METHODS OF REGULATING UNFAIR COMPETITION IN GERMANY, ENGLAND, AND THE UNITED STATES

FRITZ E. KOCH

II. UNITED STATES LAW

Prior to 1914, unfair competition was governed in the United States, as in England, by the principles of the common law. Federal legislation—the law of the individual states will not be considered here—stated the rules applicable to competition, through Section 5 of the Federal Trade Commission Act,\(^1\) without, however, defining the same or declaring concrete examples as unfair competition falling under the law. The Senate Commission preferred to insert the general statement that "unfair methods of competition in commerce are declared unlawful" rather than attempt to declare numerous concrete practices as constituting such, because "there were too many unfair practices to define and after writing 20 of them into the law, it would be quite possible to invent others."\(^2\) In regard to the question of regulation of unfair competition, it was also said:

“There are numerous practices tending towards monopoly that may not come within the provisions of the anti-trust law and amount to a monopoly or to monopolization. We want to check monopoly in the embryo.”\(^3\)

An essential purpose of Section 5 of the Federal Trade Commission Act\(^4\) was to combat unfair methods of competition. In order to assure the application of the law to such cases, and to see it limited to cases of unfair competition which had been dealt with by the courts before the existence of this law, the expression "unfair competition", contained in the draft, was changed to

\(^2\) Senator Newlands in the Senate debate.
\(^3\) Ibid.
“unfair methods of competition”. The Circuit Court of Appeals for the Third Circuit has said that,

"... freedom of access to the consumer, and the entire absence of monopoly and non deprivation of the public, have been regarded as an important element in the decision of cases of alleged unfair business competition." 6

For this reason the measures forbidden, as in restraint of trade or as monopoly or an attempt to monopolize, by the Sherman 6 and Clayton 7 Acts are considered, on the one hand, as unfair methods of competition; while, on the other, the measures expressly allowed by these laws never constitute unfair competition.

A. Boycott and Similar Measures.

Every business man may choose his customers as he pleases and refuse them for such reasons as he thinks proper. 8 He may, therefore, refuse such business intercourse as he deems harmful to his business, and he may condition this business intercourse on the firm's not selling to his competitors. Even if a number of firms refuse to deal with a certain customer, about whom they all have the same opinion, there being, however, no arrangement or agreement between them, this procedure is fair. Trade boycott is only present when the exclusion of the customer is due to an agreement, *i.e.*—combination or conspiracy. If "'exclusive unity in business is unified and others are kept out of it, except those who act with the combination, it is a combination'. This exclusiveness exists by virtue of a restraint of the liberty of others" 9.

---

6 Curtis Publishing Co. v. Federal Trade Commission, 270 Fed. 881, 914 (C. C. A. 3d, 1921); see also the address of William L. Donovan, assistant to the Att'y Gen., at the Annual Convention of the National Paint, Oil and Varnish Ass'n, Inc.: "It is the settled law of this country that public convenience and welfare demand that the natural lines of competition be left undisturbed and that the control of prices through combinations tends to restraint of trade and monopoly and is an evil thing. This principle of competition still remains a fixed policy of our country. It is when these consolidations attempt to eliminate competition, to enhance existing prices and to exercise permanent control in the industry that they constitute violations of the law".


9 Thornton, Combinations in Restraint of Trade (1928) 373.
In the case of *Federal Trade Commission v. Wholesale Saddlery Assoc.* an association of wholesale dealers boycotted the manufacturers who sold to non-members of the wholesale association, and admitted only wholesalers to the association who made no retail sales, in order to prevent retailers from buying directly from the manufacturers. The court confirmed the decree of the Federal Trade Commission, to the effect that such acts constituted unfair methods of competition in violation of Section 5 of the Clayton Act.

Exclusive contracts among several firms, cutting off non-members or persons not parties to the contracts were forbidden, in principle, by the Sherman Act. They were considered an unlawful means to exclude others from the same traffic or business.

The case of *Whitwell v. Continental Tobacco Co.*, involved the question of the permissibility of preferred rebates and exclusive-dealing clauses. The company made contracts with its customers which, considering the amount of merchandise they were to purchase and the price, were oppressive to them. If, however, the customer fulfilled his promise to deal exclusively with the company, the amount of merchandise to be purchased and the price thereof were reduced to a measure advantageous to the customer. An action brought by one of the customers was defeated, and the existence of a boycott against customers and third parties was denied. It would have been no violation of the law under consideration if the tobacco company had refused to sell any of its commodities at any price; much less could it be a violation of the Act for the defendant to fix its prices too high for profitable purchase by the plaintiff. In its decision the Court said:

---

10 *Fed. Trade Com. Dec. 335 (1919).*
12 THORNTON, *loc. cit. supra* note 9, and cases cited in n. 6 and n. 7 of same.
13 *125 Fed. 454 (C. C. A. 8th, 1903).*
"The tobacco company and its employees sold its products to customers who refrained from dealing in the goods of its competitors at prices which rendered their purchases profitable. But there was no restriction upon competition here, because this act left the rivals of the tobacco company free to sell their competing commodities to all other purchasers than those who bought of the defendants, and free to compete for sales to customers of the tobacco company by offering to them goods at lower prices or on better terms than they secured from that company".  

