THE LAW CONCERNING TRADE REGULATIONS
PRIOR TO THE TWENTIETH
CENTURY

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THE LAW CONCERNING TRADE REGULATIONS
PRIOR TO THE TWENTIETH
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CHAPTER I

ANCIENT LAW CONCERNING RESTRICTIVE TRADE PRACTICES

In almost all the relevant literature, generally falling under such headings as "monopoly," "restraint of trade," "trusts," "regulation of business," the reader will find fairly early in the work documented references to the fact that man's attempt to gain control of the productive capacity and the fruits of production of society is, if not as old as society itself, certainly an ancient one.

Charles Beach, for instance, in his book Monopolies and Industrial Trusts (1, p. 1), indicates that the problem of monopoly has plagued man at least since Biblical times by referring to Proverbs 11:26, wherein Solomon said: "He that withholdeth corn, the people shall curse him; but blessing shall be upon the head of him that selleth it."

According to Vernon Mund, in his Monopoly, the Egyptians were beset with state monopolies. Records indicate, he says, that Ptolemy II (309-246 B.C.) rigidly
controlled production and distribution of grain, flax, wool, spice, and oils (6, p. 2).

But of course neither Mund nor Beach nor for that matter any other modern writer in the area is laying claim to having made some startling new discovery when noting the scraps of evidence which indicate the ancient's concern with the control of the communities' productive facilities. The fact of the matter is, as V. Gordon Childe indicates in his book, Man Makes Himself (3), it is accepted as general knowledge that ancient societies were under the rigid domination of royal or priestly classes, or both; and this domination spread over all aspects of life, not the least of which was economic.

At any rate, if law reflects the climate of opinion of the society of which it is a part, then the evidence is clear: ancient societies, not surprisingly, were as aware and concerned over the problems of control and regulation of the economy as are contemporary western societies.

There is a wide and conceivably irreconcilable difference of opinion as to the nature of law, as any modern work on jurisprudence will indicate. But there is one area around which there is a fair amount of agreement: law is a consequence of the problems flowing from conflict occurring in society. Whether the resulting solution—law—is right or wrong is something else again. This latter problem is, of course, the one which the text is attacking.
What is surprising, however, is the manner in which the long standing preoccupation with the regulation of the economic aspect of life is presented to the reader. Beach (1, p. 4), for example, referring to the ancient Egyptians and Assyrians combining and conspiring to control prices and production, says there is little direct evidence they did such things other than what "is inferable from the inclination of fallen human nature." The implications of such a statement are clear: that before the fall pricing, production and distribution were somehow taken care of by the free play of man's real, basic nature, whatever that may be.

Writing of a later people and age but still concerned with the same basic problem, J. C. Peppin in his article "Price Fixing Agreements Under the Sherman Act,"⁸ says (7, p. 310) that from almost the very first "English law assumed an attitude of hostility towards conspiracies, combinations, or agreements to fix prices. . . ." Thus, again, the influence seems abundantly clear: man, generally inarticulate until very recent times to be sure, has always been opposed to control, administration, or regulation of the economic side of his life and has been for free, impersonal economic determination.

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⁸The title, "Price Fixing Agreements Under the Sherman Act," is quite misleading. There is, for example, in part of the article a lengthy and thoroughly documented review of English law concerning monopoly, restraint of trade, etc.
When one begins to examine ancient law concerning trade restraints, the above arguments almost instantly begin to assume some validity. Severed cleanly from the culture out of which they grew, these ancient laws appear to be nothing more nor less than our ancestors' attempts to set aright the natural order of things.

Viewed in such a manner, then, the famous Code of Zeno—called by Roman Piotrowski in his noteworthy book, Cartels and Trusts, "the most important contribution of the Roman era to the history of the monopoly movement and its legislation" (8, p. 111)—issued by the emperor of the Eastern Roman Empire (Zeno) to the Praetorian Prefect of Constantinople in 483 A.D., becomes an ancient, but highly sophisticated, society's imperfect attempt to anticipate by some fifteen hundred-odd years the Sherman Antitrust Act's avowed purpose to restore competition to the marketplace.

We command that no one may presume to exercise a monopoly of any kind of clothing, or of fish, or of any other use, whatever its nature may be, either of his own authority, or under a rescript of an emperor already procured, or that may hereafter be procured, or under an imperial decree, or under a rescript signed by Our Majesty; nor may any person combine or agree in unlawful meetings, that different kinds of merchandise may not be sold at a less price than they have agreed upon among themselves.

Workmen and contractors for buildings, and all who practice other professions, and contractors for baths are entirely prohibited from agreeing together that no one may prevent one who has contracted for a work from finishing it; full liberty is given to anyone to finish a work begun and abandoned by
another, without apprehension of loss, and to
denounce all acts of this kind without fear and
without costs.

And if anyone shall presume to practice a
monopoly, let his property be forfeited, and him-
self condemned to perpetual exile. And in regard
to the principals of other professions, if they
shall venture in the future to fix a price upon
their merchandise, and to bind themselves by agree-
ments not to sell at a lower price, let them be
condemned to pay 40 pounds of gold. Your court
shall be condemned to pay 50 pounds of gold if
it shall happen through avarice, negligence, or
any other misconduct, the provisions of this
salutory constitution for the prohibition of
monopolies and agreements among different bodies
of merchants, shall not be carried into effect (2). 8

Clearly an unequivocal commitment for competition.
Or was it? Returning to the social context out of which
the code came, what is to be found?

The Roman world has oftentimes been characterized
as an early day, swashbuckling, capitalistic society;
in his book, Economic History of Europe, Herbert Meaton
(4, pp. 38-59) intimates as much. Perhaps such a char-
acterization is justified if one limits the definition
to private ownership of property and a rather well de-
cined concept of contract. William Seagle in his The
History of Law (9, p. 162) says: "The Roman justists
who systematized the classical Roman law perceived in
it the basic lines of a law of property, obligation
[contract], and delict [roughly, the modern concept

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8For those interested in such things, Piotrowski
(8, p. 11, n. 2) has the code reproduced in the original
Latin in his book.
of tort]." These concepts and others as well the Romans' law had, some of which England was to adopt, and a great deal of which the French, some fifteen hundred years later, were to use in their famous Code Napoléon (4, pp. 160-164, 277-288).

