be prohibited by legislation creating a new criminal offense. The minority did not favor general prohibition. Instead, they recommended continuance of the case-by-case investigation and drafting of remedies.

C. *Restrictive Trade Practices Act, 1956*

The Restrictive Trade Practices Act of 1956 has three major parts, only the first of which will be treated in this section.[19] The act adopts the minority view of the Monopolies Commission in the *Collective Discrimination* report in that it does not make the listed trade practices crimes, but rather provides for registration of all such agreements and prohibition of those found contrary to the public interest. It provides for judicial review, which the business community prefers to the previous administrative investigation. The 1956 Act thus continues the "pragmatic," case-by-case approach of the 1948 Act in contrast to the "dogmatic" method of criminal condemnation of all unreasonable restraints of trade found in the Sherman Antitrust Act.[20]

The 1956 Act creates one administrative office and one new court. The Registrar of Restrictive Trading Agreements, appointed by the Crown, is charged with compiling and maintaining

General Report of the Monopolies Commission, 19 MODERN L. REV. 63 (1956); Hunter, *The Progress of Monopoly Legislation in Britain: A Commentary,* 2 SCOTTISH J. POL. ECON. 198 (1955); Jewkes, *supra* note 15, at 4-5; GUENAULT & JACKSON, *op. cit. supra* note 12, at 150-62.

[19] Part II, which prohibits and makes unlawful all collective arrangements to enforce resale price maintenance by boycott or discriminatory terms, is discussed *infra* under the heading "Resale Price Maintenance." Part III curtails the scope of investigations to be undertaken by the Monopolies Commission, since review of restrictive agreements is taken over by the Restrictive Practices Court. Part III will not be treated in this article. Treatises published on the 1956 Act are Wilberforce, Campbell & Elles, *op. cit. supra* note 3; HEATHCOTE-WILLIAMS, ROBERTS AND BERNSTEIN, THE LAW OF RESTRICTIVE TRADE PRACTICES AND MONOPOLIES (1956); ALBERY AND FLETCHER-COOKE, MONOPOLIES AND RESTRICTIVE TRADE PRACTICES (1956); MARTIN, RESTRICTIVE TRADE PRACTICES AND MONOPOLIES (1957). See Keyes, *Antitrust at Last in Britain: The Restrictive Practices Act of 1956,* 25 GEO. WASH. L. REV. 627 (1957); Grunfeld, *Antitrust Law in Britain Since the Act of 1956,* 6 AM. J. COMP. L. 439 (1957).

[20] Kaysen, *Anti-Monopoly Policy in Britain and the United States,* WESTMINSTER BANK REVIEW, August 1956, 5, 8.

a register of agreements which persons and firms are required to file under the act. He also has the duty to initiate proceedings before the Restrictive Practices Court to test the validity of registered agreements. The Restrictive Practices Court consists of five judges of high court standing, to be nominated from existing courts, and ten lay members, appointed on recommendation of the Lord Chancellor by virtue of their "knowledge of or experience in industry, commerce or public affairs."[21]

Section 6 (1) requires registration of agreements in the United Kingdom containing restrictions in respect to prices, terms or conditions, quantities or descriptions of goods, process of manufacture, or persons or areas to be supplied.[22] Under section 6, "agreement" is to have a comprehensive meaning under the act, and will include any arrangement between parties to accept the listed restrictions, whether it is intended that such agreement will be enforceable by legal proceedings or not.[23] Furthermore, recommendations by trade associations to members to accept one of the listed restrictions in most cases will be held an agreement by a conclusive statutory presumption that trade association constitutions contain such undertakings.

Under section 20 of the act, the power to declare an agreement to be contrary to the public interest and hence void is put in the Restrictive Practices Court. The court has a further power, upon application of the Registrar, to issue a restraining order to insure dissolution of agreements.

21 A proceeding under the act must be heard by a panel of at least three with one of the nominated judges presiding. The opinion of the judge or judges sitting prevails on questions of law. A vote of the majority of all members prevails on questions of fact.

22 Section 6 (1) requires the registration of agreements under which two or more persons carrying on business within the United Kingdom accept restrictions in respect of one or more of the following:

"(a) the prices to be charged, quoted or paid for goods supplied, offered or acquired, or for the application of any process of manufacture to goods;

"(b) the terms or conditions on or subject to which goods are to be supplied or acquired or any such process is to be applied to goods;

"(c) the quantities or descriptions of goods to be produced, supplied or acquired;

"(d) the processes of manufacture to be applied to any goods, or the quantities or descriptions of goods to which any such process is to be applied; or

"(e) the persons or classes of persons to, for or from whom, or the areas or places in or from which, goods are to be supplied or acquired, or any such process applied." 4 & 5 Eliz. 2, c. 68, § 6 (1).

23 Sections 7 and 8 exempt certain classes of agreements from the registration requirement of § 6. Among these are agreements regulated by the Iron and Steel Act of 1953, most bilateral agreements to supply or process goods, agreements to conform to standards of the British Standards Institution, agreements for services, agreements regulated under some other act, license agreements under patents or trade marks, and export agreements. See Sieghart, *The Restrictive Trade Practices Act 1956*, 107 L.J. 115 (1957).

Section 21 (1) of the act is probably the key section. Instead of defining "public interest," section 21 establishes a presumption that all registered restrictions are contrary to the public interest unless one of seven listed defenses is proved by defendant (1) to be substantial, and (2) to outweigh the public disadvantage of the restriction.[24]

Whether one of these defenses exists is a question of fact to be decided by the whole court or panel hearing the case. Whether it is substantial is a question of law to be decided by the nominated judges on the panel hearing the case. If the defense is found to be substantial, the weighing of the defense against public detriment from the restriction is again a question of fact to be decided by the whole court or panel. To a large extent this involves the estimation of unmeasurable economic forces and the weighing of interests that are not comparable. It is suggested that resort to some

[24] The seven defenses or "gateways" in § 21 (1) which may be urged and proved to justify a restriction are as follows:

"(a) that the restriction is reasonably necessary, having regard to the character of the goods to which it applies, to protect the public against injury (whether to persons or to premises) in connection with the consumption, installation or use of those goods;

"(b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom;

"(c) that the restriction is reasonably necessary to counteract measures taken by any one person not party to the agreement with a view to preventing or restricting competition in or in relation to the trade or business in which the persons party thereto are engaged;

"(d) that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from, any one person not party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such a trade or business who, either alone or in combination with any other such person, controls a preponderant part of the market for such goods;

"(e) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area, or in areas taken together, in which a substantial proportion of the trade or industry to which the agreement relates is situated;

"(f) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to cause a reduction in the volume or earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business (including export business) of the said trade or industry; or

"(g) that the restriction is reasonably required for purposes connected with the maintenance of any other restriction accepted by the parties, whether under the same agreement or under any other agreement between them, being a restriction which is found by the Court not to be contrary to the public interest upon grounds other than those specified in this paragraph, or has been so found in previous proceedings before the Court." 4 & 5 Eliz. 2, c. 68, § 21 (1).

kind of economic "theory" is inevitable.[25] This could give the court some fairly consistent framework from which to estimate the effects of specific trade practices. It cannot solve the problem of weighing the conflicting interests to reach a decision. Furthermore, the same restrictive practice or defense may arise in two industries but occur with more impact in one and be given more weight by the court in its decision. A consistent body of law is thus unlikely to arise from the decisions, as will be seen below.

D. *Progress Under the 1956 Act*

The Register contained 2240 agreements at the end of 1959, three years after its institution.[26] The large majority of restrictive agreements had been registered, so that further additions to the register of agreements were expected in much smaller numbers. They covered almost every manufacturing industry in the United Kingdom and a large sector of wholesaling and retailing.

Only a small proportion of the registered agreements were expected to be litigated. Many were in the same industries and were almost identical except for geographic coverage. In the building industry, for example, 235 agreements were registered. Almost all of these adopted the National Schedules of Daywork Charges for General Building Work, which designated fixed percentages to be added to labor cost, material cost and other direct charges in bidding on construction projects.[27] It also recommended rates for hire of building equipment and machinery and haulage rates. The next largest group was 210 agreements relating to consumer goods. These were agreements between local consumer cooperatives not to enroll members or build shops in each other's terri-

25 Grunfeld & Yamey, *Restrictive Practices Act, 1956,* [1956] PUBLIC LAW 313, 317-18. For an analysis of the seven possible defenses in light of the findings of the earlier Monopolies and Restrictive Practices Commission reports, see Heath, *The 1956 Restrictive Trade Practices Act: Price Agreements and the Public Interest,* 27 MANCHESTER SCHOOL 72 (1959).

26 Office of the Registrar of Restrictive Trading Agreements, Press Notice, January 21, 1960. A speech of R. L. Sich, Registrar, before British Association for the Advancement of Science on September 3, 1959 is published as: *Progress Under the Restrictive Trade Practices Act, 1956,* 177 BOARD OF TRADE J. 367 (1959), 11 YORKSHIRE BULL. 116 (1959).

27 Registered Agreement No. 274, Birmingham Association of Building Trades Employers. See Stone and Reiners, *Organization and Efficiency of the House-Building Industry in England and Wales,* 2 J. INDUS. ECON. 118 (1954); Carter, *The Building Industry,* in 1 BURN (ed.), STRUCTURE OF BRITISH INDUSTRY 47 (1958).

tories.[28] There were also large groups of agreements in other single industries.[29]

An official survey of the registered agreements was published in 1961.[30] About two-thirds of the agreements concerned selling prices, but of the 970 important agreements of nationwide application, 790 contained selling price restrictions. Limitations on persons with whom parties would deal (exclusive dealing) were accepted in about 300 agreements. Division of territories was the subject of about 300 agreements also, while about 200 agreements limited the types of goods the parties would produce. In most of the industries enforcement of restrictions is vested in a trade association which is able to organize boycotts to patrol adherence.

In the first three years of the act, proceedings had been formally instituted by the Registrar in regard to 85 agreements. The Board of Trade selected the first groups of agreements to be referred to the court on at least two bases. First, restrictive practices in a number of key industries, such as automobiles, tires, paper, and the distribution of newspapers had been the subject of much public complaint.[31] Others had been the subject of Monopolies Commission reports where damaging restrictive practices were uncovered. Second, the cases were chosen in order to bring before the court an array of restrictions under each of the five types listed in section 6 (1) of the act.

The effects of the act and of the early decisions have been widespread. By the end of 1959, over 730 agreements had been voluntarily abandoned. Of the 600 abandoned by August 1959,

[28] A case testing the legality of the agreements by consumer cooperatives not to solicit members or open shops in each other's territories was decided after this manuscript was completed. These agreements for division of territories were held contrary to the public interest under § 21 (1) (b) of the 1956 Act as not being of public benefit. *In re* Doncaster and Retford Co-operative Societies' Agreement, L.R. 2 R.P. 105, [1960] 1 W.L.R. 1186, [1960] 3 All E.R. 541. In the United States, agreements for division of territories are illegal *per se* under § 1 of the Sherman Act. Addyston Pipe and Steel Co. v. United States, 175 U.S 211 (1899); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

[29] In the radio and cathode ray tubes industry, there were 175 agreements; gravel and crushed stone, 96; bread, 75; bolts and nails, 70; lime and concrete building materials, 61; paper and paperboard, 61; clay bricks and pipes, 60; newspapers, 53; flour, 47; railway vehicles, 42; crude chemicals from coal, oil and gas, 35; timber preservatives, 34; insecticides, 33; sand, 32; beer and ale, 32. In the various branches of the iron and steel industry, there were 199 registered agreements. Registered agreements in the food industry are analyzed in Cuthbert & Black, *Restrictive Practices in the Food Trades,* 8 J. INDUS. ECON. 33-57 (1959).

[30] Registrar of Restrictive Trading Agreements, *Report for the Period 7th August, 1956 to 31st December, 1959,* CMD. No. 1273 (1961). See Heath, *Freer Prices—What Progress?* The Banker, February 1960, 1.

[31] *More Cases for the Court,* ECONOMIST 1061 (March 22, 1958).

250 of them had received notice from the Registrar that he intended to refer them to the court and 350 had not yet received notice.[32] Consent orders by the court terminated the contested restrictions in 50 cases and nine cases were tried by the court. These are discussed in the following two sections.

E. *Decisions of the Restrictive Practices Court*

The nine decisions of the Restrictive Practices Court are summarized in Table I. Price-fixing restrictions were the primary issue in eight of the nine agreements. Agreed margins or discounts appeared in three cases. Exclusive selling or boycotts were litigated in two cases. Quality restrictions and allocation of customers were each a subject of one of the cases.

Not all of the seven possible defenses listed in note 24 above have been litigated. Defense (b), specific and substantial public benefit from the restriction, has been urged in all nine cases. Defense (f), likely reduction in volume or earnings of export business, has been litigated in two cases. Defense (a), prevent public injury; defense (d), enable negotiation of fair terms with a monopolist; and defense (e), prevent persistent adverse effect on employment, were each argued in one case. A defense was proved to be substantial in four of the cases. In one of these, the proved defense was found to be outweighed by the detriments to the public of the restriction. In the other three, the proved defenses were held to outweigh the detriments of the restrictions and therefore to be not contrary to the public interest. The decisions in the cases will be discussed under the specific defenses which have been litigated.

Defense (a): Prevent Public Injury. This defense was at issue only in the first case, that of the *Chemists' Federation,* involving horizontal and vertical exclusive dealing agreements.[33] The function of the Federation was to prevent the retailing of patent medi-

[32] Sich, *supra* note 26.