On the other hand, in the case of *Hunt v. Riverside Cooperative Club*, an agreement between the manufacturers and dealers in plumbers' articles was declared to be void where the latter obligated themselves to charge non-members a premium of fifteen to thirty per centum above the regular sale prices. This was said to be an unlawful combination in restraint of trade.

Preferred rebates are now regulated by Section 2 of the Clayton Act and the Elkins Anti-rebate Act. According to the former, it is forbidden to discriminate in price between different purchasers of commodities "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Turnover rebates or measures of price policy, undertaken in good faith to meet competition, are allowed. The Supreme Court has also said in effect that it is settled law, that a trader or manufacturer engaged in a private business may sell to whom he pleases, may charge different prices for the same article to different individuals and may make such discrimination in his business as he chooses. This, of course, with the restriction that his contract shall not be in violation of law, imposed for the protection of the public. The reason that the extending of preferred rebates to faithful customers is an unfair method of competition lies in the fact that

---

15 140 Mich. 538, 104 N. W. 40 (1905).
18 *Cf.* ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION 1927, at 15.
19 See United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 321, 17 Sup. Ct. 540, 551 (1897); Fosburgh v. California, etc., Refining Co., 291 Fed. 29 (C. C. A. 9th, 1923); THORNTON, *op. cit.* supra note 9, at 851.
the discrimination tends to lessen competition or create a monopoly.

The Elkins Act makes it unlawful to give or to receive rebates, concessions, or discriminations in respect to the transportation of property in interstate commerce and provides that one who accepts a rebate must pay treble the amount thereof to the United States Government by way of penalty.

Although the Supreme Court, in United States v. Koenig Coal Co. had stated the purpose of the law to be "to cut up by the roots every form of discrimination, favoritism and inequality", the law, at first, was interpreted as applicable only to common carriers and shippers. However, in the case of Spencer Kellogg & Sons, Inc. v. United States, the Supreme Court refused to confirm this interpretation of the law, and declared that it should apply also to others. The purpose of the law is to prevent transportation of property in interstate commerce at less than tariff rates and it applies to any person or corporation whose designed acts accomplish that result.

B. Tying Contracts

Tying contracts, so-called, are prohibited by the special provision of Section 3 of the Clayton Act, which states:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of

20 Supra note 17.
22 20 F. (2d) 459 (C. C. A. 2d, 1927).
METHODS OF REGULATING UNFAIR COMPETITION

a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce”.

The leading cases are those of United States v. United Shoe Machinery Co. In these cases the defendant company leased its machines under certain conditions which prohibited the lessees, under penalty of having their rights to the use of the machines withdrawn, from performing operations on these machines, where the preliminary work had been done on machines of other manufacturers, and from using machines of other manufacturers together with the machines of the defendant. The contracts which the defendant company made tended toward a monopoly, as its machines were absolutely essential to the lessees for the successful functioning of their businesses. The contract clause in question was declared void as an infringement of the Clayton Act. The Court said:

“This system of ‘tying’ restrictions is quite as effective as express covenants could be and practically compels the use of the machinery of the lessor except upon risks which manufacturers will not willingly incur”.

In the case of Federal Trade Commission v. Sinclair Refining Co. the Supreme Court declared the agreement, commonly imposed by the large oil companies, to the effect that the lessees of their tanks should only store therein oil delivered by them, to be valid in so far as the lessee was not prohibited from renting tanks from, or selling the oil of, other companies. But the agreement between a seller and purchasers that the latter are prohibited from reselling merchandise of other manufacturers, if the said agreement results in essentially endangering free competition in

---


this merchandise, is considered an infringement of the Clayton Act.\textsuperscript{28}

\textbf{C. Price-cutting}

Price-cutting is prohibited by Section 2 of the Clayton Act. This section is aimed at the method, employed by large firms before the passage of the Act, of combating competition in a certain district by slashing prices therein, and later, after the elimination of the competitors, re-introducing normal prices. Apart from the Clayton Act, it is also forbidden in so far as it comes within the Sherman Act, when used by combinations in restraint of trade.\textsuperscript{29}

\textbf{D. Rings (Agreements Not to Tender)}

In the United States, rings are considered combinations in restraint of trade, and consequently, not only is a ring unlawful which excludes free competition and fixes prices, but also any agreement which controls bidding at an auction.\textsuperscript{30}

\textbf{E. Maintenance of Resale Prices}

The principles which the United States courts have developed on this subject are as follows: It is not essentially an unfair method of competition under the anti-trust laws to refuse the sale of an article if the buyers refuse to maintain the minimum resale price fixed by the seller. As the Supreme Court has said:

"In the absence of any purpose to create or maintain a monopoly, the act does not restrain the long recognized right of a trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he is to deal and, of course, he may announce in advance the circumstances under which he will refuse to sell".\textsuperscript{31}


\textsuperscript{29} Cf. the cases discussed in \textit{Annual Report of the Federal Trade Commission} 1927, at 43 \textit{et seq.}

\textsuperscript{30} United States v. Swift & Co., 122 Fed. 529 (C. C. N. D. Ill. 1903); 188 Fed. 92 (N. D. Ill. 1911).