But legal and economic historians generally agree (4, pp. 160-166; 9, pp. 38-59) that even in its Republic days Roman society was regulated along inflexible status lines. In spite of the common understanding that the Romans were "law" minded, Seagle notes (9, p. 254) that theirs was a society still largely governed by custom. The state freely granted monopolies, economic privileges of all sorts were bestowed upon the favored classes and individuals; the artisan, the craftsman, the shopkeeper, were simply inferior and government regulation of their trade was viewed—certainly by those doing the regulating—as a natural state of affairs.

The very existence of Zeno's Code indicates that monopolistic organizations were indeed widespread, which, of course, they were (8, p. 116). The real effect of the instrument, then, was not an unalterable opposition to monopoly and a determination to have as an alternative free competition, but rather quite the opposite: that the proper persons regulated and administered the economy. In a few eloquent phrases, Piotrowski has described the economic realities of Zeno's time and afterwards:
Actually the constitution of Zeno did not bring about any change, it rather made the former situation worse. Later sources show that the Emperor Justinian continued basing his economic policy on a system of monopolies despite the opposite principles of his own constitution. Although these were not monopolies granted to private persons, but were state monopolies managed by imperial officials, the effects felt by people were worse than if they had been private. The State monopolized by its undertakings the manufacture of silk goods, etc. The trade in the indispensable victuals, such as corn, bread, meal, olive oil, and wine, was taken from private merchants and put under the management of special officials, who took the place of the old private monopolies licensed by the Emperor. In their official character they increased prices without fear of criminal prosecution, and, worse still, they did it not so much in the interest of the treasury as to the advantage of their own pockets. Such a state of affairs continued also under the successors of Justinian until the beginning of the thirteenth century (8, pp. 116-117).

In sum, then, to paraphrase another concerned with the law of trade regulation, William L. Letwin (5, p. 356), can modern authorities, with any any genuine degree of validity, attribute to the promulgators of ancient law even an ill-defined concept of competition when the rest of the community hardly knew the meaning of the word but rather considered monopoly, or rather, a tightly regulated economy, both natural and desirable? The question could be answered in the affirmative only if one could assume that they alone had miraculously managed somehow to transcend the accumulated experiences up till that time. The Greek philosophers in their visionary perfect states, it should be noted finally, saw them as being strictly regulated in an economic sense.
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CHAPTER II

COMPETITION: A CAUSAL FACTOR OF PROGRESS?

As the nineteenth century drew to a close mankind in most of the Western world could pause and, reflecting back over the past hundred-odd years, feel a justifiable sense of pride in accomplishment. Perhaps its uniqueness has been recognized by no one as well as Karl Polanyi (4), where once there had been wilderness, factories now dotted the countryside. People could communicate almost instantaneously over vast distances. Man could travel rapidly with relative ease and comfort. New goods, beyond imagination a hundred years before, poured out daily from the factories and laboratories; goods not dreamed of before were now, miraculously, necessities. And, perhaps most important of all, men were steadily being relieved of back breaking labor as inanimate energy was being harnessed; now a man had a few leisure moments, with his mind not the devil’s workshop but, rather, science’s catalyst. If progress has any meaning at all, then man was progressing; and to reinforce the meaning was the knowledge that tomorrow things would be better still.
Thus, the reflective man at the turn of the century could be proud. But of all his inventions the one which must rank very near the top as a source of pride was the conceptualization of progress. For as strange as it may sound to contemporary ears, nevertheless, as J. B. Bury so adeptly proves in his work, The Idea of Progress (1, pp. 65-66), there was no genuine theory of progress until the early sixteen hundreds. Before that time it was felt that man reached "golden ages" only to degenerate and struggle back up, a hopeless cycle in which man is doomed to be unable to accumulate any real large amounts of knowledge; that the earth was doomed anyhow in the not too distant future and whatever knowledge which might be gained should be used preparing for the next world; and that man could always depend upon providential intervention, which is to say, man simply could not depend upon the invariability of the laws of nature. Given such a pessimistic climate of opinion, a more melioristic view such as that embodied in the idea of progress did not occur overnight. Conditions by the sixteen hundreds were, however, ripe for change. In a relatively short time such contrary views as the certainty of the superiority of our knowledge over that of our ancestors, the use of our knowledge to alleviate the conditions of man in this world, the certainty of the invariability of the laws of nature were in ascension. These latter ideas,
and ideas like them, were destined to capture the minds
of western man and to form the foundation upon which
modern science was built.

As the nineteenth century drew near, England stood
poised on the brink of the industrial revolution. The
"ideas" of progress had inevitably led to practical
consequences; great material transformations had been
wrought in men's lives.

Observing the phenomenal changes which were taking
place, Adam Smith, philosopher turned economist, began
speculating as to the causes of spectacular material
changes occurring all about him. The kinds of questions
he asked can be deduced from the full title he gave his
masterpiece: *An Inquiry into the Nature and Causes of
the Wealth of Nations* (5).

Smith, of course, uncovered a number of "causes" of
the wealth of nations, each of which was essential to
his system. Yet, as C. E. Ayres points out (2, p. 71),
there was one element in Smith's analysis so vital as to
merit being called the moving "spirit" behind his entire
system. The "spirit" was that of competition. And,
oddly enough, even though it was subsequently accepted
as being perhaps the fundamental ingredient in the
classical economic system, competition has never received
the close analytical scrutiny it deserves by Smith's
professional descendents. J. M. Keynes, for example,

But Smith himself, recognizing the vital—pre-conditioning as it was—part played by competition in his system, from the very first stated clearly the importance of the competitive spirit. In what is easily his most famous passage, Smith observed that the prudent investor "is led as though by an invisible hand to promote an end which is no part of his plan." (5) Taken in context with the rest of his system, what Smith meant was that if everyone takes care of his own selfish inclinations, responding with alacrity to the wants of the community (which, naturally, a man bent on maximizing his profits will do) the result is an economic system wherein all the resources of the community are constantly being called forth and shunted hither and yon in response to the wants of the individuals within the system—all, of course, under the aegis of the competitive ideal.