[33] *In re* Chemists' Federation Agreement, L.R. 1 R.P. 75 (1958). The federation included about two-thirds of the retail chemists (registered pharmacists), an unstated proportion of drug wholesalers and 122 out of 356 manufacturers of patent medicines. About 4000 out of a total of 9000 patent medicines were on the Chemists' Federation approved list and sales of these constituted about one-third of total sales of patent medicines. Manufacturer members agreed to sell their products only to wholesaler members or to registered pharmacists. Wholesaler members agreed to sell only to registered pharmacists. See Note, 72 HARV. L. REV. 1581 (1959).

cines by persons or firms other than registered pharmacists.[34] Under defense (a), the Federation argued that the restriction prevented injury to the public in that only a registered pharmacist could advise customers on possible harm from taking incorrect drugs or incorrect dosages. As to the estimated three-quarters of patent medicines not covered by special legislation requiring dispensing by pharmacists, the finding was that the vast majority sold in pharmacists' shops were sold by unqualified assistants without any inquiry being made. Furthermore, the half of all patent medicines not covered by the Chemists' Federation Agreement were sold in other stores by unqualified persons, and defendants showed not one concrete case of injury. Since this defense was not proved and neither was defense (b), discussed below, the Chemists' Federation agreement was held contrary to the public interest and thus void.[35] Subsequently the Chemists' Federation was dissolved.[36]

Defense (b): Specific and Substantial Public Benefit. In the *Chemists' Federation* case, defense (b) was urged primarily in connection with the examining and testing of drugs by the standards committee of the Federation to see if they conformed to advertised claims. The court found that another trade association of manufacturers performed this same function, so that no public benefit would be lost if the Chemists' Federation ceased. Also as to defense (b) the Federation urged that its exclusive dealing restriction kept in business a number of chemists in country districts who would be forced out of business if the restriction ended, denying the public their entire services. The court found the evidence of this too nebulous to support the conclusion. Data on the low incomes of rural pharmacists did not alone indicate the effect on incomes of removing the restrictions. For these reasons, the defense was held not to be proved.

[34] The extensive system of resale price maintenance in the industry was enforced by stop lists through another, separate trade association, the Proprietary Articles Trade Association. Thomas, *The Pharmaceutical Industry*, in 2 BURN (ed.), THE STRUCTURE OF BRITISH INDUSTRY 331, 359, 366 (1958).

[35] In the United States under § 1 of the Sherman Act [26 Stat. 209 (1890), 15 U.S.C. § 1 (1958)], horizontal agreements in the form of group boycotts or concerted refusals by traders to deal with other traders, are illegal *per se*. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211-12 (1959). See Fashion Originators' Guild v. FTC, 312 U.S. 457, 465 (1941); Eastern States Retail Lumber Dealers Ass'n v. United States, 234 U.S. 600 (1914). As a remedy under the Sherman Act, injunctive decrees containing compulsory-selling provisions have been entered in a number of cases. See table in Mund, *Refusal To Sell*, 11 VAND. L. REV. 339, 354 (1958). See also Mund, *The Right To Buy*, S. Doc. No. 32, 85th Cong., 1st Sess. (1957).

[36] *Chemists Wind Up*, ECONOMIST 1104 (December 20, 1958).

An analogous boycott situation, alleged a public benefit, was held unproved in the *Carpet Manufacturers'* case.[37] The arbitrary admission of firms to the approved wholesalers' list was held not to be a benefit to the public, but a harm. The exclusion of genuine wholesalers from the list had deprived the public and local retailers of adequate retail service. Likewise, no justification was made for the restriction on sales directly to consumers and the court held this plainly bad. Nor was it shown that joint advertising arrangements were in any way dependent on the boycott restrictions and hence the court found that such advertising could continue without them.

Price-fixing restrictions were argued as benefits to the public under defense (b) in a number of different aspects. Price stabilization was the most frequently argued benefit from price fixing, being pleaded in five cases. The first of these cases was that of the *Cotton Yarn Spinners' Agreement.*[38] The court held that price stabilization would not benefit the purchasing public since it could be had only at the loss of a free competitive market.[39] The court

[37] *In re* Federation of British Carpet Manufacturers' Agreements, L.R. 1 R.P. 472 (1959), [1960] 1 All E.R. 356. The primary defendant, the Federation of British Carpet Manufacturers, included 58 of the 72 producers in the United Kingdom. These members made about 75% of the total United Kingdom production of all wool or worsted mixture carpets. The Wholesale Floor Covering Distributors' Association were also made defendants.

The defendant members of the Manufacturers' Federation adopted restrictions in the form of fixed prices for two qualities of Axminster and Wilton carpets, known as A-1 and W-1, and a fixed wholesalers' discount of 11 to 12½% from the fixed prices. The manufacturers sold only to wholesalers on an approved list, and agreed not to give quantity discounts or to make direct sales to consumers, regardless of size of purchase. The price fixing limited competition on the manufacturer and on the wholesaler levels. The agreed discount to wholesalers prevented them from exercising their local monopoly power in bargaining for carpets with the manufacturers. In exchange, the Federation's approved list of wholesalers (193 in 1959) appeared to limit entry of new firms and protected established wholesalers from greater competition. In order to secure the wholesalers' distribution services, manufacturers also agreed to the restriction on their selling directly to consumers.

[38] *In re* Yarn Spinners' Agreement, L.R. 1 R.P. 118, 188-89 (1959), [1959] 1 W.L.R. 154, [1959] 1 All E.R. 299. See analysis of trial in Sutherland, *The Restrictive Practices Court and Cotton Spinning,* 8 J. INDUS. ECON. 58 (1959); Davis, *The Yarn Spinners' Agreement,* 109 L.J. 134 (1959). This association included the bulk of the firms manufacturing cotton into thread in the Lancashire cotton industry. The price-fixing scheme in this declining industry involved an agreement not to sell below minimum prices calculated by the association on the basis of average cost data.

[39] In the United States under § 1 of the Sherman Act, price-fixing agreements are illegal *per se.* United States v. Trenton Potteries Co., 273 U.S. 392, 395-401 (1927); United States v. Addyston Pipe and Steel Co., 85 F. 271, 293 (6th Cir. 1898), *aff'd,* 175 U.S. 211, 235 (1899). The defense of price stabilization to prevent "competitive abuses" and establish "fairer competitive prices" was rejected under the Sherman Act in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940), as follows: "Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every

found, however, that price stabilization, in terms of preventing troughs and peaks, was a specific benefit to weavers and doublers. But it found the benefit to this small segment of the public was outweighed by the detriment of the general purchasing public in losing a free market.

The view that price stabilization is not a benefit to the consuming public was reiterated in the *Scottish Bakers'* cases.[40] The evidence failed to support the allegation that stable prices for standard bread enabled lower production costs. The court found that stable prices for standard bread were likely to result from the structure of the industry itself and the evidence did not show that the agreed price created greater stability. Furthermore, the costing methods and the discretion in the costing committee allowed recommendations that did not necessarily accomplish lowest economic prices. The system prevented the efficiencies of the lowest cost producers from being passed on to the public in the form of lower prices.

A similar rejection of price stabilization as a public benefit occurred in *British & Irish Bakers'* case.[41] The maximum prices recommended by the association were found to operate as fixed prices.[42] Since the members were warned against price cutting, the court found that the recommended price would continue to so operate. The court found that the recommended prices had not in fact kept bread prices below what they would have been in a free market. The cost-determined price formula was based on discredited sampling methods and resulted in profits too high to justify a claim that the formula adequately protected the consumer.

price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended." Judge Yankwich has stated: "Economic benefits do not excuse price fixing in interstate commerce." United States v. Food & Grocery Bureau of So. Cal., Inc., 43 F. Supp. 966, 972 (S.D. Cal. 1942).

[40] *In re* Wholesale and Retail Bakers of Scotland Association's Agreement and *In re* Scottish Association of Master Bakers' Agreement, L.R. 1 R.P. 347 (1959, [1959] 3 All E.R. 98. The Scottish Association of Master Bakers had 1221 members. The Wholesale and Retail Bakers of Scotland, an association of large producers or "plant bakers," had 23 members. These associations made price recommendations to their members, based on cost investigations, for standard bread. This bread constituted 30% of total bakery sales.

[41] *In re* Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, L.R. 1 R.P. 387 (1959), [1960] 1 W.L.R. 393, [1960] 1 All E.R. 227. The respondent Federation, founded in 1942, had 193 members in 1959. All of these were plant bakers, using the modern mechanized method of the traveling oven. Their share of total bread production in England and Wales in 1958-1959 was 51%. Standard bread, the only type for which the Federation recommended prices, constituted 56.9% of the value of output of all bakeries.

[42] In the United States under § 1 of the Sherman Act, a horizontal agreement which fixes only maximum prices, like all other horizontal price-fixing agreements, is illegal *per se*. Kiefer-Stewart Co. v. Joseph E. Seagram and Sons, 340 U.S. 211 (1951).

The court found that long-run declining demand and the market rivalry of plant bakers should lead to price reductions which the agreed restriction would prevent.

In the *Carpet Manufacturers'*[43] and *Phenol Producers'*[44] (carbolic acid) cases price stabilization was also found of no public benefit. The carpet pricing was allegedly based on cost while the phenol agreed prices were not.[45]

With these five clear precedents that price stabilization was not of public benefit and therefore not a defense for price fixing, the court did an about-face and upheld the defense of price stabilization in the *Black Bolt & Nut* producers' case.[46] The specific and substantial benefit to wholesalers and larger industrial users, purchasers of two-thirds of bolts and nuts sold domestically, was that they would not have to "go shopping" for the lowest prices, but could order from any single manufacturer and get the same price. It was found that the remaining buyers would suffer no appreciable disadvantage or detriment. Likewise, it was found that the public as consumers of products using black bolts and nuts would not suffer a detriment by the loss of free market price determina-

[43] In the *Carpet* case (L.R. 1 R.P. 472, 540), price stabilization was held, under similar circumstances, not to benefit the public. The prices fixed for A-1 and W-1 carpets (which were the only ones fixed) were arbitrary and not based on any generally accepted accounting procedures. Evidence showed a substantial range of costs among producers, and the costing system, based on no more than informed guesses, could not assure that prices were reasonable in the interest of the public. As to stability of prices, the court found it to confer no benefit on the public in this case. The court held that ending the price fixing would not create undue price instability, but could lead to increased competition that would benefit the public. See note 36 *supra*.

[44] *In re* Phenol Producers' Agreement, L.R. 2 R.P. 1 (1960), [1960] 1 W.L.R. 464, [1960] 2 All E.R. 128. The estimated United Kingdom production of phenol for 1960 is 54,000 tons, of which about 16,000 tons will be natural phenol and 39,000 tons synthetic phenol. The 14 members of respondent Association produced a substantial part of the natural phenol and about one-third of the synthetic phenol. Sales of synthetic phenol by nonmembers to large buyers were made at prices below the Association price, as were the sales by all firms in the export market. Price stabilization was also rejected as not a public benefit in a case decided after this manuscript was written. *In re* British Bottle Association's Agreement, Times (London), March 25, 1961, 12.

[45] The court rejected the argument that phenol price stabilization in times of excess short-run demand operated as a price ceiling. Citing the *Scottish Bakers'* and *Yarn Spinners'* cases, the court held that stabilization of price by itself had not been proved an advantage to the public. Furthermore, the finding of fact in this case of excessively high, rigid prices, bearing no relation to cost, could not be justified. They were clearly monopoly prices. Rather than benefit the public, they were detrimental.

[46] *In re* Black Bolt & Nut Association's Agreement, L.R. 2 R.P. 50, [1960] 1 W.L.R. 884, [1960] 3 All E.R. 122. The association had 44 members who produced about 90% of the black bolts and nuts, carriage bolts and nuts, and railway fastenings in the United Kingdom.

tion because the agreed prices "have in fact been unreasonable."[47] For the first time the court made a finding that a restrictive agreement resulted not only in reasonable prices, but what it also felt to be reasonable profits. Hence, the price fixing was held not contrary to the public interest.

Price fixing was also urged as a benefit under defense (b) because it allegedly kept less efficient firms from failing and thereby maintained needed capacity in the particular industries. In *Cotton Yarn Spinners'*, a declining industry, the court rejected this defense. It found the demand variance only plus or minus 10 percent from average and was unconvinced that exceptional measures like price fixing were necessary to create and maintain reserve capacity. The court also ruled that the large excess capacity did not have to be maintained for national emergencies. In *Water-Tube Boilermakers,*[48] a long-run expanding industry, the court also rejected this defense. Even though it felt that preservation of capacity was important in this industry, the court held that defendants had failed to prove that price fixing would support this purpose. It found all six members financially able to survive a recession and retain vital personnel. The *Phenol Producers'* case was the third and most recent case where the need for excess capacity argument was pleaded and rejected. The defendants argued that the then

47 [1960] 1 W.L.R. 884, 908. It should be noted that minimum price fixing in sales to government was found not to be of specific and substantial benefit to it or any other sector of the public and was therefore held contrary to the public interest.