If, however, by means of an express or implied agreement with purchasers, especially through a boycott of wholesale dealers and middlemen who will not submit to such an agreement, a system is created which functions as a restraint of trade or creates a monopoly, there exists an "organized maintenance of uniform prices" which will be considered an unfair method of competition. The Supreme Court has expressed this limitation in this manner:

"He may not . . . go beyond the exercise of this right, and by contracts of combination, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade".

In the case of Dr. Miles Medical Co. v. Park & Sons an agreement between a pharmaceutical company and its resale dealers (including almost all such dealers in the United States) to resell its products only at certain set prices in the wholesale and retail trade was declared void as in restraint of trade. Likewise, in the case of Federal Trade Commission v. Beech-Nut Packing Co., it was determined that the company had created an artificial system which would assure the maintenance of resale prices. The Court said:

"By these methods the company . . . is enabled to prevent competition in their subsequent disposition by preventing all who do not sell at resale prices fixed by it from obtaining its goods".

On the other hand, in the Colgate case the illegality of the agreed resale prices was denied, because the retail dealer could

---

33 Fed. Trade Com. v. Beech-Nut Co., 257 U. S. 441, 453, 42 Sup. Ct. 150, 154 (1922); also see the REPORT OF THE BOARD OF TRADE AND INDUSTRIES OF THE UNION OF SOUTH AFRICA, 57: "The truth is, the law adjusts itself to the facts, not to logic. And the facts have seemed to require the suppression, in the public interest, of concerted agreements or understandings with distributors to maintain fixed prices, whereas in the view of the courts, the mere exercise of the private right of refusal to deal with obnoxious parties does not threaten to become an effective means of achieving standardized prices."
34 220 U. S. 373, 31 Sup. Ct. 376 (1911).
35 Supra note 33.
36 Ibid. at 456, 42 Sup. Ct., at 155.
sell the articles he had bought at any price he wanted to, without running any danger other than incurring the ill will of his seller, who, for his part, could make use of his undoubted right to stop further dealings.

In the case of *Harriet Hubbard Ayer, Inc. v. Fed. Trade Com.*\(^{38}\) the Supreme Court refused a *certiorari* where the Circuit Court of Appeals had held the action of the defendant company legal, because of the fact that it had had no systematic inspection and employed no force in restraint of trade, but limited itself to warning where retail prices were cut, and, in two instances where price-cutting was continued, refused further deliveries. "Such occasional instances", said the court, "do not constitute unlawful or unfair methods of competition . . ." \(^{39}\)

Such a resale price system is also illegal in the case of a patented article. However, the owner of the patent may, by means of a license, obligate the licensee to resell the article manufactured under the license at a certain price.\(^{40}\)

In 1928 the Federal Trade Commission started an investigation to determine the benefit or injury of the maintenance of resale prices from the point of view of the producer, the wholesaler, the retailer, and the consumer. The investigation concerns itself with the cost of production, premiums, and profits of the purchasers and dealers in free as compared with restricted goods, and all other questions connected therewith. The material collected will serve as the basis of a report which will include the question of maintenance of prices in the United States and certain foreign countries.\(^{41}\)

---


F. Bogus Independents

Keeping secret, for the purpose of competition, the fact that an apparently independent firm is in reality dependent, has been held by the courts to be an illegal act. "The seller may let the buyer cheat himself ad libitum", said a Federal court, "but must not actively assist him in cheating himself." 42

III. ENGLISH LAW

The law in England concerning the regulation of unfair competition is based entirely on the common law. Statutes which previously applied to certain parts of the subject are no longer in force. 43 In order to form an opinion as to whether the typical forms of competition herein treated are, according to English law, legal or illegal, the attitude of the common law toward freedom of trade on the one hand, and freedom of contract on the other, is of prime importance. This will answer the question as to how far a specific restraint of trade is illegal and consequently void, unenforceable, or even criminal. 44

The general rule of the common law is that a restraint of trade will be held valid in so far as it is reasonable, i.e.—so long as it is no greater than necessary to protect the justifiable interests of the parties in question, and not against public policy. Questions of the validity of cartel agreements, their legal effect on the parties thereto, and the validity of contractual obligations of cartels on their members toward customers or suppliers, depend, in every case, on whether the contract is reasonable and not against public policy.

The following discussion will disclose to what extent measures adopted by a cartel against third parties, in regulation of competition and not in the form of a contractual obligation, are permitted.

43 This subject is more fully discussed in Koch, Grundzüge des Englischen Kartellrechts (1927).
44 Ibid.
A. Boycott

a. In England

The English law recognizes, in principle, the boycott as a legal means of combating competition. Everyone has the right to conduct his business according to his own ideas and as he deems best, even though he thereby comes in conflict with the business of another.