The implications of the Wealth of Nations were obvious: whatever barriers there were which might somehow be restricting man's natural competitive bent must be broken down. That was the kind of talk a large segment of society wanted to hear. Phrases and catch-words were invented almost as rapidly as new goods. Free trade,
laissez-faire became commonplace terms. "Anarchy plus a policeman" was the succinct description of the ideal being pursued. An eminent historian, Herbert Heaton, describes vividly that unique century which followed so closely upon the heels of Adam Smith's book:

The economy of the nineteenth century was not merely more capitalistic and commercial than that of any preceding period but also more competitive. Those who ran it were given at times to glory in this last characteristic. "Competition" and "progress" were two of the most popular words in their vocabulary, and the first was deemed an important factor in causing the second. "Competition is the life of trade and the law of progress"—this was an unquestionable truism in 1850. The classical economist regarded competition as the road to maximum welfare, the spur to efficiency, the enemy of incompetence, the guardian of the consumer, and the best guarantee that no man got more of the national income than he deserved (2, p. 601).

Heaton had reference primarily to the British economy; which brings up another aspect—and one of paramount importance—of the nineteenth century. It was, Polanyi (4) notes, a British century. It was there that the industrial revolution began; British subjects first tasted the fruits of that most unique of all revolutions, it was a century of relative peace—pax Britannica. Though the torch of industrial leadership has slipped from the British, none have since held such absolute pre-eminence as she once did.

Thus, as the twentieth century dawned, it was the reflective British subject in particular who could glory in accomplishment. If these were ominous clouds
gathering on the industrial horizon, if these were busi-
ness forces gathering whose power exceeded the wildest
dreams of the sultans of old, they were too far away for
the British to be bothered with. For, contrary to his
American cousins who in 1890 had, by the adoption of the
Sherman Act, legislatively committed themselves to seeing
to it that competition was to be "restored" and "contin-
ued" in the market place, the British felt (and, as shall
be shown, this was reflected in their law) that if com-
petition had any meaning, it was, as the economist had
been saying for over a century, natural, self-generating,
so to speak.

Hermann Levy, in his too often overlooked book, The
New Aspects of Industrial Combination (3, pp. 3-5),
relates the story that when he was in England in 1907
to study the organizational structure of trusts and
cartels his professional economic colleagues there were
startled that anyone should undertake such a useless
venture, for they firmly believed there were none in
existence (and if there were any they were per se tem-
porary) and could prove by impeccable logic why there
were none. Levy fails to state, it should be added,
what the British economists' reactions were when he
laid before them proof of the existence of a fifty
year old coal cartel, and of a textile industry char-
acterized by combinatory organizations, transportation
monopolies and shipping cartels, and a munitions monopoly decades old.

A vital element in that impeccable British logic was the legal environment. They could—and did—say, as will be seen shortly, that British law had always been opposed to restraint of trade, that is to say, anything restricting competition, and had struck down those restrictions wherever confronted. But, if that be so, then one is at a loss to account for Levy's discoveries of monopolies and cartels. And, in addition, how could one explain repeated assertions by a group of England's outstanding contemporary lawyers in Restrictive Trade Practices and Monopolies (6) such as: "... trade combinations have been prevalent in England for centuries" (6, p. 21); "during the eighteenth and nineteenth centuries it is thought that monopolistic practices were prevalent throughout the land" (6, p. 36); and: "What is notable among British consolidations and associations is not their rarity or weakness so much as their unobtrusiveness. There is not much display in the window but there is a good selection inside" (6, p. 8).

Was English law so blind? Or had she helped create a climate wherein such activities could flourish?
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CHAPTER III

ILLUSORY NATURE OF EARLY ENGLISH LAW

CONCERNING TRADE RESTRAINTS

The British authors of *Restrictive Trade Practices* and *Monopolies* (12, p. 26) state: "Legislation in England dating from the Magna Carta laid down that all monopolies without exception, even those granted by the Kings, were considered contrary to the law, because they restricted the freedom of the individual."

Peppin, in his article, "Price Fixing Agreements Under the Sherman Antitrust Act," says (7, p. 310): "... the English law very early assumed an attitude of hostility towards conspiracies, combinations, or agreements to fix or raise prices or wages."

And Justice Taft, in his famous decision in the *Addyston Pipe Co.* case (11), wherein he presented a very scholarly review of authorities to support his opinion, said: "From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contract."
The above views, of course, do not exhaust the list. They do however reflect the prevailing view and come from those recognized as being authorities. But if indeed the picture they conjure up—an atmosphere wherein the legal system is ever on the alert to search out and penalize those who are not playing the competitive game properly—is in fact correct, then a plausible argument can be made that, if not the major factor, competition was certainly a very important one in accounting for the industrial revolution having occurred in England rather than elsewhere.

There is no lack of evidence which can give apparent substance to the prevailing position. Peppin, for example, cites a number of cases which, he says (7, pp. 311-312), reveal that "public opinion even in this early period was opposed to such agreements and conspiracies [i.e., to restrain trade, lessen competition]." In 1298, he notes, coopers were convicted for passing an ordinance that no one should sell hoops below a certain amount; in 1300 chandlers were indicted for agreeing among themselves that none should sell a pound of candle for less than another; in 1353 a matter was to be looked into wherein merchants had agreed upon prices they would pay and sell wool for. These and similar cases were quite numerous, but, as Donald Dewey points out (10, p. 112), they are
really much too fragmentary in nature to establish public policy from them.

However, taken in conjunction with some of the earlier statutes, the position of unalterable opposition to trade restraints tends to grow stronger.

Some of the more important relevant statutes were:

Ordinance of Conspirators, 1304

33 Edw. I (1304) st. 2: regarded as making criminal conspiracies to fix or raise prices or wages.

27 Edw. III, Stat. 2, Ch. 25 (1353)

... we have ordained and established, that no merchant or other shall make Confederacy, Conspicacy, Coin, Imagination, or Murmer, or Evil Device in any point that may turn to the impeachment, Disturbance, Defeating or Decay of the Staples, or of anything that to them pertaineth, or may pertain.