The rule in this case was strictly construed as applying only to bolts and nuts in the next subsequent case, in which price fixing was unsuccessfully defended as necessary to finance selling in rural areas and to save customers the trouble of shopping for confectionaries. *In re* Wholesale Confectioners Alliance's Agreement, L.R. 2 R.P. 135, [1960] 1 W.L.R. 1417; injunction issued, [1961] 2 All E.R. 8. In the following case, however, an industry-wide agreement for multiple basing-point pricing of cement was held not contrary to the public interest as a public benefit under defense (b). The court felt that the cartel pricing resulted in lower prices to customers far from plants which it held to outweigh the detriment of higher prices to customers near plants, citing the *Black Bolt and Nut* case as authority. *In re* The Cement Makers' Federation's Agreement, [1961] 2 All E.R. 75. These two cases were decided after this manuscript was written.

48 *In re* Water-Tube Boilermakers' Agreement, L.R. 1 R.P. 285 (1959), [1959] 3 All E.R. 257. The respondents, six of the nine United Kingdom manufacturers, belonged to the Water-Tube Boilermakers' Association. For the years 1952 to 1958 inclusive, these six firms' sales comprised 79% of all boilermaker sales by United Kingdom firms. Under the agreement, each member reported every inquiry or request to bid to the Association. If more than one received an inquiry or request to bid on the same project, the director of the Association called a meeting to which these firms all brought their tentative offers. They then selected one firm that was allowed to lower its offer to be equal with the lowest tentative offer presented at the meeting. This firm was usually able to secure the contract. The agreement also provides for preferential interfirm buying of specialized products.

present excess of supply over demand that made the world free-market price for phenol below the United Kingdom domestic price was only short-run, since there was a rising long-run industrial demand for phenol. It argued further that ending the price-fixing would cause the phenol price to drop 25 percent and that this would cause an estimated 50 percent of the tar used in distilling natural phenol to be diverted to fuel uses within three or four years, thus sharply curtailing the output of by-products derived solely from producing natural phenol. The court rejected this defense. It suggested lower prices can generate new uses and new demand. It further pointed to the elementary economic fact that there will be no excess supply in a free market because price will equate supply and demand. Furthermore, it asserted that the continued construction of synthetic phenol plants would be likely to anticipate the growing long-run demand, and hence there would be no shortage of supply in future years.

Price fixing was further urged as a benefit under defense (b) because it allegedly prevented debasement in quality of product. This argument was rejected by the court in all of the five cases in which it was urged. In *Cotton Yarn Spinners'*, defendants alleged that price fixing channeled competition into product rivalry which maintained and improved quality. The court found no logical connection between the two, holding that both price and product competition were desirable. Similar findings that competition in all its aspects made for improved quality or that defendants had failed to prove a causal connection between price fixing and preventing quality debasement were made in the *Scottish Bakers'*, *Carpet Manufacturers'*, and *Black Bolt & Nut Producers'* cases. In the *Blanket Manufacturers'* case the argument of preventing debasement in quality was rejected because the price fixing applied to such a small proportion of total output, and, since prices were usually above the agreed minimum, the small likelihood of a recession severe enough to bring the scheme into operation.[49]

Price fixing was pleaded as a benefit under defense (b) in that it enabled the defendants to engage in research and plant modernization. In the *Cotton Yarn Spinners'* case, the court considered this argument to have some merit but then rejected it, holding that

[49] *In re* Blanket Manufacturers' Agreement, L.R. 1 R.P. 208 (1959), [1959] 1 W.L.R. 442, [1959] 2 All E.R. 1. The twenty members of the association produced 70% of the total United Kingdom output of white all wool raised blankets in 1957. This type blanket, the only one subject to the minimum price agreement, was 15% of the total woven woolen blankets produced by members. See Davis, *The Blanket Manufacturers' Association's Agreement*, 109 L.J. 279 (1959).

the benefits of modernization attributable to price fixing were not substantial. It found that the price-fixing scheme's main effect here would be to delay price reductions that should result from reduced costs in modernization. In the *Blanket* case, where the price fixing on this small proportion of total blankets was rarely operative, the court felt the modernization could be attributed to price fixing only to a small extent. In the *Water-Tube Boilermakers'* case, the court found research costs to be such a small proportion of overhead expenditures and a deep depression so unlikely that it felt research would continue in spite of any future recession. In the *Black Bolt & Nut* case, the court found that cooperative research was not shown to be directly related to agreed pricing so that the former was dependent on continuance of the latter. Hence this ground for defense (b) was rejected in all four cases.

Price fixing was also defended as a public benefit on the ground that it prevented monopoly. In the *Cotton Yarn Spinners'* case this was rejected because there was no evidence that the five largest firms, then controlling 40 percent of output, would, on termination of price fixing, monopolize the industry. In the *Scottish Bakers'* case, there was also no evidence that the technological trend to fewer, large plant bakers would be in any way affected by the end of price fixing.

Mark-up and discount restrictions were defended in three cases as a public benefit under defense (b). The defense failed in all three cases. In the *British & Irish Bakers'* case, the recommended fixed retailers' margin was found to introduce an element of rigidity in the price structure that would hinder sales to independent retailers at reduced prices. In the *Carpets* case, the abrogation of the fixed wholesale discount, even if it led to greater discounts or quantity discounts, was found not to deny the public substantial benefits. The court held there was no ground for believing that increased discount from manufacturers to wholesalers would either increase the price of carpets to the general public or decrease the range of carpets available. In the *Black Bolt & Nut* case, a quantity discount based on aggregate purchases from all members of the association was held not to benefit the public as purchasers. It was found not to have the economic justification of a large-order discount. The court did not find it necessary to mention the possible detriment to the competition of non-members of the association.

The *Blanket Manufacturers'* case was the other of the two cases where defense (b) was proved and held not contrary to the public interest.[50] The first supplementary part of the *Blankets* agreement, not to make woolen raised blankets below a certain minimum weight, was upheld as conferring specific and substantial benefits or advantages on the public. Respondents showed that blankets weighing less than the specified minimum were thin, flimsy and weak and that these defects were unlikely to be discovered by the housewife on inspection of a new blanket. The benefit to the public was held to outweigh the detriment of this agreement that prevented product competition of thin blankets.[51]

The rest of the supplementary agreements in the *Blankets* case, concerning terms of trade and packaging, except one, were found not to confer substantial benefits on the public and were, like the price fixing, held contrary to the public interest. The one agreement which the court held not even to be a restriction under section 6 (1) was that "No manufacturer shall agree to the breaking of any contract by reduction in price." Contracts were to be canceled or varied only with consent of a committee of the trade association. The Registrar acceded to the view that this was not a restriction. The Court of Appeal upheld the Restrictive Practices Court ruling to this effect.[52]

Defense (d): Enable Negotiation of Fair Terms With a Monopolist. Defense (d) was pleaded in the *Water-Tube Boiler-*

[50] The successful defense under § 21 (1) (b) in the price fixing of Black Bolts and Nuts was described first but occurred later in time.

[51] In the United States under § 1 of the Sherman Act, concerted agreements to standardize products and refrain from the manufacture of some types have been held illegal. United States v. United States Gypsum Co., 340 U.S. 76, 91 (1950). In the cases, concerted standardization has been held illegal as an adjunct to a price-fixing conspiracy. C-O-Two Fire Equipment Co. v. United States, 197 F.2d 489, 493 (9th Cir. 1952), *cert. denied*, 344 U.S. 892 (1952). Trade association standardization activities not accompanied by agreements to adhere to the proposed standards are presumptively legal. LAMB & KITTELLE, TRADE ASSOCIATION LAW AND PRACTICE 86 (1956).

[52] *In re* Blanket Manufacturers' Agreement, L.R. 1 R.P. 271 (C.A. 1959). See Ison, *Restrictive Trade Practices — The Danger Sign*, 23 MODERN L. REV. 202 (1960), commenting that a horizontal sanctity of contracts resolution which was used to reinforce price collusion might standing alone still impede contract revision that might be characteristic of some competitive markets.

In the United States under § 1 of the Sherman Act, an agreement of trade association members to adhere to their individually announced and reported prices is an illegal price-fixing agreement. Sugar Institute, Inc. v. United States, 297 U.S. 553, 643-44 (1936). See Donovan, *The Effect of the Decision in the Sugar Institute Case Upon Trade Association Activities*, 84 U. PA. L. REV. 929 (1936); Fly, *Observations on the Anti-trust Laws, Economic Theory and the Sugar Institute Decisions*, 45 YALE L.J. 1339 (1936); Fly, *The Sugar Institute Decisions and the Anti-trust Laws*, 46 YALE L.J. 228 (1936). Agreements to adhere to list prices also violate § 5 of the Federal Trade Commission Act [15 U.S.C. § 45 (a)]. Advertising Specialty National Ass'n v. FTC, 238 F.2d 108 (1st Cir. 1956).

makers' case as a ground to justify a system of price fixing and allocation of customers among the members. Respondents argued that their agreement was reasonably necessary to negotiate fair terms with a buyer controlling a preponderant part of the market for such goods. The facts showed that during the years 1952 to 1958 inclusive the Central Electricity Generating Board placed 83 percent of domestic boiler orders, or 56 percent of domestic and foreign orders, measured in money terms. The court accepted one argument supporting this defense and rejected the other. Evidence from the Electricity Board asserted that they did not desire to force prices of boilers down to less than production costs. The court found, however, that in this industry of only six large firms, some were likely to make offers at uneconomic prices in the hope of getting an occasional contract. It held that price rivalry which might drive any of these large firms out of business would not be in the national interest, thereby accepting the capacity preservation argument it had rejected under defense (b).[53] On the other hand, the court found the restriction was too wide, in that it covered not only Electricity Board offers but all boiler offers. On this latter ground, it held that defense (d) had failed.

Defense (e): Prevent Serious and Persistent Unemployment. This defense was pleaded only in the *Cotton Yarn Spinners'* case. The Association urged that the more efficient organization of the industry which would result from the end of price fixing would increase and aggravate the persistent local unemployment in Lancashire.[54] The court pointed out that the unemployment statistics and estimates were incomplete and not reliably accurate. It found that plants were closing in spite of (or partially because of) the scheme as demand declined and, at most, ending the price fixing would only accelerate closings.[55] In conclusion on defense (e), the court did find that ending price fixing would have an adverse effect upon employment and that it would probably be persistent.

[53] See Yamey, *Water-Tube Boilers: Contradictions and a Paradox,* 23 MODERN L. REV. 79 (1960); Note, 108 U. PA. L. REV. 924 (1960). This defense was also unsuccessful in a case in a related industry decided after this manuscript was written. *In re* Associated Transformer Manufacturers' Agreement, Times (London), March 25, 1961, 12.

[54] The court did not mention the possibility that lower, competitive prices might stimulate demand and thereby increase employment or at least reduce the drop in employment. See Yamey, *The Yarn-Spinners' Agreement: Economics in Court,* 22 MODERN L. REV. 416, 417n (1959).

[55] See Furness, *The Cotton and Rayon Textile Industry,* in 2 BURN (ed.), THE STRUCTURE OF BRITISH INDUSTRY 184, 203 and 217 (1958); ALLEN, BRITISH INDUSTRIES AND THEIR ORGANIZATION 188, 211 (3d ed. 1951).

The next task was to weigh the alleged benefits of price fixing against its detriments.

The court found the detriments to the public from the scheme to be threefold: (1) higher prices for cloth made from cotton yarn, (2) loss or handicap of export trade, and (3) waste of national resources caused by excess capacity. It had held that the arguments under defense (b) benefited only a small class of trade purchasers and thus did not offset the detriment to the public of this price-fixing scheme. It found defense (e), the resulting unemployment, more significant, but held that the price fixing only postponed reorganization of the industry to lower capacity. On balance, it held the employment benefits of price fixing outweighed by its detriments.

Defense (f): Likely Reduction in Volume or Earnings of Export Business. The first of the two cases in which this defense was pleaded was *Water-Tube Boilermakers.* Respondents argued that removal of the restriction would reduce the volume and earnings from export business, which was substantial in relation to the whole business of the industry. About 40 percent of members' sales were in the export market. This argument the court accepted as a valid defense. It held that consultation among the members on foreign offers enabled them to correct each other's errors in making bids and enabled a preferred member to offer a foreign customer the "keenest" possible price. It held further that the restriction gave members that extra confidence which made it worth while to keep expensive foreign establishments.

In the final balancing of the benefit from the protection to export volume and earnings against the detriments to the public of the restriction, the court held for respondents. It held that the public here would be the purchasers of boilers and not the general public as electricity users. The court refused to consider the misallocation of resources a detriment because of the argument accepted under defense (d) that the few large orders should be spread among the firms in order to keep them all in business. In the court's opinion, the other major detriment, the higher prices resulting from the restriction, were outweighed by the benefits of protecting export volume and earnings.

This case demonstrates the potency of economic nationalism.[56] Firms currently able to meet world competition convinced the

[56] In the United States under the Webb-Pomerene Act [15 U.S.C. §§ 61-65 (1958)], trade association price fixing which is confined solely to the export markets is exempt from prosecution under the Sherman Act. See LAMB & KITTELLE, TRADE ASSOCIATION LAW AND

court that they had to act jointly to compete on the flimsy arguments that they would correct each other's errors in planning offers and that they needed price restrictions domestically to have confidence to maintain foreign offices. The first argument is probably untrue and the second is a *non sequitur*.