In the case of Ware and De Freville v. Motor Trade Assoc., the action of a dealer, boycotted for not maintaining the association prices, against the associations for the purpose of being taken off the blacklist, was defeated, the court saying, "... what the defendant did ... was done bona fide in protection of their trade interests".

The leading case is that of Sorrel v. Smith, where the House of Lords, after considering in detail the earlier cases of Allen v. Flood and Quinn v. Leathem, enunciated the ruling principles of the common law. In this case the National Federation of Retail Newsagents, Booksellers, and Stationers, for the purpose of combating newly-established outsiders, demanded that a wholesaler boycott a designated outsider, and, upon refusal of the demand, a boycott was instituted by the federation against the wholesaler. Among the retail dealers who, because of this boycott, had ceased business relations with the wholesaler, was the plaintiff Sorrel, who changed to another wholesaler named Watson. The committee of the circulation managers of the London daily newspapers took up the matter to protect the boycotted wholesaler, and threatened to boycott the wholesaler Watson, in which threat the defendant Smith also joined, if Watson did not stop his deliveries to Sorrel. Watson complied and Sorrel thereupon brought an action against Smith to stop him from interfering with Sorrel's business relations with Watson. The complaint was dismissed on the ground that the concerted action of

45 [1901] 3 K. B. 40.
46 Ibid., 62; Hardie and Lane v. Chilton, [1928] 1 K. B. 663.
49 [1901] A. C. 495.
Smith and the committee of the managers operated to promote the justifiable protection of the business of the newspaper publishers. The House of Lords announced the following rules of law:

If an individual, even with the intention of injuring another, commits an act legal in itself, he does not act illegally. But if two or more commit the same act, with the intention of injuring another, they are guilty of conspiracy and subject to damages.

If, however, the purpose of the coöperation of two or more persons is not to injure a third party, but to promote or protect the business of the parties to the contract, no illegal act is committed in so far as no illegal means, such as threats, duress, inducement to breach of contract, etc., are employed.

Consequently, no cause of action arises except in the case of conspiracy or the employment of illegal means. A threat is illegal if thereby an illegal act is threatened. A threat of boycotting deliveries is legal. Inducement to breach a contract is illegal; however, an inducement to terminate the contract in the manner and time provided therein is permissible.

b. In Scotland

The rules of the Scottish law are similar to those just examined. In the case of Scottish Coöperative Wholesale Society, Ltd. v. Glasgow Fleshers' Trade Defence Association\(^6\) the defendant association informed the dealers that they would participate only in those auctions in which the plaintiff's bids were rejected. The dealers obeyed this mandate, published a corresponding notice, and rejected the plaintiff's offers. The action of the association against the dealers, demanding that the rejection of offers be stopped, and against the butchers association for damages, was dismissed. The dealers were, in the opinion of the court, entitled to reject offers from anybody they pleased. The butchers did not act illegally when, by legal means, they caused the buyers to pursue a given course which was itself legal.

\(^6\) Scot. L. R. 645 (1898).
c. In the Dominions

Here unfair competition is, in part, regulated by statutes which deviate from the common law and approach the American attitude.51 In Australia the Act for the Preservation of Australian Industries and the Repression of Destructive Monopolies 52 is in force. This law was passed in 1906, and was amended up to 1910. By this Act, in business transactions which are carried on beyond the borders of an individual state of the federation, a monopoly or any other unfair method of competition which is not reasonable or does not conform to public policy, especially a boycott as to delivery, is illegal and punishable.

In interpreting the law, those principles are to be applied which were laid down by the Privy Council in the criminal case of Attorney General of Australia v. Adelaide Steamship Co.53 In that case, an association of collieries and a steamship association entered into an exclusive contract under which the steamship company had to sell the coal, which they had taken over at fixed F. O. B. prices, at C. I. F. terms. The judgment in favor of the plaintiff, rendered under Section 4 (1) (a) of the Act,54 and based upon the alleged intent of the defendant "to restrain trade or commerce to the detriment of the public", was reversed unanimously by the appellate court; and this reversal was later affirmed by the Privy Council on the ground that there was no intention on the part of the defendant to injure the public. The United States rule 55 that the enforceability of the contract should be a test of its legality was rejected. The court said:

"... the Act of 1906 only deals with contracts or combinations ... which involve detriment to the public and in which a sinister intention is of the essence of the offence." 56

51 Supra p.
54 Australian Industries Protection Act, loc. cit. supra note 52.
55 Supra p.
New South-Wales has passed similar provisions against unfair measures of competition, in its Monopoly Act of 1923. In New Zealand, the Act for the Repression of Monopolies in Trade or Commerce of 1910, by Section 4, makes every person guilty of an offence

"... who either as principal or agent refuses, either absolutely or except upon disadvantageous or relatively disadvantageous conditions, to sell or supply to any other person or to purchase from any other person any goods for the reason that the latter person—(a) deals, or has dealt, or will deal, or intends to deal or has not undertaken or will not undertake not to deal with any person or class of persons either in relation to any particular goods or generally; or, (b) is not, or has not been, or will not become or undertake to become, or has not undertaken to become a member of a Commercial Trust; or, (c) does not act, or has not acted, or will not act, or does not intend to act, or has not undertaken or will not undertake to act, in obedience to or in conformity with the determinations, directions, suggestions or requests of any Commercial Trust with respect to the sale, purchase, or supply of any goods."