37 Edw. III, Ch. 5 (1363)

"Merchants shall not ingross merchandise to enhance the price of them, nor use but one sort of merchandise."a

The above enactments, it should be noted, were concerned with the same offenses for which the merchants in the cases Peppin uncovered were being prosecuted or investigated. As already indicated, the cases are much

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a I.e., made criminal conspiracies or agreements to sell only merchandise which was scarce and to withhold abundant merchandise from the market until it became scarce.
too fragmentary for one to determine whether or not they were pursued as offenses against the common law or violations of statutory law. They were, however, concerned with what was to become known as forestalling, regrating, and engrossing, offenses which, according to Thorelli in The Federal Antitrust Policy (10, p. 15), were themselves eventually to become confused by the courts and used interchangably. At any rate, British concern with those offenses was an abiding one for literally centuries, if the more or less steady barrage of statutes is any measure.

Statutory prohibition of those activities by merchants reached the highwater mark in 1548 and 1552. The acts were passed during the reign of Edward VI. These particular acts, since they have been eulogized by modern authors (7; 8), are set out in detail below. (It should be noted that 5 & 6 Edward VI shored up the earlier act by making regrating and engrossing as well as forestalling prosecutable offenses.)

After reciting "forasmuch as late divers sellers of victuals, not contented with moderate and reasonable gain, but minding to have and to take for their victuals so much as list them, have conspired and covenanted together to sell their victuals at unreasonable prices," 2 & 3 Edw. VI (1548) c. 15 made it a criminal offense "if any butchers, brewers, bakers, poulterers, cooks,
costermongers or fruiters... shall conspire, covenant, or promise together, or make any oaths, that they shall not make or do their work but at a certain price or rate. . . ."

5 & 6 Edw. VI (1552) Ch. 6

Forestalling:—Therefore be it enacted and declared by the King that whatsoever person or persons, that after the first day of May next coming shall buy or cause to be bought, any merchandise, or victual or any other thing whatsoever, coming by land or by water toward any market or fair to be sold in the same, or coming toward any city, port, haven, creek, or road to this realm or Wales, from any port beyond the seas to be sold... or shall make any notice by word, letter, message or otherwise, to any person or persons, for the enhancing of the price or dearer selling of anything or things above mentioned... shall be deemed, taken and adjudged as a forestaller.

Regrating:—Whatsoever person or persons shall by any means regrate, obtain or get into his hands or possession, in any fair or market any corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, ... or any other dead victual whatsoever, that shall be brought to any fair or market within this realm or Wales to be sold, and do sell the same again in any fair or market holden or kept in the same place, or in any other fair or market within four miles thereof, shall be accepted, reputed and taken for a regrator or regrators.

Ingrossing:—Whatsoever person or persons... shall ingross or get into his or their hands, by buying, contracting or promisetaking, other than by demise, grant, or lease of land or tithe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish or other dead victuals whatsoever within the realm of England, to the intent to sell them again, shall be accepted, reputed and taken as unlawful ingrosses and ingrossers.
Faced, then, with several centuries of court and parliamentary bias apparently unalterably opposed to restraint of trade and in favor of impersonal market determination of price and resource allocation, that is to say, a forthright stand for competition, one would certainly feel some degree of effrontery to disagree with the authorities. But it is submitted that such a presentation of law is illusory. For if the statutes and case law are set back down into the environment out of which they have been torn a view contrary to that prevailing and one a good deal more realistic can be had.

An insight into the real purpose of the forestalling legislation and prosecution can be gained from reading a short passage from that most revered of all authorities, Adam Smith.

The popular fear of engrossing and forestalling may be compared to the popular terrors and suspicions of witchcraft. The unfortunate wretches accused of this latter crime were not more innocent of the misfortunes imputed to them, than those who have been accused of the former. The law which put an end to all prosecutions against witchcraft, which put it out of man's power to gratify his own malice by accusing his neighbor of that imaginary crime, seems effectually to have put an end to those fears and suspicions, by taking away the great cause which encouraged and supported them. The law which should restore entire freedom to the inland trade of corn, would probably prove as effectual to put an end to the popular fears of engrossing and forestalling (9, p. 501).
that Adam Smith saw of course was that, far from "encouraging competition," the centuries of legislation had fostered and protected elements in the economy which were by their very nature regulatory; namely, markets and gilds.

Jones, in his thoroughly documented article, "Historical Development of the Law of Business Competition" (4), states forthrightly that the statute books are replete with legislation protecting the markets and fairs, specifically, those concerning forestalling, regrating, and engrossing. Thus, a presentation of the law of that day without likewise at least indicating the social, the economic realities that were contemporaneous with it, creates, irrespective of how painstakingly the "law" may have been researched, an illusion.

Thus, even though it would tend to indicate as much, the early law of England was not commanding all to compete or suffer the consequences. Far from encouraging competition, the real purpose behind the early engrossing, forestalling, and regrating statutes was to protect those upon whom market privileges had been bestowed and the gilds. The effect of those statutes was to entrust to those two institutions—markets and gilds—the burden of running the British economy.

Something of an insight into the nature of the market may be gained by reading a crown grant of a market.
Crown Grant of Market Privileges, 1298

Edward by the Grace of God King of England to the archbishops, bishops, abbots, priors, earls, barons, justices, sheriffs, reeves, ministers, and all his bailiffs and faithful, greeting:

Know ye that we conceded and confirmed by this our charter to our beloved in Christ, the abbot and convent of Ramsey, that they and their successors should have in perpetuity a market each week on Mondays, at their manor of St. Ives in the county of Huntingdon, unless that market be to the nuisance of neighboring markets.

Therefore we wish and strictly command, for us and for our heirs, that the aforesaid abbot and convent and their successors should have the market at their manor in perpetuity, with all liberties and customs pertaining to this manner of market, unless the same should be a nuisance to the neighboring market, as aforesaid (3, p. 26).