In the *Carpets* case, the defense relating to earnings in the export trade was entirely rejected. Carpet exports as a whole were in rapid decline and exports of type A-1 carpets were in greater decline than all carpets together. Since British A-1 was shown to be a quality standard in the Australian market, defendants argued that end of the restrictions would lead to debasement of quality and eventually hurt sales in Australia. This the court rejected. It could see no reason why established manufacturers could not continue their sales by maintaining their quality and bringing this to the notice of the public. Finally the court noted that the Federation had adopted a policy in many export markets of removing the restrictions. It found it difficult to see why freedom of action in the home market should lead to a reduction of exports.[57]

F. *Consent Orders Under the 1956 Act*

Fifty consent orders terminating restrictive agreements which had been referred to the Restrictive Practices Court by the Registrar were entered during the first four years of the act's operation. Only two of these, both price-fixing agreements, were entered before the filing of the opinion of Justice Devlin in the *Yarn Spinners'* case in January 1959. The other forty-eight were entered following the general condemnation of price fixing in that opinion. The facts of these consent orders are summarized in Table II *infra*.

Forty-two of the fifty agreements had overt price fixing as their primary clause. In two others, Garage Equipment and Electric

PRACTICE 122-40 (1956). The Webb-Pomerene Act does not exempt domestic price fixing from the Sherman Act, regardless of the impact this may allegedly have on exports or export earnings.

[57] Before trial of this case, respondents applied to the court to sever that portion of their agreements relating to exports and thereby exclude them from consideration by the court. Agreements relating solely to export trade must be registered with the Board of Trade for possible consideration by the Monopolies Commission and not with the registrar for review by the Restrictive Practices Court. The application in this case was refused. *In re* Federation of British Carpet Manufacturers' Application, L.R. 1 R.P. 550 (1959). In the United States under § 1 of the Sherman Act, such a combined domestic and export agreement to fix prices would also be illegal *per se*. United States v. U.S. Alkali Export Ass'n, 86 F. Supp. 59 (S.D.N.Y. 1949). Only if the export agreement were entirely separate and unrelated to the domestic market would it be exempt under the Webb-Pomerene Act. 15 U.S.C. § 62 (1958). The exports earnings defense was also rejected by the Court in the *Transformer* case. See note 53 *supra*.

Light Fittings, the firms agreed to adhere to their individually announced prices until formal announcement of new prices. Five others were supplementary agreements in industries covered by price-fixing agreements. Thus, the only industry subject to a consent order which did not have an industry-wide price agreement of some type was Radio and Cathode Ray Tubes. In two industries, Electric Resistance Furnaces and Springs and Interior Springing, agreements provided for additional price consultation among members when a special order was to be produced. Delivered pricing was required of members in six agreements. These were Agricultural Twines, Tuyere Makers, Zinc Oxide, Paving and Kerb Manufacturers, Bath Manufacturers, and Hard Fibre Rope.

Many of the agreements contained clauses to limit product rivalry and thereby make it possible to police a system of price agreements. Limitations on types of product, in some cases by setting quality standards, were found in Flour Milling, Pneumatic Tools, Air Compressors, Concrete Mixers, Plate Glass, Hard Fibre Cord and Twine, Trawl Twine, Electric Light Fittings, and Hard Fibre Rope. Limits on types of services or processes offered were used in the Rubber Proofers' and Glass Benders' agreements. Similar restrictions were in effect in Twist Drills, Building Bricks and Galvanized Tanks. Other agreements provided that one firm would not sell to a customer who was in arrears in paying another seller (Building Bricks; Washed Sand and Gravel), that members would divide territories (Washed Sand and Gravel; Paving and Kerb Manufacturers), and that members would not supply parts to fit machines of other members (Electric Resistance Furnaces; Pneumatic Tools; Air Compressors).

Certain of the restrictions were of types that could have resulted from customer pressure on the member firms. The agreements among the Association members would tend to equalize their market positions in submitting to these pressures. Agreements to sell only with resale price maintenance were made in Semirotary Wing Pumps, Domestic Electric Cookers, Building Bricks, Concrete Mixers, Hard Fibre Cord, Garage Equipment, Electric Light Fittings, Metal Bedsteads, and Hard Fibre Rope. Agreements to sell only to buyers on a certified list were used in Radio Tubes, Flour Millers, Building Bricks, Light Edge Tools, Agricultural Twine, Concrete Mixers, Garage Equipment, Electric Light Fittings, and Glycerine. To the extent that these lists were used to limit the number of firms receiving distributors' discounts, but not prevent

sales to others, they also benefited sellers. The Flour Millers' scheme of deferred rebates for large buyers was probably induced by the factors, who were the bulk purchasers. Likewise, the Plate Glass agreement to sell only to members who made at least certain minimum purchases was probably induced by the purchasing distributors as a barrier to entry.

Two legal points were established in the cases resulting in consent orders. In the *Constructional Steelwork* case[58] it was held that a price-fixing agreement that was terminated after reference to the court but before hearing is still properly subject to a consent order. Only if a declaration that the agreement was contrary to public interest was of record could the Registrar seek injunctions against renewed price-fixing schemes. In the *British & Irish Millers'* case[59] six respondents refused to be represented by the trade association in the hearings and were not parties to the consent order. The court held that even though these parties did not appear or defend their case, a declaration that the restrictions in which they engaged were contrary to the public interest would be entered together with an injunction restraining them from giving effect to or enforcing the agreement.

G. *Summary and Comparison With the United States*

Only nine cases involving substantive controversies under the Restrictive Trade Practices Act have been heard. In eight of the nine cases (all except the Chemists' Federation), price fixing was the primary purpose of the agreement. In only four cases, defenses were proved to exist and found legally substantial so that they had to be balanced against the detriment resulting from the agreement. In the *Yarn Spinners'* case, defense (b), specific benefit to that segment of the public in the trade resulting from price stabilization, and defense (e), that removal of the restriction (price fixing) was likely to have a persistent adverse effect on employment in the area, were both held substantial but were found to be outweighed by the detrimental effects of the higher prices. In the *Blanket Manufacturers'* case, though the price fixing was not proved to benefit the public, the minimum weight agreement for raised wool blankets was held to benefit the public under defense (b) and the benefits were found to outweigh the detriments of

[58] *In re* British Constructional Steelwork Association's Agreement, L.R. 1 R.P. 199 (1959).

[59] *In re* National Association of British and Irish Millers Ltd.'s Scheme, L.R. 1 R.P. 267 (1959), [1960] 1 W.L.R. 63.

this agreement. In the *Water-Tube Boilermakers'* case, defense (f), that removal of the restriction (price fixing and allocation of customers' orders) would be likely to cause a reduction in the volume of the export business, was held substantial and was found to outweigh the detrimental effects of the agreements. In the *Black Bolt & Nut* case, price fixing was found under defense (b) to benefit the public because the resulting price stabilization would enable wholesalers and larger buyers to avoid "going shopping" for lowest prices and this was held to outweigh any possible detriments to the public from the agreements. Thus, in only three instances have defenses been held to outweigh detriments, thereby upholding the restrictions. Two of these cases were under defense (b) and one under defense (f).

The Restrictive Trade Practices Act has operated as a much more potent anti-monopoly weapon than most observers had predicted.[60] The fact that over 700 agreements were abandoned by January 1960 must be attributed to the sweeping language of the court in condemning price-fixing restrictions in the *Yarn Spinners'* case.[61] The basic construction of the statute must not be minimized. The act puts an initial burden of persuasion on the defendant to prove that one of the defenses in section 21 (1) is substantial. But this estimation or prediction of economic effects and their magnitude always involves speculation.[62] To the extent that the court demands measurable and factual evidence to support the defenses in section 21 (1), cases become more difficult and hence less likely to result in a successful defense. The presumption that the restrictions listed in section 6 are contrary to the public interest derives from the established theories of neoclassical economics.[63] The courts' strong language in the first few cases rests directly on the economics of free markets. But the defenses upheld in the *Water-Tube Boilermakers'* and *Black Bolt & Nut* cases show the triumph of pragmatic factual reasoning over the welfare considerations of positive economics. The cases demonstrate the non-

60 Dennison, *The Restrictive Trade Practices Court in Action*, 11 YORKSHIRE BULL. 100, 102 (1959).

61 For an analysis of agreements abandoned by industry classes, see Heath, *Freer Prices — What Progress?* THE BANKER, February 1960, 1.

62 Yamey, *A New Court's First Judgment*, 22 MODERN L. REV. 213 (1959).

63 For an analysis of the problem of breaching the gap between theory and practice, see Symposium on Restrictive Practices Legislation, Wiseman, *Economic Analysis and Public Policy*, 70 ECON. J. 455 (1960). For economic analyses of some of the defenses, see Dennison, *The British Restrictive Trade Practices Act of 1956*, 2 J.L. & ECON. 64, 71-75 (1959); Heath, *Restrictive Practices Court on Competition and Price Restriction*, 28 MANCHESTER SCHOOL 1-18 (1960).

legal nature of the weighing of benefits alleged by defendants to derive from the agreements against the detriment to the public presumed by the act and argued by the Registrar. The weighing and balancing of unmeasurable and non-comparable economic consequences of agreements is not a judicial task in the usual meaning of law interpretation.[64] There is no reason to believe, however, that an administrative commission of professional politicians would do a superior job.

The fifty consent orders under the Restrictive Trade Practices Act further indicate the generalized force that the *Yarn Spinners'* decision has had on price fixing. They, together with the large number of price agreements that were abandoned, indicate the large sector of the business community which is convinced that its price agreements cannot be successfully defended. Agreements limiting product rivalry or barring sales to uncertified buyers have also been the subject of a number of consent orders. Other practices have not been brought before the court enough times to generalize on the likelihood of successful defenses.

The scope of the British Act is much narrower than that of the United States antitrust laws. The 1956 statute is almost exclusively concerned with horizontal agreements between independent business firms.[65] Problems of monopoly are specifically left by the 1956 Act in the hands of the Monopolies Commission.[66] This means that alleged monopolies are subject to investigation only on reference from the Board of Trade and are not illegal, as under section 2 of the Sherman Act.[67] Mergers are not covered by the 1956 Act, and if the two or more merging firms together do not produce or process one-third of the products in their industry, they are not subject to monopoly investigation either.[68] Contrast this with the standard of section 7 of the Clayton Act, where mergers are illegal if their effect may be substantially to lessen competition or tend to create a monopoly.[69]

64 Symposium on Restrictive Practices Legislation, Lloyd, *The Lawyers Point of View*, 70 ECON. J. 467, 471 (1960).

65 Intra-enterprise agreements are specifically exempted as follows: "interconnected bodies corporate or individuals carrying on business in partnership with each other shall be treated as a single person." 4 & 5 Eliz. 2, c. 88, §§ 6(8) and 8(9). In the United States, intra-enterprise conspiracies may violate § 1 of the Sherman Act. See review of cases in REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 30-36 (1955).

66 4 & 5 Eliz. 2, c. 68, §§ 28-31 (1956).

67 26 Stat. 209 (1890), 15 U.S.C. § 2 (1958).

68 11 & 12 Geo. 6, c. 66, §§ 3-5 (1948).

69 38 Stat. 731 (1914), as amended 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

The British Act explicitly exempts from registration vertical agreements between a single seller and a single buyer.[70] This section is reinforced by another which exempts exclusive dealing arrangements and exclusive buying or representation agreements, as long as the agreement has only two parties, a seller and a buyer.[71] The breadth of the exemption on vertical agreements is illustrated by the *Austin Motor* case.[72] Prior to passage of the Restrictive Practices Act, Austin entered annual, multiparty agreements with distributors and dealers providing for resale price maintenance, minimum annual purchases, minimum inventories of new cars, limiting dealers' sales areas, and other minor limitations. In 1957 all the multilateral agreements were replaced by a series of bilateral agreements designed to accomplish the same marketing scheme. In an action to test whether these bilateral agreements were registrable, the Chancery Division of the High Court[73] held that they were not. This decision, rendered on the basis of the agreements themselves, without collateral evidence, has been criticized as unduly limiting the scope of the act.[74] In contrast to the British statute, vertical agreements are not exempt from sections 1 or 2 of the Sherman Act.[75] Exclusive dealing arrangements are illegal under section 3 of the Clayton Act where the effects of such an agreement may be substantially to lessen competition or tend to create a monopoly.[76]

The five classes of horizontal agreements which must be registered under section 6 (1) of the British Act are delineated in specific and detailed terms. The defenses under the British Act, too, are stated in fairly specific terms in section 21 (1) of the act. Exact guides for courts not only facilitate enforcement, but they minimize the litigation over the breadth and scope of the principal statutory terms. Contrast this with seventy years of litigation in

70 4 & 5 Eliz. 2, c. 68, § 7 (2).

71 4 & 5 Eliz. 2, c. 68, § 8 (3).

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

73 The High Court, rather than the Restrictive Practices Court, is given jurisdiction to decide whether or not an agreement is subject to registration under the Restrictive Trade Practices Act. 4 & 5 Eliz. 2, c. 68, § 13 (2).

74 Grunfeld, *The Restrictive Trade Practices Act in Court*, 21 MODERN L. REV. 83 (1958); Wedderburn, *Restrictive Trade Practices—Resale Price Maintenance—Registration of Agreements*, [1957] CAMB. L.J. 121, 122.

75 As to close combinations, see Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. CHI. L. REV. 157 (1954). As to loose combinations, see Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1 (1959).

76 38 Stat. 731 (1914), 15 U.S.C. § 18 (1958). See HANDLER, ANTITRUST IN PERSPECTIVE 29-48 (1957).

the United States over the meaning and scope of "reasonable restraint of trade" in section 1 of the Sherman Act. Under the British act, however, great discretion is vested in the Restrictive Practices Court in weighing the defenses in section 21 (1) against the presumption of illegality. Defense (b), the broadest and most ambiguous of the seven, was given great vitality by the *Black Bolt & Nut* decision. If the court follows this view in later cases, defense (b) will become at least as wide and uncertain as "unreasonable restraint of trade" under the Sherman Act.