In Canada, under the Criminal Code, it is provided that:

"A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade."

Under Section 498, everyone is guilty of an indictable offence

"... who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company—(a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce. ..."

Under Section 2 of the Combines Investigation Act,

"... any actual or tacit contract, agreement, arrangement, or combination which has or is designed to have the..."
effect of (I) limiting facilities for transporting, producing,
man制造ing, supplying, storing or dealing; or, (II)
preventing, limiting or lessening manufacture or production;
or, (III) fixing a common price or a resale price, or a com-
mon rental, or a common cost of storage or transportation;
or, (IV) enhancing the price, rental or cost of article, rental,
storage of transportation; or, (V) preventing or lessening
competition in, or substantially controlling within any par-
ticular area or district or generally, production, manufacture,
purchase, barter, sale, storage, transportation, insurance or
supply; or, (VI) otherwise restraining or injuring trade or
commerce. 

is deemed a combine if it has operated, or is likely to operate, to
the detriment of, or against the interest of, the public.

In South Africa, the Board of Trade and Industries of the
Union of South Africa is engaged in investigating the effects of
cartels, especially in so far as they aim at the creation of
monopolies or the restraint of trade. According to the Custom
Tariff and Excise Duties Act of 1925, the Governor General has
the right to proceed against unfair measures of competition by
regulation of custom duties.

B. Deferred Rebates

In the case of Mogul Steamship Co. v. McGregor Gow &
Co.60 a number of steamship companies agreed with one another
as to the number of ships to be sent to a certain port, the freight
to be charged and other matters. The companies informed their
customers that a certain rebate would be granted in the case of
exclusive use of their lines, and they forbade their agents, under
penalty of dismissal, to engage in any activity for other lines.
When the plaintiff, an outsider, sent ships to this port, the mem-
bers of the ring reduced their freight rates and increased the
number of ships. They forbade their agents to be of service to
the ships of the plaintiff and threatened their customers with
cancellation of rebates if plaintiff’s ship were used. The plaintiff
was forced thereby to run its ships at a loss.

60 23 Q. B. D. 598 (1889), aff’d, [1892] A. C. 25.
This case contained a number of measures for regulating competition—boycott, deferred rebates, and price-cutting—all of which were declared by the court to be fair. Lord Esher, dissenting, declared that the action of the steamship companies "is a thing done not in the due course of trade, and is therefore an act wrongful . . . and is also wrongful against the right of the public to have free competition against traders . . . and, if it is carried out and injury ensues, is actionable".\textsuperscript{61} The other judges, however, declared:

"If peaceable and honest combinations of capital . . . are to be struck at, it must . . . be by legislation, for I do not see that they are under the ban of the common law." \textsuperscript{62}

"I know no limits to the right of competition in the defendants—I mean, no limits in law. I am not speaking of morals or good manners. To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the Courts." \textsuperscript{63}

In the dominions, the special statutes, to which reference has been made, are in force.\textsuperscript{64} In Australia, the granting of rebates is forbidden by the Australian Industries Preservation Act:

"Any person who in relation to trade or commerce with other countries or among the States, either as principal or agent, in respect of dealing in any goods or services gives, offers or promises to any other person any rebate, refund, discount, concession or reward for the reason or upon the condition express or implied that the latter person (a) deals, or has dealt, or will deal, or intends to deal exclusively with any person either in relation to any particular goods or services or generally; (b) deals, or has dealt, or will deal, or intends to deal exclusively with members of a commercial trust either in relation to any particular goods or services or generally; or, (c) does not deal, or has not dealt, or will not deal, or does not intend to deal with certain persons either in relation to any particular goods or services or gen-

\textsuperscript{61} Ibid. 610.
\textsuperscript{62} Ibid. 620.
\textsuperscript{63} Ibid. 626.
\textsuperscript{64} Supra notes 52, 57, 58, 59.
erally; or, (d) is or becomes a member of a commercial trust, is guilty of an offence (penalty 500 English pounds)".65

In New Zealand, under Section 3 of the Commercial Act of 1910, every person is guilty of an offense,

"... who, either as principal or as agent, in respect of dealings in any goods, gives, offers or agrees to give to any other person any rebate, refund, discount, concession, allowance, reward or other valuable consideration for the reason, or upon the express or implied condition, that the latter person... undertakes, or has undertaken, or will undertake to deal exclusively or principally with any person or class of persons, or becomes, or has been, or has undertaken, or will undertake to become a member of a Commercial Trust”.