Markets, then, were nothing more nor less than an area—itself more or less convenient—where goods could be traded. But it should be clearly understood, as Vernon Mund in his book Open Markets makes abundantly clear (6) (although he was attempting in the book to prove that markets were early manifestations of the practical application of the spirit of free enterprising competition—of course, "appropriately" and "realistically regulated"), that not every enterpriser who took it into his head to start up a market was free to do so. Quite the contrary was the case; a fact which, in itself should destroy any preconception one may have concerning the early Englishman's dedication to free enterprise (5).
The crown grant of the market privilege set out above is typical of those issued; it was, in Handler's words (3, p. 26, n. 6), the "Magna Carta" for the local area involved. But, as Letwin indicates (5, pp. 367-368), for the market privilege to have any meaning there would have to be some regulation provided to punish those who might trade outside. Thus, the steady outpouring of legislation concerning forestallers who were, in reality, nothing other than people who were speculating outside more or less clearly defined monopolistic market areas (6, p. 34). Furthermore, as Letwin (5) and others (4) emphatically indicate, the British society of that era was not analogous to ours today nor to any modern or relatively modern idealistic competitive society; it was one, rather, nearer those of more ancient eras already briefly indicated above—that is to say, it was one highly regulated and administered, one in which the King, privy council, parliament, gilds, cities, and manors, had, either individually or in various combinations, customary right to control and regulate prices and production. And, Letwin asks—a question the answer to which is self evident—what better method of surveillance could be devised than a centralized market system? And one other vital point needs to be raised. How could an opposition to restraints of trade be imputed to Englishmen from the eleventh to the seventeenth century, when they
viewed with obvious alarm those who went outside the established, the customary, the accepted, method of trading, i.e., the forestallers, the real enterprisers (3, p. 28)?

Mund and others have long recognized that the most powerful organizing force in the markets during this phase of English economic development was the gilds. They were both caused by and caused the market system. But, be that as it may, the gilds made inroads into and eventually completely dominated the area which once had been the market monopolist's. Mund notes (6, p. 67) that "the underlying reason for the gradual break down of the market system in England . . . was the fact that the gilds . . . had become effective monopolies with a continuing interest in avoiding competition."

Little really needs to be said concerning the gild system in England. Few, if any, have ever argued that they were competitive. E. P. Cheyney has stated perhaps better than anyone else what the position of the early gild merchants and later craft gilds were in the British society (2, p. 51).

The authority of the gild merchant within its field of trade regulation seems to have been as complete as that of the town community as a whole in its field of judicial, financial, and administrative jurisdiction. The gild might therefore be defined as that formal organization of the town which controlled its trade and industry. The principle reason for the existence of the gild was to preserve to its members the monopoly of trade.
Cheyney notes additionally that by the fourteenth century the gild merchant was a much less conspicuous institution than it had been previously, having been largely replaced by a group of organizations in each town which were spoken of generally as gilds, or sometimes as fraternities, misteries, or, often, merely by their occupation, as "spurrier," "the dyers," "the fishmongers." He further notes: "They were formed primarily to regulate and preserve the monopoly of their own occupations in their own towns, just as the gild merchant existed to regulate the trade of the town in general. . . ." (2, p. 59) There were, it should be understood, no restrictions as to membership as such; that is, no one was per se excluded; anyone could choose any craft he desired. The only difficulty was he had to be passed upon by the members of the gild, going through apprenticeship, becoming a journeyman, etc. and then, of course, upon being admitted, subject himself to all the various gild ordinances. These ordinances, as one would expect, became steadily more restrictive and onerous.

A large number of the original ordinances, the regulatory enactments which, on a local level, controlled the activities of the members, have managed to survive (in the physical sense) till today. Cheyney (2) and Handler (3) have reprinted verbatim several of them.
They were masterpieces of administrative insight. They were trade and fraternal organizations as the ordinances explicitly made clear. And, as is common knowledge today, these regulations did a great deal more than to set up a definite date when the local membership in a certain "misteria" would get together to drink beer, sing, and give a specified donation to an injured mother "or to a dead brother's" widow (which they did as a rule); they regulated the quality of the goods of the particular craft, the amount of goods each could produce, the hours one was to work, the requirements of apprentices and journeymen (a hotly contested problem from almost the first, as shall be noted), etc.

In short, it was an era when the central government was weak but one in which regulation and control of the production and fruits of production were tightly administered, first by the market monopolists and then, as they gradually lost control, the gilds. The gild authority was, of course, legally recognized and its ordinances were enforced by the courts. Gild authority, incidentally, is thought to stem from 37 Edward III, set out below.

37 Edw. III, C. 6, 1363

Concerning Gild Membership:—It is ordained that artificers, handicraft people hold then everyone to one mystery which he will choose and two of
every craft shall be chosen to survey that none use other craft than the same which he hath chosen.\footnote{This particular, and very important statute, was construed to mean that everyone was to choose a craft and adhere to it. This interpretation, naturally, led eventually to an increasing number of jurisdictional disputes and statutes regulating them. E.g., 2 Hen. VI, C. 7, 1423, forbade shoemakers from exercising the craft of tanner; 19 Hen. VII, C. 19, 1503, prohibited shoemakers from being curriers.}

Handler (3) and others (1; 4) warn that one should keep in mind the fact of the town's primacy over the nation during that period of gild domination. There is a good deal of controversy as to the relationship between towns (outgrowths of market privileges) and gilds. Apparently in many instances the gilds were the dominant factor in all phases of a town's daily activity; in most, however, the administrative activities were the concern of others with official recognition being given the gilds which, in any event, were entrusted with administering the town's economy.

From time to time, in addition to 37 Edward III, there was legislation designed to aid gilds. For example, 1 Ric. III, C. 9, 1485, severely limited the manner in which foreign (specifically Italian) goods could be brought into and sold in England in competition with gilds; 1 & 2 Ph. & M., C. 7, 1554, regulated trade which could be brought into old, established towns unless all gild requirements were met; 11 Hen. VII, C. 19, 1495,
required non-gild traders (in London) to be subject to gild regulations relative to quality of goods, etc.; and 2 & 3 Edw. VI, Ch. 15, Sec. 1, 1543, forbade journeymen from conspiring to raise wages, cut working hours, etc. And, of course, the forestalling legislation was obviously as beneficial to gilds, which were preoccupied with the problem of enterprisers trading outside gild monopolies (3; 4), as they were to the old market monopolists from whom the gilds had gradually, almost imperceptibly, wrested control.

As has been true of most British institutions, the gild monopolies never gained absolute dominance; for from almost the very beginning the crown made steady inroads into the gild's customary as well as legal authority as the nation's economic administrators. For instance, with the passage of 12 Ric. II, C. 5, 1388, the crown very early began to encroach upon the gild's long recognized authority over apprentices and journeymen. From then on the crown through various enactments (e.g., 7 Hen. IV, C. 17, 1405; 22 Hen. VIII, C. 4, 1530; 28 Hen. VIII, C. 5, 1536) asserted its will in that vital area until almost complete control of apprentices and journeymen passed into the hands of the crown with the passage, in 1563, of 5 Eliz., C. 4.