As to the five classes of horizontal agreements which are registrable under section 6 (1) of the British act and presumed contrary to the public interest, it can be argued that Parliament was too cautious in refusing to declare them illegal.[77] In the United States, these classes of agreements have been held unreasonable *per se* and therefore illegal under the Sherman Act.[78] From an economic point of view, the three registered agreements which were successfully defended are highly questionable. The agreement in the *Blankets* case not to manufacture blankets below a certain weight will probably channel non-members' production toward this product of questionable quality. Meanwhile, members will have less motive to try to develop new, light-weight woolen blankets of greater durability. In the *Water-Tube Boilers'* case, there was just no valid, logical connection between domestic price-fixing and greater export sales other than price discrimination in favor of export markets. In the *Black Bolt & Nut* case, the court approved the closure of the free market for the products because the immediate parties found price fixing more convenient.

The conclusive statutory presumption in section 6(7) of the British act that recommendations by a trade association are pursuant to agreement of the members is a useful innovation.[79] It could go a long way toward reducing the power of British trade associations. Trade associations in the United States refrain from making recommendations for future price or output of members because they are very likely to be held illegal.[80]

77 This was the view of the majority of the Monopolies and Restrictive Practices in the 1955 report on Collective Discrimination, *supra* note 18. See comments of Cairns, *Monopolies and Restrictive Practices*, in GINSBERG (ed.), LAW AND OPINION IN ENGLAND IN THE TWENTIETH CENTURY 173, 180 (1959).

78 See footnotes 35, 39, 42, 51, 52 and 57 *supra*.

79 The validity of this section was upheld in *In re* Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, L.R. 1 R.P. 387, 455-57 (1959).

80 American Column & Lumber Co. v. United States, 257 U.S. 377 (1921). See LAMB & KITTELLE, TRADE ASSOCIATION LAW AND PRACTICES 34-42, 64-70 (1956).

The final and most difficult question is that of the effectiveness of anti-monopoly law in creating industrial performance more closely approximating competition.[81] One-third of the registered restrictive agreements in the United Kingdom have been abandoned. But, given the background of former industrial government by trade associations, these firms may hesitate to initiate price rivalry.[82] Price leadership is likely to become prevalent.[83] Over longer periods of time, with new production and distribution methods, changing cost structures may foster increased price rivalry and break down the older patterns of price stability. The presumptive illegality of agreements to control inputs of production or market outlets may also stimulate the entry of new firms and expansion of existing firms into new products. With exception of the merger loophole, British law has gone a long way toward creating the legal environment of competition which is characteristic of the United States economy. It remains to be seen whether the Restrictive Practices Court will adhere primarily to the economic principles of free markets or uphold the defenses in so many instances that the presumptions of the act come to be doubted by the business world.

II. RESALE PRICE MAINTENANCE

It was estimated in 1938 that approximately 30 percent of domestic consumers' expenditures for goods in the United Kingdom were for items subject to resale price maintenance.[84] In 1960, a critic of resale price maintenance estimated that about 25 percent of personal consumer expenditures were for goods sold under price maintenance,[85] while a proponent of the practice estimated this figure to be only 20 percent.[86] The purpose of this discussion

81 See Keezer, *The Effectiveness of the Federal Antitrust Laws: A Symposium*, 39 AM. ECON. REV. 689-724 (1949); Markham, *The Effectiveness of the Federal Antitrust Laws: Comment*, 40 AM. ECON. REV. 167 (1950); WHITNEY, ANTITRUST POLICIES (1958); Miller, Comment, *Impact of Antitrust*, 12 VAND. L. REV. 1047 (1959); CONANT, ANTITRUST IN THE MOTION PICTURE INDUSTRY (1960).

82 Beacham, *The Restrictive Trade Practices Act, 1956*, 11 YORKSHIRE BULL. 79 (1959).

83 Symposium on Restrictive Practices Legislation: Heath, *Some Economic Consequences*, 70 ECON. J. 474 (1960).

84 Great Britain, Board of Trade, *Report of the Committee on Resale Price Maintenance* CMD. No. 7696 (1949) at 1, quoting National Institute of Social and Economic Research.

85 YAMEY, RESALE PRICE MAINTENANCE AND SHOPPERS' CHOICE 8 (1960).

86 ANDREWS & FRIDAY, FAIR TRADE: RESALE PRICE MAINTENANCE RE-EXAMINED 9 (1960). Comparable figures for the United States estimated price-maintained goods in 1939 to be about 5% of retail sales of goods with an upper estimate of 10%. GRETHER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION 322 (1939). Herman estimates that the volume of goods subject to resale price maintenance may have reached 10% of total retail dollar sales in

is to explain the estimated decline. Primarily, this involves an evaluation of the changes in the law and practice of resale price maintenance following passage of the Restrictive Trade Practices Act of 1956.[87]

A. *Law and Practice Prior to 1956*

Resale price maintenance in the United Kingdom originated in the last two decades of the nineteenth century for such goods as drugs, tobacco, stationery, leather goods, bicycles and some grocery and hardware items.[88] An early decision held resale price maintenance agreements not to be in restraint of trade, and, if reasonable for the parties, enforceable between them.[89] Resale price agreements could not be enforced, however, where plaintiff was not a party to the particular contract. A tire manufacturer thus was not allowed to enforce a resale price contract made at his direction between his distributor and a retailer on the ground that there was no privity of contract between plaintiff and defendant.[90] But if goods were patented, resale price maintenance could be enforced, by virtue of the statutory patent monopoly, against persons not parties to resale price contracts.[91]

Enforcement of resale price maintenance by breach of contract actions proved infeasible for the bulk of goods which moved through one or more middlemen before reaching the retailers. The middleman who sold to the price-cutting retailer, the only seller in privity of contract with him, usually had no interest in such enforcement and would not report the facts of violations. Furthermore, the assembly of sufficient evidence for legal proof

1950 but in 1954 was 6.9%. Herman, *A Statistical Note on Fair Trade*, 4 ANTITRUST BULL. 583, 587 (1959). The percentage is substantially less in 1961.

87 4 & 5 Eliz. 2, c. 68 (1956).

88 YAMEY, ECONOMICS OF RESALE PRICE MAINTENANCE 133-57 (1954).

89 Elliman, Sons & Co. v. Carrington & Sons, Ltd., [1901] 2 Ch. 275; Palmolive Co. (of England) v. Freedman, [1928] Ch. 264. For detailed surveys of the law of resale price maintenance, see DIX, THE LAW RELATING TO COMMITTEE TRADING 110-26 (1938); HEDGES, LAW RELATING TO RESTRAINT OF TRADE 60-63 (1932).

In the United States, early state court decisions divided on whether resale price maintenance contracts were in unreasonable restraint of trade. See annotations: 7 A.L.R. 449, 460 (1920). In the federal courts, resale price maintenance contracts were held to be in restraint of trade, and where commerce among the several states was involved, such agreements violated § 1 of the Sherman Antitrust Act. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

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

91 National Phonograph Co. of Australia v. Menck, [1911] A.C. 336; Columbia Graphaphone Co. v. Thoms, [1924] 41 R.P.C. 294; Dunlop Rubber Co. v. Longlife Battery Depot, L.R. 1 R.P. 65, 70 (1958). Contra rule in the United States: United States v. Univis Lens Co., 316 U.S. 241, 250 (1942); Straus v. Victor Talking Mach. Co., 243 U.S. 490 (1917).

of violation by an individual retailer on a few small items was costly. As a result an alternative method of commercial enforcement was developed by the trade associations, namely, boycott in the form of stop-lists.[92] All members of the trade association agreed not to supply their products to any wholesaler or retailer put on a stop-list. The boycott or money penalties assessed against price cutters were administered by a system of extra-legal tribunals within the trade association.[93] Members or non-members of the association were notified that someone had charged them with price cutting and that failure to answer at the trade association tribunal would result in their being cut off by all suppliers of the product who were members of the association. Upon appearing and being judged violators, the price cutters were either assessed a money penalty or, if they refused to pay, were put on a stop-list.

The use of boycott as a technique of industrial self-government had been upheld since the *Mogul* case[94] against the charge that its operation was in restraint of trade and therefore a tort of conspiracy against the boycotted party. Following this rule, the use of trade association stop-lists to enforce resale price maintenance was held legal in the *Ware & De Freville* case,[95] defeating a claim that they were in an unlawful conspiracy in restraint of trade and that their publication was defamatory. The use of trade association tribunals in administering stop-list enforcement and the assessment of money penalties against price cutters as an alternative to boycott were upheld in the *Thorne* case.[96] Trade associations were thus vested by the courts with almost unlimited coercive regulatory power to enforce price maintenance by commercial boycott.[97]

Between 1920 and 1955, resale price maintenance in the United Kingdom was subjected to four governmental investigations. The first of these found resale price maintenance to be to the public advantage in holding down prices during inflation and assuring

92 GRETHER, RESALE PRICE MAINTENANCE IN GREAT BRITAIN 284-300 (1935); LEVY, RETAIL TRADE ASSOCIATIONS 137-61 (1942).

93 JOHNSON-DAVIES, THE PRACTICE OF PRICE MAINTENANCE 43-54 (1955).

94 See note 7 *supra*. Compare treatment of this problem, Part I *supra*, note 35.

95 Ware and De Freville v. Motor Trade Ass'n, [1921] 3 K.B. 40, 19 A.L.R. 893 (1922). In the United States, following the rule that collective boycotts are illegal *per se*, the use of such boycotts to enforce resale price maintenance is also illegal. United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 723 (1944); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 454 (1922). See United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

96 Thorne v. Motor Trade Ass'n, [1937] A.C. 797, [1937] 3 All E.R. 157, 323.

97 The courts would not review or interfere with decisions of trade association tribunals unless they involved a violation of law or a patent violation of the association's published rules. Lee v. Showmen's Guild of Great Britain, [1952] 2 Q.B. 329, [1952] 1 All E.R. 1175. See JOHNSON-DAVIES, *op. cit. supra* note 93.

middlemen a fair remuneration for services performed.[98] To ensure that the maintained prices would be fair and reasonable, the committee recommended that a tribunal be created to investigate complaints of excessive charges, but this latter recommendation did not receive action. The second report, in 1931, found price maintenance schemes which result in withholding supplies of goods from some retailers to be a public disadvantage.[99] The Committee recommended no legislation, however, finding that freedom of contract, including the right to combine, were paramount public interests. The third report was that of the Lloyd-Jacob Committee in 1949.[100] This report found that collective price maintenance schemes and collective enforcement of resale prices "impeded the development of economical methods of trading and prevented the reduction of distributive costs and prices."[101] It recommended that these practices be rendered illegal. As to individual resale price maintenance, however, the report recommended that it should be allowed to continue and that means be devised to ensure its effectiveness.

The *Collective Discrimination* report[102] of the Monopolies Commission, the immediate impetus for passage of the Restrictive Trade Practices Act of 1956, was the most recent government study to treat resale price maintenance. The report found that individual price maintenance restricted the ability of distributors to compete with one another in price and denied consumers a choice between methods of distribution.[103] It found these effects intensified by horizontal agreements of producers to adopt resale price maintenance since it discouraged the adoption of new marketing methods. It also found collective action to enforce resale price maintenance open to serious objection. It put coercive regulatory power into the hands of trade association officials without effective

98 Gt. Britain, Standing Committee on Trusts, Subcommittee on Fixed Retail Prices, *Findings and Decisions*, CMD. No. 662 (1920).

99 Gt. Britain, Committee Appointed by the Lord Chancellor and the President of the Board of Trade to consider certain trade practices, *Report on Restraint of Trade* (1931).

100 Gt. Britain, Board of Trade, *Report of the Committee on Resale Price Maintenance*, CMD. No. 7696 (1949).

101 *Id.* at 33. This report was followed by a statement of the Labour Government of its intention to introduce legislation to make individual as well as collective resale price maintenance illegal. Gt. Britain, Board of Trade, *A Statement on Resale Price Maintenance*, CMD. No. 8274 (1951). The legislation had not been introduced when the Labour Government left office in November 1951.

102 Gt. Britain, Monopolies and Restrictive Practices Commission, *Collective Discrimination: Report on Exclusive Dealing, Collective Boycotts, Aggregated Rebates and Other Discriminatory Trade Practices*, CMD. No. 9504 (1955).

103 *Id.* at 51.

restraints on their arbitrary use of such power.[104] The majority of the Commission recommended that collective agreements to adopt resale price maintenance or to enforce it be prohibited by law.[105]

B. *Restrictive Trade Practices Act, 1956*

Agreements between or among manufacturers merely to adopt resale price maintenance, without provision for enforcement, come under the registration requirements of the main body of the act, Part I. They are horizontal price-fixing agreements, one of the five categories of restrictions which must be registered pursuant to section 6(1)[106] and reviewed under section 21(1) of the act.[107] It should be noted that individual resale price agreements are not subject to registration under Part I of the 1956 Act. [108]

Agreements for collective enforcement of resale price maintenance receive special treatment in Part II of the act.[109] Section 24 makes horizontal agreements of sellers to boycott or discriminate against violators of resale price maintenance unlawful.[110]

104 *Id.* at 62. "Such agreements place in the hands of associations a power over individual traders which we regard as excessive and dangerous."