C. Tying Contracts

In contrast to the law of the United States, where a restraint of trade was found in the shoe machine case66 when the manufacturers of shoe-making machines, by a so-called “tying” clause, obligated their purchasers to refrain from using any machines of their competitors in their factories during the twenty years for which the contract was to run, the English courts have declared such a provision to be valid.67 While the lower courts in Canada recognized the plea of restraint of trade as sufficient in an action brought to enforce such a contract, the Privy Council reversed the decision of the lower court, and decided against the defendant, saying:

"By virtue of the privilege which the law secures to all traders, namely, that they shall be left free to conduct their own trade in the manner which they deem best for their own interests, so long as that manner is not in itself illegal, the respondents are at liberty to hire or not to hire the appellants’ machines as they choose, irrespective altogether of the injury their refusal to deal may inflict on others. The same privilege entitles the appellants to dispose of the products they manufacture on any terms not in them-

---

65 Supra note 52, § 7 (a).
selves illegal, or not to dispose of their products at all, as they may deem best in their own interest, irrespective of the like consequences. This privilege is, indeed, the very essence of that freedom of trade in the name and in the interest of which the respondents claim to escape from the obligations of their contracts".68

Mr. Simpson attacks this decision because it does not sufficiently consider whether the restraint of trade contained in the contract was unreasonable and injurious to the public. He says:

"If a combine can enforce a contract like this, the doctrine of restraint of trade hardly applies to combines at all".69

In the Dominions of the British Empire tying contracts, as in the United States, are subject to the previously-mentioned laws, prohibiting them as in restraint of trade or as a monopoly. In the report of the Board of Trade in South Africa, it is stated:

"Generally speaking, however, it should be evident that there is nothing fraudulent or unethical in this practice. That this policy is subject to abuse and may lead to undue restraint of competitive trade, is not to be denied, but the determination of unfairness and undue restraints detrimental to public interest is a matter for careful consideration of the detailed circumstances in each case".70

D. Price-cutting

In the case of Mogul Steamship Company v. McGregor Gow & Co.,71 the English judges declared the reduction of rates in combating outsiders and forcing them to run their ships at a loss to be permissible. The Board of Trade of South Africa has also, in the report already mentioned, concerned itself with this question. It came to the following conclusion:

"At best, public policy is seriously concerned whenever misrepresentation in connection with this price-policy takes

---

68 Ibid. 342.
70 Ibid. 7, 8.
71 Supra note 60.
place, especially whenever this policy is designed as a temporary measure to drive out competition and gain monopolistic control with intent to raise prices in order to recuperate previous losses.”

In addition, the report stated:

“If it can be proved that respondents are attempting to destroy or oust their competitors with intent to set up a complete monopoly, the board would also have surer grounds for recommending interference”.

Sir John McDonall, who has come to the conclusion that systematic cutting of rates, in order to combat competition, is not illegal, stating:

“Upon this point there have been in England great differences in judicial opinion but since the decision of the House of Lords in Allan v. Flood and Quinn v. Leathem the law appears to be that, whatever may be the motive of the person carrying on unfair competition, no action will lie in the absence of injury in the legal sense.”

nevertheless finds that the English courts, in taking this position are inconsistent with their attitude in other decisions combating monopolies, for the reason that “they have legalized what is in practice the most effective mode of destroying competition and creating a monopoly, i.e.—under-cutting and other devices for destroying rivals in trade”.

E. Rings (Agreements Not to Tender)

In the case of Johns v. North four firms engaged in selling bricks entered into an agreement whereby A should make the most favorable bid to a company which had requested offers, and A, at the same time, obligated himself to purchase a certain quantity of bricks from the other parties to the agreement, B, C, and

---

72 Report of the Committee on Trusts, supra note 69, 4.
73 Ibid. 23.
74 McDonall, Notes as to the Law Relating to Combinations (1919) (published by the Committee on Trusts).
75 Ibid.
76 L. R. 19 Eq. 426 (1875).
D. The latter, on their part, agreed not to sell any bricks to the company in question for a certain number of years. B breached the contract and made a bid which was accepted. A was successful in an action brought to prohibit delivery to the company because the contract, considering the interests of the parties thereto, was held to be reasonable and consequently valid.

In the same way, in conformity with the earlier decision, it was held in Rawlings v. General Trading Co.,77 that an agreement among several persons not to bid against one another at a public auction was not illegal.

F. Maintenance of Resale Prices

In the case of Elliman Sons & Co. v. Carrington & Son, Ltd.78 certain manufacturers sold goods to wholesalers upon the condition that they should not be resold under a certain price and that the wholesaler, in reselling, must impose upon his purchaser certain minimum reselling prices. A wholesale dealer sold the goods to a retail dealer without requiring the latter to obligate himself to resell only at the prescribed retail minimum price. An action for damages brought by the manufacturer against the wholesaler was successful. The court said:

"Why should the [plaintiff] not be at liberty to make the further bargain with . . . [defendants] that they shall not sell it below a certain price? It is said that it is in restraint of trade. In one sense it is, but it is just as much and no more in restraint of trade for plaintiff to say that they will not sell at all. It seems to me that what is restraint of trade as regards [defendants] is really the liberty of trades as regards [plaintiffs]."79

On this subject the committee on Trusts states:

"One of the most important phases of restraint of trade is the practice of resale price maintenance, particularly in the case of proprietary articles. In Great Britain this practice is practically universal and is sponsored by the Pro-