The crown's power began to be asserted in other areas. In 1541, 33 Hen. VIII, C. 3, forbidding craftsmen
from selling goods designed to deceive buyers, was passed. And 3 Hen. VIII, c. 6, 1511, regulated the quality of products generally in the woolen industry. Finally, during Elizabeth's reign, numerous statutes, e.g., 8 Eliz., c. 12, 1565, and 23 Eliz., c. 8, 1581, took practically all remaining power of regulation of goods from the gilds and placed it in the sovereign.

Whatever power as economic administrators the gilds may have retained was crushed in 1549 with the passage of 2 & 3 Edw. VI, c. 15, secs. 1 & 2. This famous enactment, likened by some to the Sherman Antitrust Act, but whose purpose and effect rested on entirely different practical as well as philosophical grounds, branded gilds as price setting conspiracies and inflicted heavy punishments upon them.

The philosophy of "Mercantilism" had added respectability and right to the crown's power in stamping out the gild's centuries old authority as the realm's economic administrators. No one has argued that mercantilists were in the least interested in competition.
CHAPTER BIBLIOGRAPHY


CHAPTER IV

DEVELOPMENT OF THE RULE OF REASON IN ENGLAND BEFORE THE TWENTIETH CENTURY

From the foregoing chapters one fact stands out above all the rest: the community's economic activity was subject to strict and ubiquitous regulation. Such propositions as Peppin's—that early British law was persistently opposed to monopolies and restraints of trade—is at best unrealistic; for the rest of the community at the time considered the phenomenon both natural and desirable.

As has already been shown those early cases (and they were numerous) wherein certain persons were prosecuted, indicted, or investigated for enhancing the price of the goods or services they had for sale, and those statutes (which in all likelihood were embodiments of the common law) that prohibited forestalling, etc., were not as one might justifiably at first suppose, viz., early manifestations of a dedication for the impersonal pricing of a "free" market to determine the allocation of resources. They were, on the contrary, designed to penalize
those who wished to circumvent the accepted patterns of economic behavior which, far from being conducive to competition, were actually regulated and monopolistic. Those early English forestallers—the ones who were being punished under statutory and common law which it is today being contended were the rude, beginning articulations of the law's opposition to monopolistic activities—were in reality the direct ancestors of today's idealized enterpriser.

Thus far, however, attention has been directed primarily to English legislative enactments, statutory law. But still another great body of law, the common law, was growing along contemporaneously and exerting a powerful influence upon (and, of course, in turn being influenced by) British economic activity. The common law, therefore, should be carefully analyzed for a number of reasons, not the least of which is its aid indicating what a particular climate of opinion may have been in a given area. And when the assertion is

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a The natures of statutory and common law are another complex subject altogether. At the risk of confusing rather than enlightening by oversimplification, for present purposes all that needs be understood is that common law is judge-made law as distinct from legislation made law, statutes. In England, parliamentary law is the law of the land; otherwise the common law reigns supreme. The common law is further characterized as being controlled by precedent. That is, except in unusual circumstances, courts are bound by prior decisions in cases resting on similar circumstances.
made that the English "law" early manifested a hostility towards all activities which might have restrained trade (26; 33; 35), the "law" referred to is almost wholly the common law. Finally, and of paramount importance, is the fact that by the dawn of the nineteenth century the only law of any genuine consequence concerning business activity in England was that being developed in the common law.

The common law of England relative to trade regulations developed along several rather indistinct lines, each of which to varying degrees overlapped the others: the law regarding "interference with markets"; the law regarding contracts in restraint of trade; the law regarding monopolies proper; and the law regarding combinations or conspiracies in restraint of trade.

It was the first of those, the law regarding interference with markets, which has given rise to the claim that from the very beginning the law displayed a hostility towards restraint of trade, and it will subsequently be shown not to have been the case at all. It will, however, later be noted with some detail that a rather more modern interpretation of the ancient law forbidding forestalling, regrating, etc., was resuscitated so to speak by Lord Kenyan in the famous case of King v. Waddington (17).

In face of the irrefutable fact that the markets, and later the gilds and royally (and parliamentary) granted privileges, were all sanctioned, closely
administered monopolies and recognized as such with complete equanimity by most of society of that day and age, the assertion continues to be made that the law opposed such activities. This assertion generally stems from the language (as distinguished from the economic realities both before and after the case) of the leading case of Darcy v. Allen (otherwise known as The Case of Monopolies) (7), along with decisions rendered by courts when dealing with problems more closely related with contracts or combinations and conspiracies in restraint of trade.

At any rate, by the 1800's the courts of England were concerned almost exclusively with contracts and combinations (conspiratorial or otherwise) in restraint of trade, and it was problems involving those very things which had been confronting the courts almost from the very first.

By all odds, the case most frequently offered in evidence as support of the proposition of the law's continuing opposition to trade restraints is The Dyers Case (1). Considering its evident importance it is set out in full (less citations) below:

Anonymous—"Dyer's Case"

A writ of debt was brought by one John Dyer wherein the defendant alleged, by Lod, that, according to a certain indenture which he put forth and on condition that the defendant should not use
his art of a dyer's craft within the town where the, etc., for a certain time, viz., for half a year, the obligation was to lose its force; and he said that he did not use his art of a dyer's craft within the time limited, which matter he offered to prove and demanded judgement whether the action, etc.

Hull. To my mind you might have demurred on him since the obligation is void because the condition is against the common law, and per Dieu, if the plaintiff were here, he should go to prison till he paid a fine to the king.

Strange. We say that the defendant did use his art during the time, etc., to wit, for seven days within the time limited by the conditions ready, etc. Issue joined.

When the judge, with obvious indignation, said that "by God" a person should go to jail if he enters into an agreement whereby the other party is restricted by the terms of the agreement from practicing his trade, he was in all likelihood upholding, as he says, the common law, as well as expressing the general sentiment of the community of that day. But before reading more into the cases than probably was actually there, it is absolutely essential to recall the setting in which they were made. In 1415 the gilds, with their multifarious regulations, had within their grip the economic livelihood, that is to say life itself in most instances, of the members of the community. A number of those regulations have already been brought out. One in those days did not simply pick up and move from one town to another and set up a trade until at last one decided to settle down. In fact, one
did not with any greater ease take up a new trade even in the same town. The concern, therefore, over such contracts is quite understandable; if one entered into a contract, particularly where hapless apprentices and journeymen were concerned (and in almost every reported case that appears to be the situation), agreeing not to practice his trade even for a limited time, there was a good chance that person might perish and would surely become a public charge.