105 *Id.* at 82-83. Although the Collective Discrimination report did not pass judgment on individual resale price maintenance, one industry report, that on tires, did find its use to be against the public interest (5-to-4 vote). Monopolies and Restrictive Practices Commission, *Report on the Supply and Export of Tyres* 132 (1955).

106 See § 6(1)(a), note 22 *supra*. In the United States, under § 1 of the Sherman Act, horizontal agreements to engage in resale price maintenance are illegal *per se*. United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945). The Miller-Tydings amendment to the Sherman Act limits the resale price maintenance exception to agreements that are solely vertical and specifically continues the illegality of horizontal agreements to establish or maintain minimum resale prices. Act of August 17, 1937, c. 690, 50 Stat. 693, 15 U.S.C. § 1 (1958).

107 See note 24 *supra*.

108 4 & 5 Eliz. 2, c. 68, §§ 7(2) and 8(3). Registration is required only when two or more parties accept one of the restrictions listed in § 6(1). In the individual resale price maintenance agreement, only one party, the buyer, accepts the resale price restriction. Yamey, *The Investigation of Resale Price Maintenance Under the Monopolies Legislation*, [1958] PUBLIC LAW 358, 359-60.

109 4 & 5 Eliz. 2, c. 68, §§ 24-27.

110 4 & 5 Eliz. 2, c. 68, § 24(1) states in part:

"Subject to the provisions of this section, it shall be unlawful for any two or more persons carrying on business in the United Kingdom as suppliers of any goods to make or carry out any agreement or arrangement by which they undertake—

"(a) to withhold supplies of goods for delivery in the United Kingdom from dealers (whether party to the agreement or arrangement or not) who resell or have resold goods in breach of any condition as to price at which those goods may be resold;

"(b) to refuse to supply goods for delivery in the United Kingdom to such dealers except on terms and conditions which are less favourable than those applicable in the case of other dealers carrying on business in similar circumstances; or

"(c) to supply goods only to persons who undertake or have undertaken to withhold supplies of goods, or to refuse to supply goods, as aforesaid."

Likewise, agreements among buyers to boycott or discriminate against sellers who refuse to adopt resale price maintenance in their selling is made unlawful.[111] This section specifically outlaws the extra-legal tribunals and money assessments by which trade associations policed resale price maintenance. Even a recommendation by a supplier or dealer to another to engage in the named acts is treated as an unlawful agreement, and all of the prohibitions also apply to trade associations.[112] This section is not enforceable by criminal but by injunctive or other civil proceeding brought by the Crown.[113] Such proceeding is without prejudice to the right of any injured party also to bring a civil action.

Individual resale price maintenance contracts and their enforcement are specifically exempted from the prohibitions of section 24.[114] Section 25 goes even further by adding positive strength to individual resale price maintenance, which for the first time is made enforceable against non-signers of resale price contracts who acquire the goods with notice that the goods are price-maintained.[115] In effect this overrules the decision in *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*,[116] which prohibited enforcement against non-signers via the common law. This section applies to all goods, not just to trademarked or branded commodities, and may be applied even if the manufacturer has a virtual monopoly in the commodity.[117] A manufacturer may enforce resale price

111 4 & 5 Eliz. 2, c. 68, § 24(2).

112 4 & 5 Eliz. 2, c. 68, §§ 24(4), 24(5).

113 4 & 5 Eliz. 2, c. 68, §§ 24(6), 27(7).

114 4 & 5 Eliz. 2, c. 68, § 24(3).

115 4 & 5 Eliz. 2, c. 68, § 25(1), as follows: "Where goods are sold by a supplier subject to a condition as to the price at which those goods may be resold, either generally or by or to a specified class or person, that condition may, subject to the provisions of this section, be enforced by the supplier against any person not party to the sale who subsequently acquires the goods with notice of the condition as if he had been party thereto."

In the United States, state resale price statutes generally provide for enforcement against non-signers. The California non-signer clause, the first to be passed, is typical. It reads as follows:

"Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to this chapter, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." CAL. BUS. & PROF. CODE § 16904.

116 [1915] A.C. 847. See text accompanying note 90 *supra*.

117 Fulda, *The Resale Price Maintenance Provisions of the Restrictive Trade Practices Bill: An American Comment*, 3 BUS. L. REV. 180 (1956). In the United States, state resale price statutes uniformly apply only to trademarked or branded goods. Resale price maintenance, adopted in the United States pursuant to state statute, is exempt by federal statute from antitrust prosecution only if the goods are sold "in free and open competition with commodities of the same general class produced or distributed by others. . . ." 50 Stat. 693, 15 U.S.C. § 1 (1958). See Eastman Kodak Co. v. FTC, 158 F.2d 592 (2d Cir. 1946), *cert. denied*, 330 U.S. 828 (1947).

maintenance against non-signers of resale price contracts by an injunction, which will apply to all the manufacturer's goods thereafter acquired and resold by the defendant.[118] It should be noted that Part II of the act is enforced in the High Court, not in the Restrictive Practices Court.

C. *Court Decisions and Consent Orders Under 1956 Act*

Four decisions have been rendered by the Restrictive Practices Court under sections 6 and 21 of the 1956 Act concerning collective recommendations for resale price maintenance without provision for collective enforcement. The first two of these were in the *Scottish Bakers*[119] and *British & Irish Bakers*[120] cases. In both of these cases, resale price maintenance was auxiliary to and in support of horizontal price-fixing agreements among the bakers. Most of the bakers in the two cases did some retailing and the primary purpose of the agreements was to fix the retail price of bread in different areas. Since other sales were made by baker members to independent retailers, it was necessary to protect the bakers' own retail price fixing with a recommendation to independent retailers that they charge the Associations' announced prices.

In both of these cases, the bakers' agreements on the wholesale discounts from the recommended retail prices to be allowed to independent retailers were defended under defense (g), that the restriction was reasonably required for purposes connected with maintenance of another restriction accepted by the parties.[121] But the main restrictions upon which these agreed discounts for independent retailers depended, the bakers' own fixed retail prices, were in both cases held to violate the Restrictive Trade Practices

[118] 4 & 5 Eliz. 2, c. 68, § 25(4). Enforcement will be denied for any resale price restriction which has been declared by the Restrictive Practices Court to be contrary to the public interest. Sec. 25(3).

[119] *In re* Wholesale and Retail Bakers of Scotland Association's Agreement and *In re* Scottish Association of Master Bakers' Agreement, L.R. 1 R.P. 347 (1959), [1959] 3 All E.R. 98.

[120] *In re* Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, L.R. 1 R.P. 387 (1959), [1960] 1 W.L.R. 393, [1960] 1 All E.R. 227.

[121] *In re* Wholesale and Retail Bakers of Scotland Association's Agreement, L.R. 1 R.P. 347, 374 (1959); *In re* Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, L.R. 1 R.P. 387, 453 (1959). In a case decided after this manuscript was written, collective adoption of resale price maintenance was held not contrary to public interest where the main agreement of manufacturers to fix their prices was held legal. *In re* The Cement Makers' Federation's Agreement, [1961] 2 All E.R. 75, 93-94.

Act.[122] Hence, the court did not have to consider the validity of the wholesale discounts in either case.

In the *Carpet Manufacturers'* case, as in the *Bakers'* cases, resale price maintenance was a supplemental reinforcement to a horizontal price-fixing agreement among manufacturers.[123] The manufacturers' agreements fixed the wholesale prices, the prices at which they would sell directly to large retailers. The manufacturers agreed to limit their other sales, at the 11 to 12½ percent discount from announced wholesale prices, to wholesalers on their Federation's approved list. Each wholesaler on the approved list was required to sign a letter to the Manufacturers' Federation whereby he agreed to accept the manufacturers' price to retailers as his own minimum price to retailers.[124] In this case, as in the *Bakers'* cases, the collective agreement to adopt resale price maintenance, together with the primary agreement of the manufacturers for horizontal price fixing, was held contrary to the public interest.[125] The abrogation of the fixed wholesale discount, a key aspect of resale price maintenance as it was imposed on the wholesalers in this industry, was likely to lead to greater wholesale mark-up or quantity discounts to wholesalers. The court found, however, that there was no reason to believe that this would increase the price to the general public, since restoring price competition both at the wholesale and manufacturers' levels was likely to result in lower manufacturers' prices.[126]

The fourth case before the Restrictive Practices Court involving collective adoption of resale price maintenance was in the motor vehicle industry.[127] Before passage of the 1956 Act there had also been collective enforcement of resale price maintenance

122 See text at notes 40, 41 *supra*. In the *Scottish* cases, the Court held the price fixing not to confer specific and substantial benefits or advantages on the public under § 21 (1) (b) of the Restrictive Trade Practices Act. Public advantage from the price fixing, allegedly resulting from price stabilization, from prevention of undue concentration in production, and from maintenance of quality, was held not proved by the evidence. *In re* Wholesale and Retail Bakers of Scotland Association's Agreement, L.R. 1 R.P. 347, 377-84 (1959). In the *British and Irish* case, the defense of public benefit or advantage under § 21 (1) (b) was also not proved. The court found that the recommended maximum prices operated in fact as minimum prices and that the evidence did not show that the recommended prices were below what could be expected to prevail in a free market. *In re* Federation of Wholesale and Multiple Bakers' Agreement, L.R. 1 R.P. 387, 462-472 (1959).

123 *In re* Federation of British Carpet Manufacturers' Agreement, L.R. 1 R.P. 472 (1959), [1960] 1 All E.R. 356. See note 37 *supra*.

124 *Id.* at 530-31.

125 See text discussion at notes 37 and 57 *supra*.

126 L.R. 1 R.P. 472, 541-42.

127 *In re* Motor Vehicles Distribution Scheme Agreement, [1961] 1 All E.R. 161, [1961] 1 W.L.R. 92.

by trade association tribunals, money penalties, and boycotts.[128] When collective enforcement became illegal under section 24 of the 1956 Act, the British Motor Trade Association system of market control was replaced by a new distribution scheme.[129] Pursuant to this new trade association agreement, the previous multiparty agreements between manufacturers and groups of distributors and dealers were replaced by numerous biparty vertical agreements incorporating essentially the same terms.[130] The new scheme, *inter alia,* was a collective agreement to adopt resale price maintenance. Although the new scheme provided no means for enforcement, section 25 of the 1956 Act enabled enforcement by the individual manufacturers against non-signers. The British Motor Trade Association retained its investigation procedures, utilizing "trap purchases" to secure evidence and prepare cases for individual enforcement by one of the five major manufacturers.

The entire new distribution scheme of the British Motor Trade Association was declared contrary to the public interest in this latest decision.[131] The parties had agreed to certain minimum specifications and equipment for a firm to be appointed a franchised dealer. Only these firms were to receive the 17½ percent dealers' discount off the prescribed retail prices. Franchised dealers and distributors were allowed to resell to dealers in other makes of cars or to non-franchised retailers at 10 percent or 12½ percent off retail price, depending on the class in which the Trade Association listed the purchaser. Defendants denied that the language of the first clause of the scheme was a collective agreement to adopt resale price maintenance.[132] The court found, however, that the true intention of the distribution scheme was that all

128 Thorne v. Motor Trade Ass'n, [1937] 3 All E.R. 157, 323, [1937] A.C. 797; JOHNSON-DAVIES, THE PRACTICE OF PRICE MAINTENANCE (1955). Under this system of compulsory industrial government, all automobile dealers were required to be members of the British Motor Trade Association. See MAXCY AND SILBERSTON, THE MOTOR INDUSTRY 145-50 (1959).

129 186 ECONOMIST 683, 684 (Feb. 22, 1958). The five major automobile manufacturers (producing 90% of British motor vehicles) and 80% of the dealers became members of the new scheme on a voluntary basis.

130 These new vertical agreements were held exempt from registration under the Restrictive Trade Practices Act, § 8(3). 4 & 5 Eliz. 2, c. 68, § 8(3). *In re* Austin Motor Co. Ltd.'s Agreements, L.R. 1 R.P. 6 (1957).

131 *In re* Motor Vehicle Distribution Scheme, [1961] 1 All E.R. 161, 179.

132 "Each signatory shall prescribe and may at any time vary as he shall in his own unfettered discretion decide the retail prices of his products. . . ." [1961] 1 All E.R. 161, 174. During the hearing of the case, this language was varied in order to support the argument that it was not a horizontal agreement to adopt resale price maintenance. The amended clause was as follows: "Each signatory shall publish the retail prices of his products (but may at any time vary such prices as he shall in his own unfettered discretion decide). . . ." *Id.* at 181.

manufacturers would maintain retail prices and that the scheme would not work without resale price maintenance.[133] Since respondents, in arguing that they had no agreement to adopt resale price maintenance, had failed to defend this clause of their agreement, it was held contrary to the public interest under section 21 (1) of the act.

Termination of collective agreements to adopt resale price maintenance was one of the terms of nine out of the first 50 consent orders ending restrictive agreements registered under the 1956 Act.[134] These included semirotary wing pumps, domestic electric cookers, building bricks, concrete mixers, hard fibre cord, garage equipment, electric light fittings, metal bedsteads and hard fibre rope. In all of these industries there was also horizontal price fixing among the manufacturers, so that the resale price maintenance could have been merely auxiliary to those primary agreements. In four of these industries—building bricks, concrete mixers, garage equipment, and electric lighting fixtures—there were also agreements to sell only to buyers on a certified list. This would likely be evidence of collusive pressure among the buyers, who would also try to enforce their own horizontal price fixing by causing manufacturers to adopt resale price maintenance.