---

77 [1921] 1 K. B. 635.
78 [1901] 2 Ch. 275.
79 Ibid. 279.
prietary Articles Trade Association. This practice is also
good in law and recently, in so far as this practice is engaged
in by trade associations or combinations, the English Court
of Appeal has more or less consistently upheld this form of
associational protection of private interest.\textsuperscript{80}

The case of \textit{National Phonograph Company, Ltd. v. Edison
Bell Consolidated Phonograph Co., Ltd.}\textsuperscript{81} was an action by a
manufacturer against a retail dealer for damages and an injunc-
tion. The latter had purchased goods from a middleman, who
was bound by contract to sell the goods at certain agreed resale
prices, on terms and at prices which constituted a breach of the
agreement of the middlemen with the plaintiff. The Chancery
Division dismissed the complaint. The judge did not discuss
the question whether the price agreement in question constituted
an illegal restraint of trade. The court stated that the complaint
was not well founded, because the plaintiff had suffered no dam-
age; and the mere fact that the defendant had bought goods at
less than the agreed prices was not an inducement to a breach
of contract that would render the defendant liable in damages,
provided there was no positive interference with the contractual
relations between the plaintiff and anyone else. The question
whether a breach of contract is actionable depends on the nature
of the contract broken.

In the British Dominions agreements as to resale prices are
forbidden by the statutes against monopolies and commercial
trusts.\textsuperscript{82}

\textbf{G. Bogus Independents}

The maintenance of "bogus independents" by a trust, for
the purpose of camouflage is in principle permitted. It is only
when this arrangement is abused and falsely used to deceive the
public, or for the purpose of unfair competition and unreasonable
restraint of trade, that it becomes reprehensible and detrimental
to the public interest.\textsuperscript{83}

\textsuperscript{80} \textit{Report of the Committee on Trusts, supra} note 69, at 55.
\textsuperscript{81} 96 T. L. R. 218 (1906).
\textsuperscript{82} See statutes cited \textit{supra} notes 52, 58, 59, 65.
\textsuperscript{83} \textit{Supra} note 69.
IV. Summary

A comparison of the principles of law in the field of regulation of unfair competition in Germany, England, and the United States shows the following results:

In the United States the division present in German law between the private side of this problem of unfair competition and the public economic problem of cartels is not known. United States law considers as unfair methods of competition not only the private measures of open competition such as misrepresentation, deceiving, etc., which are *contra bonos mores*, but also those measures which, from the viewpoint of public policy, under special statutes, are deemed illegal because they militate against open competition, and consequently act in restraint of trade by tending toward monopoly.

German law does not consider acts which materially restrict open competition to be fundamentally unfair. It requires the permission of the Cartel Court only in the case of a boycott or similar measure under Section 9 of the Cartel Order; and only in the absence of such permission is a tort committed. Further, in accordance with Sections 4 and 10 of the Cartel Order, the Reichswirtschaftsminister has the right to move the Cartel Court to declare void, (ar ro) allow parties to withdraw from, or rescind, the contracts and agreements of cartels, or the business terms, or the manner of fixing prices of firms or associations of firms, where public policy or the general welfare require it. On the other hand, United States law considers every act, the tendency of which might be to lessen substantially open competition unfair and illegal. The differences between the United States and the German legal points of view are consequently fundamental and extremely far-reaching.

According to the English law, (in the Dominions the law of regulating competition is frequently embodied in statutes in accordance with the United States point of view), methods of

---

84 Our type of civilization has been based upon the principle of competition. That principle has been embodied in our law not as a rule of business conduct, but as a philosophy of human relationship." W. J. Donovan, former Assistant Att'y Gen., at the Annual Convention of the National Paint, Oil and Varnish Ass'n, Oct. 28, 1927.
combating competition are in themselves fair, and only constitute a tort when illegal means, such as intimidation, coercion, or conspiracy are employed. The German method of considering the matter from an economic point of view, quite apart from the problem of unfair competition as being contra bonos mores, and of submitting problems of that nature, not to the ordinary courts which concern themselves only with unfair competition, but to the special cartel court, is unknown in English law.\textsuperscript{85}

The principle that restraint of trade is invalid in so far as it is either unreasonable or against public policy, is applied only to such measures of combating competition as arise from contractual agreements among members of a cartel, customers, or suppliers. It is not applied to measures taken against third parties, or against customers and third parties, in execution of a cartel agreement which in itself is in restraint of trade, but which is nevertheless performed by the parties thereto.

The recognition of the fundamental fairness of measures taken against third parties, and the refusal of the courts to concern themselves with such measures, in the absence of statutory authorization, is clearly expressed in the \textit{Mogul} case.\textsuperscript{86} Here the court refused to decide upon the fairness or unfairness of measures of such a character, or to consider whether they were moral or immoral, but stated that consideration of their unfairness of immorality, so far as their legality is concerned, must be left to the legislature. Agreeing with this policy, McDonnal, in his report of the Trust Committee,\textsuperscript{87} expresses the opinion that the ordinary courts are not competent to decide such questions, since a decision of such cases involves the solution of difficult economic problems.