The feeling in the matter was most graphically put by Anderson J., in a case (5) in 1548 concerning an agreement a blacksmith made binding himself not to practice his trade, wherein the judge said: "He might as well bind himself that he would not go to church."

The long line of decisions stretching back to The Dyer's Case and even beyond, those refusing to enforce agreements limiting a man in his trade or refusing to reward damages when such agreements were breached, reached their culmination in the case of Colgate v. Bachelor (5) in 1596. In that case a haberdasher agreed not to practice his trade for four years within the county of Kent or in the cities of Rochester and Canterbury. In holding the obligation void the court remarked: "The condition is against the law, to prohibit or restrain any to use a lawful trade at any time or any place; for as well as he may restrain him for one time or one place, he
may restrain him for longer times and more places, which is against the benefit of the commonwealth."

What was involved in the cases was one's right—if, indeed not duty—to work. But what was never in question was the real restrainer, namely, the gilds, along with, of course, parliamentary and royally bestowed privileges. Indeed, why should they have been? They were accepted as normal and desirable.

To say that the power of the gilds was not in question is not entirely accurate. Earlier proof was offered to indicate that, even at their strongest, the gilds' authority was gradually being usurped by the crown. By the sixteenth century the crown's authority regarding the economy was in full ascent while for some time as a result the gild's had been decaying. But the crown's authority, just as that of the gilds, was never absolute.

Although mercantilism with its complex system of state controls was to be accepted as the desirable mode of economic behavior, it was nevertheless during Henry VIII's and Elizabeth I's reigns that the granting of royal privileges reached its zenith. And it was during Elizabeth's reign that the royal prerogative of granting monopolies was challenged. That challenge resulted in the renowned case of Darcy v. Allen also commonly known as The Case of Monopolies (7).
In that case Elizabeth granted to her groom, Darcy, the right to be sole producer and seller of playing cards. Allen, in spite of knowledge of the grant, sold playing cards in London and Darcy sued for infringement. The court, in a rather lengthy opinion, held in substance that everyone in the realm had a right to practice any trade he wished and that any act (royal) which infringed that right was void.

Giving the case a careful reading one might be led to conclude that at last the law had resolved four square to place itself between the common man and those who would violate his right to work at whatever he pleases. That conclusion, however, would be erroneous on several grounds.

Courts at that time were quite fond of referring to "rights" one had to work (20, p. 365). These rights were, as noted above, quite restrictive; one could work at whatever he wished provided national as well as gild regulations were complied with. Furthermore, Allen was no valiant, free enterpriser challenging the massed forces of the crown. He was, quite the contrary, backed by powerful elements in London jealous of any infringement.

\*Prior to this case, the Privy Council and Star Chamber had upheld such grants as valid expressions of the royal prerogative (10, p. 71, n. 75).\*
on their territory represented by Elizabeth's wide ranging grants of exclusive trading privileges.\textsuperscript{a}

And, finally, Elizabeth and her successors continued to grant the exclusive privileges, without further challenge, until the passage of the Statute of Monopolies in 1624 (32). That act, though not so highly praised as the case of \textit{Darcy v. Allen} which preceded it, nevertheless has received its share of free enterprise laurels. It abolished all privileges royally granted before the passage of the act which were monopolistic (i.e., empowered one as the sole producer and/or seller of certain goods). There was attached, however, a long list of exceptions, e.g., new industries, patents, established companies, societies of merchants, etc. It did not, \textit{inter alia}, touch on the legality of gilds. And, very significantly, although power was taken from the crown, nothing was said in the act concerning parliament's power to grant exclusive monopolies (35, p. 35), which omission parliament frequently took advantage of.

Thus, \textit{Darcy v. Allen} and the Statute of Monopolies and the cases below (which are illustrative of the decay of gild authority) were not opposed to monopoly on economic grounds but rather on political grounds.

\textsuperscript{a}Allen eventually had to sue those who had promised to back him monetarily in his "gallant" challenge to Darcy, the monopolist (20, p. 366).
The earliest case testing the power of gilds as the economic regulatory agent was Davenant v. Hurdie (3), wherein as ordinance of the powerful Merchant Tailors' Co. which required one-half of all the cloth used by members must be done by the company was challenged as being a restraint of trade. Coke in a famous decision said: "... a rule of such a nature as to being all trade or traffic into the hands of one company or one person, and to exclude all others, is illegal."

And the Ipswich Tailors' Case (4) held that a by-law prohibiting anyone from practicing his trade until he had proven he had passed his apprenticeship was held unenforceable on the grounds that it restrained one from practicing a trade and in the process cited the old Dyer's case as authority.

Those cases merely indicated the declining power of gilds. Those ordinances struck down were precisely the kind which in the centuries before had formed the backbone of gild regulatory authority. At any rate, to infer from these the common law's dedication to free enterprise is risky. For almost a century after the Ipswich case, courts with varying degrees of regularity upheld such restrictions as: an ordinance forbidding a foreigner from engaging in trade or maintaining a shop in London (3); an ordinance forbidding the employment of anyone not being free of the city or an apprentice to a freeman (29);
the exclusive right of the lord of the manor to have a
bake-house and preventing the defendant from maintaining
a bake-house in Tossiter (9).

As the gilds declined and as the regulatory power
fell more and more into the hands of a centralized
government, a third regulatory power began, gradually at
first, to make itself felt. That force was the business-
man, the enterpriser waiting for the main chance; the
element which heretofore had been punished by the law
but which was, now with the full co-operation of the
law, destined to guide the British economy through that
first century of the industrial revolution.