The one reported case involving application of the section 24 prohibitions on collective enforcement of resale price maintenance was in the grocery trade.[135] In this trade, resale price maintenance existed primarily because of the pressures of trade associations of small retailers and wholesalers.[136] Starting in late 1956, when collective enforcement of resale price maintenance became illegal, major chains in the grocery trade began to cut prices on packaged

133 *Id.* at 176.

134 See Appendix, Table II, orders dated April 21, 1959 (no. 630), June 22, 1959 (no. 106), July 16, 1959 (no. 599), Oct. 14, 1959 (nos. 958, 2373), Feb. 1, 1960 (no. 619), Feb. 15, 1960 (no. 793), April 26, 1960 (nos. 579, 1226), July 4, 1960 (no. 617).

135 Board of Trade v. Northern Council of Grocers' Ass'n, 188 ECONOMIST 397 (August 2, 1958). For a survey of the other types of restrictive agreements in the grocery field on file with the Registrar of Restrictive Trading Agreements, see Cuthburt & Black, *Restrictive Practices in the Food Trades,* 8 J. INDUS. ECON. 33 (1959).

136 KUIPERS, RESALE PRICE MAINTENANCE IN GREAT BRITAIN WITH SPECIAL REFERENCE TO THE GROCERY TRADE 63-69 (1950). Changing technology in grocery distribution toward larger self-service stores with high turnover and lower unit costs tended, under price competition, to drive many small, service-oriented stores out of business. "The most important reason . . . for the survival of the small-scale grocer would appear to be the growth of the practice of branding and resale price maintenance in this trade." JEFFERYS, RETAIL TRADING IN GREAT BRITAIN 1850-1950, 173 (1954). Most wholesale grocers sold primarily to these small stores and were therefore interested in protecting them from the new competition. The large chains of self-service stores bought directly from manufacturers and did their own distributing to their stores.

groceries.[137] Most grocery manufacturers hesitated to use the new power in section 25 of the Restrictive Trade Practices Act allowing individual enforcement of price maintenance against non-signers. They wanted lower retail prices and higher sales now that possible organized grocer boycotts, which had forced high distribution mark-ups, were illegal.[138] Furthermore, a permanent injunction could keep one manufacturer's goods at high retail prices while his rivals took sales away from him by ignoring retail price cutting and refusing to adopt or enforce resale price maintenance for their goods. In the summer of 1958, the Northern Council of Grocers, representing 10,000 independent grocers, called for a boycott to induce manufacturers to enforce their announced resale price maintenance. The Council notified six major food manufacturers by letter that unless they acceded to this demand within 28 days the "Council intends to recommend to all members that they shall discriminate against your company and its products."[139] The Board of Trade filed an action on behalf of the Crown under section 24 (7) of the Restrictive Trade Practices Act to enjoin this boycott. On hearing of the petition, the President and Secretary of the Council gave undertakings not to recommend the boycott to the Council members and the action was terminated without issuance of the formal injunction.[140]

The first case involving private enforcement of individual resale price maintenance in the Chancery Division under section 25 of the act was in the automobile industry.[141] The case resulted in a consent decree in which defendant non-signer was permanently enjoined from reselling any motor vehicles manufactured by plaintiffs at other than resale prices prescribed by plaintiffs. The court also ordered an inquiry into what damages, if any, had been sustained by plaintiffs by the violations of the defendant in the past.[142] During the first year of the Restrictive Trade Practices Act, motor industry manufacturers brought and won six

137 Comment: *Attack on Fixed Prices,* 8 CARTEL 42, 43 (April 1958); Pollard & Hughes, *Recent Trends in British Retailing,* WESTMINSTER BANK REV. 6, 9 (August 1959).

138 West, *Price Maintenance in the U.K.,* 7 CARTEL 79 (July 1957); 188 ECONOMIST 23 (July 5, 1958).

139 Comment: *Within 28 Days,* 8 CARTEL 110, 113 (Oct. 1958).

140 188 ECONOMIST 397 (August 2, 1958).

141 Austin Motor Co. & Morris Motors Ltd. v. Prince, Times (London), Dec. 8, 1956, 3.

142 Johnson-Davies, *Price Maintenance Under the Restrictive Trade Practices Act 1956,* 4 BUS. L. REV. 163, 164 (1957).

cases against violators of individual resale price maintenance.[143] There is no complete record of trial court decisions under this section nor any measure of the number of price cutters who ceased their violations merely on threat of prosecution.[144]

Two major cases have been litigated interpreting the language of section 25.[145] The first of these was *Goodyear Tyre & Rubber Co. v. Lancashire Batteries Ltd.*,[146] which concerned the meaning of "notice of the condition" of resale price maintenance as applied to non-signers. Defendant, retailer of auto accessories, received a circular from the British Motor Trade Association designed to explain the Restrictive Trade Practices Act. The circular contained lists of names and addresses of manufacturers in the industry whose goods were price-maintained and the fact that established prices could be obtained from the named firms. Plaintiff Goodyear was on the list as was the fact that its tires were price-maintained. After receiving the circular, defendant sold tires at 10 percent below list.[147] He defended the action for injunction on the ground that the circular from the Association, the only notice he had received, was not express notice of the established prices since there were no prices listed in that circular. The Chancellor held for defendant, noting that a statute which interferes with freedom of trade is to be strictly construed and that defendant

143 186 ECONOMIST 683 (Feb. 22, 1958). Of these cases, two concerned automobiles; two, tires; and two, spark plugs. *Id.* at 684.

144 One reported injunction was issued by consent in the selling of razor blades by a non-signer. Gillette Industries Ltd. v. Miller's Bargain Stores Ltd., Times (London) July 9, 1958, 4. Another permanent injunction against a non-signer, owner of cut-price food stores involved cigarettes. Imperial Tobacco Co. v. Deeming, Times (London), June 15, 1960, 8; 195 ECONOMIST 1238 (June 18, 1960).

145 Two minor decisions concerned the application of the statute to goods sold about the time it became effective, Nov. 2, 1956. In County Laboratories Ltd. v. Mindel, L.R. 1 R.P. 1, [1957] Ch. 295, it was held that the statute did not apply to a jar of price-maintained Brylcreem where defendant, non-signer retailer, had no way of ascertaining if the original sale by manufacturer to wholesaler took place before or after Nov. 2, 1956. See Wedderburn, *Restrictive Practices — Resale Price Maintenance — Registration of Agreements*, [1957] CAMB. L.J. 121; 101 SOL. J. 806 (1957). In Dunlop Rubber Co. v. Longlife Battery Depot, L.R. 1 R.P. 65 (1958), the 1956 statute was held not violated where plaintiff failed to prove that defendant non-signing retailer bought the price-maintained tires after Nov. 2, 1956.

146 L.R. 1 R.P. 22 (Ch. 1958), reversed, L.R. 1 R.P. 29 (C.A. 1958).

147 The sale violating the act was in a "trap order" by an investigator of the British Motor Trade Association. *Quaere:* Does the policing of price maintenance by a trade association constitute collective enforcement in violation of § 24 of the Restrictive Trade Practices Act? Wedderburn, *Contract — Resale Price Maintenance — Notice of Conditions*, [1958] CAMB. L.J. 163, 165.

should have been given express notice of the established prices.[148] The Court of Appeal reversed this decision, however, holding that notice that the class of goods was price-maintained was sufficient where defendant could then easily find out the established prices.[149]

The second major case under section 25 was *Beecham Foods Ltd. v. North Supplies Ltd.*[150] In this case, plaintiffs sold Lucozade, a glucose drink, pursuant to resale price maintenance. The label on the bottles stated the price as "2s. 6d." followed by "plus 3d. deposit returnable on bottle with stopper." The case arose from two "trap purchases" made from defendant retailer at a total price of 2s. 7d. per bottle. The judge denied an injunction, holding that there was no violation of the statute. The plaintiff's claim that his established price was 2s. 9d. was rejected in light of the printing on the bottle. The court found that defendant merely chose to charge 1d. for hire of the bottle instead of 3d.[151] Only the sale, and not the hire of goods, is subject to resale price enforcement against non-signers under section 25. The key question of fact in judging this case was not before the court: when the customers returned bottles were they refunded 1d. or were they given 3d., thereby cutting the established resale price?[152] This opinion must be viewed as a strict construction of the statute in favor of freedom to trade. The particular evasion illustrated here, as the judge pointed out, can be remedied by a more accurate use of language.[153]

Conclusions

The prohibition on collective enforcement of resale price maintenance since 1956 has had a marked impact on marketing in the

148 L.R. 1 R.P. 22, 88 (Ch. 1958). In the United States, state resale price statutes allow recovery for "willfully and knowingly" advertising, offering for sale or selling a price-maintained good at less than the stipulated price. A recent decision holds that, under such statute, direct notice of the prices fixed is unnecessary if it can be proved that defendant knew the products were price-maintained. Revlon, Inc. v. Janel Sales Corp., 198 N.Y.S. (2d) (Sup. Ct. 1960). There are few cases directly ruling on this issue. 1 CCH TRADE REG. REP. (Trade Cas.) ¶ 3268.

149 L.R. 1 R.P. 29 (C.A. 1958). See Grunfeld, *Resale Price Maintenance-Notice to "Non-Signers,"* 21 MODERN L. REV. 682 (1958); Korah, *Restrictive Practices IV: Resale Price Maintenance,* 26 SOL. 201 (1959); 102 SOL. J. 627 (1958); 108 L.J. 614 (1958); 74 L.Q. REV. 469 (1958).

150 L.R. 1 R.P. 262 (Ch. 1959).

151 It is a debatable question whether this transaction operates in the market as a bailment of bottles or a sale with a power to return them. Korah, *Resale Price Maintenance—"Resale,"* 23 MODERN L. REV. 88 (1960).

152 103 SOL. J. 665 (1959).

153 Blanco White, *Price Maintenance in English Law,* [1959] J. BUS. L. 241, 243.

United Kingdom. Boycott as the instrument of trade association coercion against price cutters has been ended. In fact, the Tobacco Trade Association, whose primary purpose had been to enforce resale prices, was voluntarily dissolved at the passage of the 1956 Act.[154] Price rivalry has become extensive in groceries since passage of the act;[155] and new price competition was also reported in the other trades, such as tires.[156]

Although the Restrictive Trade Practices Act strengthened individual resale price maintenance by, for the first time, allowing legal enforcement against non-signers, this section has not been greatly utilized. For items like groceries, in which the impetus for resale price maintenance comes from organized retailers, the manufacturers have no interest in enforcement. In the litigated cases where price maintenance was adopted by manufacturers as an adjunct to their own horizontal price fixing, it has been held contrary to the public interest. It is unlikely that these manufacturers will engage in resale price maintenance individually when their rivals might now encourage distributors' price cutting. Furthermore, since the end of trade association control of industry through boycott, the entry of new firms which will engage in aggressive price rivalry can be expected.

Resale price maintenance today in the United Kingdom has the legal status it had in the United States from the passage of the Miller-Tydings antitrust exemption in 1937 to about 1951. Since 1951, there has been a continuing decline even in the individual resale price maintenance that was legal in 45 out of the 48 United States. High profits on price-maintained goods has been one factor promoting the entry into retail markets of the so-called discount houses.[157] These self-service stores, specializing in high-volume goods in their own private brands and openly violating price maintenance on other goods, have taken a large share of appliance sales and other trades. The size of their sales is probably sufficient in many cases to induce manufacturers not to enforce resale price maintenance. While this change in marketing has taken place,

154 180 ECONOMIST 549 (Aug. 18, 1956).

155 See note 137 *supra;* 194 ECONOMIST 1251 (March 26, 1960).

156 192 ECONOMIST 453 (Aug. 15, 1959).

157 *Hearings Before Senate Select Committee on Small Business, Discount-House Operations,* 85th Cong., 2d Sess., 411 (1958), citing estimates by Business Week 158-59 (April 3, 1954), of 10,000 discount houses in the United States. Discount houses now claim to make one-third of total U.S. department store sales. Business Week 67 (Feb. 25, 1961).

new legal barriers have arisen to resale price maintenance in the United States. Between 1950 and 1960, the highest courts of eighteen states held non-signer clauses of state resale price maintenance statutes to violate state constitutions.[158] In 1957, it was held that mail order sales of price-maintained goods at cut prices by firms in states without price maintenance statutes into states with price maintenance statutes could not be enjoined.[159] In a few cases, an injunction against violators of price maintenance has been denied where there has been discriminatory enforcement or a failure to gain compliance by others.[160] These factors have led many firms to consider resale price maintenance to be practically unenforceable and caused them to drop price maintenance as a marketing policy.[161]

Since 1956 resale price maintenance has declined substantially in both the United Kingdom and in the United States. In the United Kingdom a government committee urged reconsideration of the individual resale price maintenance which remains legal with a view toward prohibiting even that.[162] Such an inquiry has been initiated by the Board of Trade.[163] In the United States, in many areas, enforcement of resale price maintenance has become infeasible. There have been pressures, primarily by retail trade associations, for passage of a federal law for the enforcement of resale price maintenance.[164] So far, such bills have met strong opposition of consumer groups and have failed to pass. It is unlikely that such protection against free competition in the distributive trade will become law as long as business is prosperous. In

158 See citations and analyses of cases in Conant, *Resale Price Maintenance: Constitutionality of Nonsigner Clauses,* 109 U. PA. L. REV. 539 (1961).