\textsuperscript{85} In the \textit{Financial Times} of Oct. 22, 1928, the author of an article entitled \textit{Governments and Cartels, Contrast in National Attitudes}, motivated, apparently, by industrial considerations, takes a stand against the assumed right of the \textit{Reichswirtschaftsminister} and the Cartel Court in Germany to attack, in the administration of their duties, existing contracts. The author neglects to mention the position taken in the \textit{Report of the Committee on Trusts} (1919), which was quite contrary to his, and concludes his criticism of the German situation with the words: "After making all allowances, the situation remains one to which business men in this country have difficulty in accustoming themselves".

\textsuperscript{86} \textit{Supra} note 60.

\textsuperscript{87} \textit{Supra} note 69.
In contrast to the United States system, which in its intensity in combating measures of competition deemed fundamentally unfair is far superior to the German law (which at least, however, under the Cartel Order, considers the general economic situation, and, under the Civil Code, in certain narrowly-defined circumstances, recognizes measures as contra bonos mores), the English law considers contracts in restraint of trade, which are reasonable and not against public policy, as well as measures of competition, even though directed by a combination against third parties, to be fair so long as there is no conspiracy nor use of other illegal means.

The following summary gives a comparative view of the legal situations of the various forms of regulating competition in the three countries.

A. Boycott

(1) In the United States a boycott is permitted only in so far as it amounts to a purely business measure in refusing a customer. It is illegal, especially, if it arises out of an agreement of several firms, or serves monopolistic purposes, or is a method of controlling competition.

(2) In Germany a boycott by a cartel is prohibited according to Section 9 of the Cartel Order, unless the Cartel Court has given its permission. This permission cannot be granted if the general economic interests or the economic freedom of the party against whom it is directed is thereby endangered.

The boycott is considered an immoral, and consequently illegal, act if its exclusive purpose is to hurt the other party or to injure him to an extent in excess of the advantages to be gained thereby, or if its purpose is to force the other party to perform an illegal act or to prevent him from performing a legal one.

(3) In England the boycott is without reserve, and is permitted as long as it does not employ illegal means or amount to a criminal conspiracy, i. e.—the combination of several persons for the sole purpose of injuring another, and without profit to themselves. The employment of the boycott by an individual as a means of revenge, which would make the boycott immoral in Germany, is permitted in England.
B. Rebates

(1) In the United States rebates are prohibited by Section 2 of the Clayton Act as a price discrimination, in so far as they are used as a means of eliminating competition.

(2) In Germany a rebate may, under certain circumstances, constitute a measure similar to a boycott, and therefore be forbidden, if without the permission of the Cartel Court. Fundamentally, rebates, even when "deferred", do not constitute immoral measures against third parties, as they serve the promotion of legal mercantile interests and do not lose their character of fair measures of competition merely because they also touch the sphere of interests of third parties.

(3) In England rebates are fair and legal. 88

C. Tying Contracts

(1) In the United States tying contracts are forbidden by Section 3 of the Clayton Act.

(2) In Germany they are permitted in principle, but may constitute a boycott under certain circumstances, and be immoral because they oppress the other party to an extent which is out of proportion to the advantages afforded thereby. The Cartel Court gives the Reichswirtschaftsminister the power to declare such contracts void for reasons of public policy and to make them invalid by giving the parties the right to withdraw from them.

(3) In England, according to the decisions thus far, tying contracts are upheld. Whether this is in accord with the principle of the unenforceability of a contract in restraint of trade may be doubtful in certain cases.

D. Price-cutting

(1) In the United States price-cutting is forbidden by Section 2 of the Clayton Act, as a measure to prevent free competition and because of its monopolistic tendencies.

(2) In Germany it is allowed in principle, in so far as it does not constitute a boycott requiring Court permission, or is

---

88 Supra note 60.
METHODS OF REGULATING UNFAIR COMPETITION

not immoral because of the lower wages which must be paid for the labor employed in the production of the articles.

(3) In England price-cutting is permitted.

E. Rings (Agreements Not to Tender)

(1) In the United States agreements not to tender are forbidden as in restraint of trade.

(2) In Germany they are allowed in so far as not immoral because of unjustifiable advantages derived by reason of prices being exorbitantly raised thereby.

(3) In England they are allowed if reasonable and not against public policy.

F. Maintenance of Resale Prices

(1) In the United States maintenance of resale prices is permitted only if falling within an agreement of a single transaction; it is not allowed if it goes beyond this and is to be secured by special measures and through organized cooperation with others.

(2) In Germany it is permitted by the ordinary courts in so far as it is not considered immoral because of exorbitant raising of prices, unlimited exploitation of a monopoly, etc.

The Cartel Court, on the other hand, attempts, when called upon to give its permission to the declaration of a boycott against a recalcitrant third party, to enforce the rule of public policy against the maintenance of resale prices.

(3) In England it is permitted.

G. Bogus Independents

(1) In the United States bogus independents are forbidden as being contrary to the purpose of the anti-trust laws prohibiting monopolies.

(2) In Germany they are allowed, in so far as the deceit practiced on the public, in individual cases, is not immoral.

(3) In England the law is similar to that of Germany.