159 General Electric Co. v. Masters Mail Order Co. of Washington, D.C., Inc., 244 F.2d 681 (2d Cir. 1957), *cert. denied,* 355 U.S. 824 (1957), 71 HARV. L. REV. 374 (1957); Bissell Carpet Sweeper Co. v. Masters Mail Order Co. of Washington, D.C., 240 F.2d 684 (4th Cir. 1957).

160 John H. Breck, Inc. v. Alexander's Dep't. Stores, Inc., 1960 CCH Trade Cas. ¶ 69,749 (N.Y. Sup. Ct. 1960); Mead Johnson & Co. v. Alexander's Dep't. Stores, Inc., 1960 CCH Trade Cas. ¶ 69,780 (N.Y. Sup. Ct. 1960); Max Factor & Co. v. Avenue Merchandise Corp., 1960 CCH Trade Cas. ¶ 69,795 (N.Y. Sup. Ct. 1960).

161 H.R. REP. No. 467, 86th Cong., 1st sess., 7 (1959); *Hearings Before House Committee on Interstate and Foreign Commerce, Fair Trade, 1959,* 86th Cong., 1st Sess., 387, 701, 739-41 (1959).

162 Gt. Britain, Council on Prices, Productivity and Incomes, First Report 48 (1958).

163 [1960] J. BUS. L. 373; 194 ECONOMIST 1251 (March 26, 1960).

164 S. 1083, H.R. 1253, 86th Cong., 1st Sess. (1959), to amend § 5 (a) of the Federal Trade Commission Act, 52 Stat. 111 (1938), as amended, 15 U.S.C. § 45 (1958).

both the United States and the United Kingdom, however, if a severe business recession develops, the fact that economic protectionism is not a cure for recession and can only hinder recovery will be drowned by the pleas of the small business group for legalized price fixing.

APPENDIX

TABLE I

DECISIONS OF THE RESTRICTIVE PRACTICES COURT

Case	Major Restrictions	Defenses[1]	Decision
Chemists Federation	Exclusive selling of patent medicines to registered pharmacists	a b	Not proved Not proved
Cotton Yarn Spinners	Minimum price fixing	a b e f	Withdrawn Not proved (except for weavers and doublers and to them, outweighed by detriments) Proved but outweighed by detriments Withdrawn
Blanket Manufacturers	Minimum price fixing Minimum quality (weight) Minor restrictions	b b b	Not proved Proved and held to outweigh detriments Not proved
Water-Tube Boilermakers	Price fixing (level tendering) } Allocation of customers }	b d f	Not proved Not proved Proved and held to outweigh detriments
Scottish Bakers (2 cases)	Minimum price fixing Recommended retailers' margin	b	Not proved
British and Irish Bakers	Maximum price fixing Recommended retailers' margin	b	Not proved
Carpet Manufacturers	Minimum price fixing Fixed wholesalers' discount Boycott unapproved wholesalers	b f	Not proved Not proved
Phenol Producers	Minimum price fixing	b	Not proved
Black Bolt and Nut Producers	Minimum price fixing to private buyers Minimum price fixing to government Discriminatory quantity discounts	b b b	Proved and held to outweigh detriments Not proved Not proved

[1]See note 24 for the seven defenses as defined in section 21(1) of the Restrictive Practices Act, 4 & 5 Eliz. 2, ch. 68, §21(1).

TABLE II

RESTRICTIVE TRADE PRACTICES CONSENT ORDERS

Registration Number	Trade Association or Product	Number of Parties	Dates of Orders	Types of Restrictions Terminated
556	Corrugated Paper Makers	14	April 22, 1958	Prices, rebates, and terms of sale fixed by pre-agreed schedules
693	Fractional Horsepower Motors	not stated	April 22, 1958	Prices, discounts, and terms of sale fixed by pre-agreed schedules
210	Constructional Steel	295	Feb. 2, 1959	Prices and terms of sale fixed by pre-agreed schedules
269	Cotton Yarn Doublers	127	March 20, 1959	Prices and terms of sale fixed by pre-agreed schedules
759	Northern Iron & Coal Importers	82	March 25, 1959	Prices fixed by pre-agreed schedules
313	Radio Valves (Radio & Cathode Ray Tubes)	9	April 8, 1959	1. Sell only to buyers on pre-agreed list and at pre-agreed discounts 2. Limit imports to 10% of domestic sales 3. Import new type tubes only after notice to Association
880	Road Roller Manufacturers	4	April 8, 1959	Prices and terms of sale fixed by pre-agreed schedules
603	Semi-rotary Wing Pumps	3	April 21, 1959	1. Prices and terms of sale fixed by pre-agreed schedules 2. Sell only subject to fixed resale price maintenance 3. Supply only on condition that spare parts will be purchased from seller
818	Electric Resistance Furnaces	6	April 21, 1959	1. Prices and terms of sale fixed by pre-agreed schedules 2. Notify and consult on prices and terms of sale for special orders 3. Not supply parts for furnace purchased from another member
176	North-Eastern Group of Flour Millers[a]	124	May 26, 1959	1. Limit flour grades to six
783	South-Eastern Group of Flour Millers[a]	110	May 26, 1959	2. Recommend prices, discounts, bag charge, and allowance for bulk transport
776	Scottish Flour Millers Ass'n[a]	40	May 26, 1959	3. Register of factors entitled to factors' allowance
782	Incorporated National Association of British and Irish Millers, Ltd.[a]	approx. 220		
1599	Scottish Flour Millers Ass'n[a]	16	May 26, 1959	1. Scheme of deferred rebates for large buyers of home-milled flour 2. Register of participants, millers and factors
1652	Belfast Flour Millers Ass'n[a]	20		
784	Incorporated National Association of British and Irish Millers, Ltd.[a]	All members of regional ass'ns	May 26, 1959	1. General association agreement 2. Factor allowance of 1s 6d per sack if he agrees to sell at Millers' general selling price

[a]Official consent order not yet released. Restrictions listed here are expected to be terminated by official order. Source: Compiled from consent orders on file at the Office of the Registrar of Restrictive Trading Agreements.

RESTRICTIVE TRADE PRACTICES CONSENT ORDERS—*Continued*

Registration Number	Trade Association or Product	Number of Parties	Dates of Orders	Types of Restrictions Terminated
308	Pneumatic Tools (concrete breakers, rock drills, etc.)	9	June 22, 1959....	1. Prices, discounts, and terms of sale fixed by pre-agreed schedules 2. Supply tools to trade association standards and warranty 3. Not supply replacement parts for tools purchased from another member 4. Not adopt similar design, construction, or external appearance of tools of another member
1301	Air Compressors: Portable.....	7	June 22, 1959....	Same items as No. 308 above
106	Domestic Electric Cookers.....	13	June 22, 1959....	1. Prices, discounts, and terms of sale fixed by pre-agreed schedules 2. Limit sales through architects to approved channels 3. Sell to wholesalers only subject to fixed resale price maintenance 4. Supply obsolete cookers only after notice to Association
914	Rubber Proofers.....	11	June 22, 1959....	1. Prices, terms of sale, and services offered to customers fixed by pre-agreed schedules 2. Use only processes conforming to agreement
508	High Conductivity Copper.....	18	July 16, 1959....	1. Prices, discounts, and terms of sale fixed by pre-arranged schedules 2. Prohibition on supply of goods at firm prices irrespective of market fluctuations
961	Midland Bottlers (beers).....	19	July 16, 1959....	1. Prices and terms of sale fixed by pre-agreed schedules 2. Supply bottling services for other bottlers only if they adhere to Association rules
478	Twist drills.....	29	July 16, 1959....	1. Prices, discounts, and terms of sale fixed by pre-agreed schedules 2. Not to supply certain sizes of drills wherever alternative sizes are possible
599	North of England Building Bricks.....	18	July 16, 1959....	1. Prices, discounts, and terms of sale fixed by pre-agreed schedules 2. Sell only subject to fixed resale price maintenance 3. Supply only to users or merchants included in Association register 4. Not supply to a user who is two months in arrears in payment of his account to any member 5. Not supply bricks of size greater than prescribed by Association
354	Galvanized Tank Manufacturers.....	15	July 16, 1959....	1. Prices, discounts, and terms of sale fixed by pre-agreed schedules 2. Not to supply tanks of certain specified gauges
486	Light Edge Tools.....	52	July 16, 1959....	Prices, discounts, and terms of sale for each functional class of buyers on approved lists fixed by pre-agreed schedules.
943	Washed Sand and Gravel (Scotland).....	5	July 23, 1959....	1. Prices, discounts, and terms of sale fixed by pre-agreed schedules 2. Supply only on condition that Association secretary administer collection of accounts 3. Not supply to customer on Association list of overdue accounts

595	Washed Sand and Gravel (Mid-Scotland)....	3	July 23, 1959....	Same as No. 943 above
1712	Washed Sand and Gravel.....	8	July 23, 1959....	Inter-Association arrangments between Associations in No. 943 and No. 595: 1. Not to sell in each other's trade area at prices or terms of sale other than those set by local association 2. Agree not to acquire sand and gravel from a producer not a party to this agreement
626	Agricultural Twine Manufacturers.....	13	Oct. 5, 1959.....	1. Prices, discounts, and terms of sale fixed by pre-agreed schedules 2. Sell only at delivered prices to dealers on Association list 3. Agree to minimum size of orders which will be filled
958 2373	Concrete Mixer Manufacturers Ass'n.....	8 11	Oct. 14, 1959....	1. Prices, terms and guarantees fixed by pre-agreed schedules 2. Minimum size for mixers per agreement 3. Not sell to dealer under exclusive contract to other member 4. Sell pursuant to resale price maintenance contracts
837	Glass Benders Ass'n.....	8	Dec. 16, 1959....	1. Prices, terms, and discounts fixed by pre-agreed schedules 2. Limitation on type of binding services
821	Plate Glass Ass'n.....	450	Dec. 16, 1959....	1. Minimum annual purchases by members 2. Price, terms and discount fixed by pre-agreed schedules with preferential discounts to members 3. Limitations on size of glass sold
619	Hand Fibre Cord and Twine.....	21	Feb. 1, 1960.....	1. Prices, terms and discounts fixed by pre-agreed schedules 2. Limitations on sizes and types of product 3. Sell pursuant to resale price maintenance
618	Trawl Twine Manufacturers Ass'n.....	9	Feb. 1, 1960.....	1. Prices, terms, discounts and allowances fixed by pre-agreed schedules 2. Limitations on size and types of products
278	Master Process Engravers.....	247	Feb. 1, 1960.....	1. Prices, terms, discounts and allowances fixed by pre-agreed schedules 2. Acquire goods only from another member if this is possible
793	Garage Equipment Ass'n.....	373	Feb. 15, 1960....	1. Exclusive dealing with members clause conditioning all sales 2. Not change announced prices or terms without seven days notice to association 3. Sell only at announced prices and pursuant to resale price maintenance 4. Not supply goods on consignment basis 5. Agreed discount schedules by class of customer
91	Tuyere Makers' Ass'n (blast furnace pipe)...	4	Feb. 15, 1960....	1. Delivered prices, terms, and take-in allowances fixed by pre-agreed schedules
1132	Spring and Interior Springing Ass'n.....	40	Feb. 15, 1960....	1. Prices, terms, discounts and allowances fixed by pre-agreed schedules
579	Electric Light Fittings Ass'n.....	27	April 26, 1960....	1. Adhere to announced list prices less discounts and allowances for each class of customer as fixed by pre-agreed schedule 2. Sell to distributors only subject to resale price maintenance 3. Exclusive selling to wholesalers for decorative fittings 4. Limitations on types and sizes of products

RESTRICTIVE TRADE PRACTICES CONSENT ORDERS—*Continued*

Registration Number	Trade Association or Product	Number of Parties	Dates of Orders	Types of Restrictions Terminated
1226	Metal Bedstead Ass'n.....	15	April 26, 1960....	1. Prices, terms and discounts fixed by pre-agreed schedule 2. Sell only pursuant to resale price maintenance 3. Not deal in used products
2045	Zinc Oxide Federation.....	5	April 26, 1960....	1. Delivered prices fixed by pre-agreed formula 2. Terms, discounts and packaging fixed by pre-agreed schedules
512	Associated Paving and Kerb Manufacturers	13	April 26, 1960....	1. Delivered prices, terms and discounts fixed by association committee 2. Report all inquiries about offers to association 3. Supply only to customers, in quantities, and from areas approved by association
393	Dyers' and Finishers' Ass'n.....	78	May 23, 1960....	1. Prices, terms, and discounts fixed by pre-agreed schedule
499	Makers of Wood Free Paper	30	May 23, 1960....	1. Prices, terms, and minimum quantities fixed by pre-agreed schedule
610	Rusk Manufacturers' Federation (cereal filler)	15	May 23, 1960....	1. Prices, terms and discounts for each class of customer fixed by pre-agreed schedule
548	Bath Manufacturers' Ass'n.....	19	July 4, 1960.....	1. Price, terms, discount and carriage charges for each class of customer fixed by pre-agreed schedules 2. Sell at delivered prices in Great Britain, but not elsewhere
640	Glycerine Producers Ass'n.....	43	July 4, 1960.....	1. Prices, terms and conditions of sale fixed by association council 2. Sell only to industrial users or through this association
617	Hard Fibre Rope Manufacturers.....	21	July 4, 1960.....	1. Prices, terms and discount to each class of customer fixed by association 2. Sell at delivered prices in Great Britain 3. Resale price maintenance on some classes of customers 4. Limits on technical standards 5. Minimum quality standards