The stage was set for the businessman's appearance
as a regulatory factor with the decay of the gilds. The
decay began as far as the common law was concerned with
the refusal to enforce restrictive ordinances. It was
at that very time (1613-1614) when the first contracts
in restraint of trade, contracts which from The Dyer's
Case (1) to Colgate v. Bachelor (5) had been held invalid,
were upheld. For in 1613 in Rogers v. Parry (26) the
court upheld an agreement wherein, in return for con-
sideration, one of the parties to the contract bound
himself not to practice his trade with the court dis-
tinguishing its decision on grounds of a destination
between general restraints and those whose restriction
is "for a certain time and certain place." In another
leading case, Broad v. Jollyfe (2), the court upheld another agreement not to compete and stressed the fact that the agreement was voluntary, was supported by adequate consideration, and the restriction was for "a certain time and certain place" (the inference being, of course, the restrained party could go elsewhere) to practice his trade.

The case, however, on which so many of the really major decisions of the nineteenth century rest was Mitchell v. Reynolds (22), decided in 1711. In the case the defendant had assigned a lease to the plaintiff for five years with a provision that he (the defendant) would not work as a baker in that parish for five years under penalty of paying £50 damages. After a masterful review of prior decisions and some of the social reasons for their having been reached, Parker, C. J. (later Lord Macclesfield) concluded: "In all restraints of trade, where nothing more appears, the law presumes them bad: but if circumstances are set forth, that presumption is excluded, and the court is to judge those circumstances, and to determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be enforced." Macclesfield indicated the mischief which could occur if such contracts were upheld and likewise the benefits if they were upheld. All of which were to be used as guides in determining if the restraint were reasonable.
restraint in the case was held to be "reasonable" and therefore enforceable. Thus was established in English common law the rule of reason regarding trade restraints. But since Macelesfield had indicated as much, for the rest of the century the courts wrestled around with time and geographical limitations (and occasionally even with adequacy of consideration) on the restraint to determine its reasonableness. It remained, however, for the judges of the nineteenth century to bring the "reasonableness" test to full flower.

In the meantime, by mid-eighteenth century, disenchantment with mercantilist's theories and policies had set in. It was during the period of the decline of mercantilism, during the transitional period before other policies had taken over, that a series of unique cases arose in English law. Had those few cases been followed rather than completely abandoned as they were, the entire character of nineteenth century economic development in England might have been different.

In the first case, King v. Norris (16), decided in 1756, several salt manufacturers were indicted on a charge of having conspired to raise the price of their product and binding themselves on penalty of £200 not to sell below a certain price. The court held that an agreement to fix the price of salt or "any other necessity of life" is criminal and "at what rate soever the
price was fixed, high or low, made no difference, for all such agreements were of bad consequence, and ought to be discountenanced."

In 1783 in the case of *King v. Eccles* (15) an indictment was returned against several persons (apparently master tailors) charged with conspiring to "impoverysh" a rival by preventing him from trading. (The means used is not clear in the case.) Lord Mansfield, C. J., held:

The illegal combination is the gist [sic.] of the offense . . . persons in possession of any articles of trade may sell them at any price they please, but if they confederate and agree not to sell them under certain prices, it is a conspiracy; so every man may work at what price he pleases, but a combination not to work under certain prices is an indictable offense.

And in 1798 in *Smith v. Scott* (31) six Edinburgh merchants in the business of supplying coaches for hire pledged themselves to charge higher uniform rates being unable to make a profit at the old rates. Facing the question of the legality of the conspiratorial agreement the House of Lords (the case was not decided strictly according to common law), through the Lord Chancellor, said:

By this, your lordships know, they were imposing a law to demand from the public a certain and fixed rate of posting, which was illegal and unwarrantable. . . . The case is very different, whether an individual might or might not ask what rate for posting he saw fit, but he must not make a party tensiness of it.
Then in 1800 Lord Kenyon handed down his famous opinion in *King v. Waddington* (18). This was the case wherein the judge (Kenyon) resuscitated the old forestalling offenses which had lain dormant at common law since 1690 (24, p. 66) and which, in fact, had been repealed by 12 Geo. III, C. 71 (1774). In any event, the defendant was accused of attempting, by false rumors and persuading dealers from selling, to run a corner on the hops market. On the doubtful theory that 12 Geo. III had not abolished the common law concerning forestalling, Kenyon found the defendant guilty. Kenyon made it clear in the opinion that he had read Adam Smith's views concerning fears of forestallers but nevertheless proceeded to condemn those acts engaged in by the defendant in scathing terms.

Poppin (26, p. 327), in his article notes, after having attempted to prove that up until that point the common law opposed restraints of trade, that when the nineteenth century dawned the English common law suddenly reversed itself and began creating an atmosphere conducive to private administration of the economy. But the fact is, just as in other areas of behavior, the common law

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*The defects of the repealing act were cured in 1844 with the passage of 7 & 8 Vict., C. 24. This latter statute completely abolished all prosecutions regarding forestalling, regrating and engrossing.*
underwent no sudden reversal of form. Quite the contrary. As it had in the past with markets, gilds, and central government, the law now created an environment favorable (in a legal sense) to the administration of the economy by the new ascendant group, the businessmen.

In the very early decades of the century, the courts were faced with a multitude of problems, the complexity of which seemed to be limited only by the ingenuity of the businessmen creating them. The solution to the problems, however, generally boiled down to two major alternatives: 1) The desire, stemming from the line of decisions begun by King v. Norris, to strike down all agreements, conspiracies (or for that matter, even the activity of a single individual) which are in restraint of trade; 2) The desire, stemming from the line of decisions largely begun by Mitchel v. Reynolds, to uphold those contracts freely and fairly entered into and which were "reasonable" restraints. The latter course was chosen, and, as will be seen, with each case more and more legal power to regulate the economy—easily equal to that enjoyed by market monopolists, gilds, and the crown—was thrust into the hands of the businessman.

The first major decision, Cousins v. Smith (6), was an equivocal start, hardly indicating what was to shortly follow unless one keeps King v. Waddington in mind as
background. In Cousins v. Smith a group of London businessmen, "The Fruit Club," combined in a scheme to corner the orange market. The agreement was held invalid and the court very mildly "suggested" that the agreement might possibly be an indictable offense, while only seven years before Kenyon, with inflammatory words, had fined Waddington £500 and sentenced him to prison for three months.

But then in 1815 in the case of Hearn v. Griffin (12) the court of King's Bench upheld an agreement between two rival stagecoach lines made for the purpose of arranging schedules and fixing fares. The Chief Justice's own words clearly indicate the view of competition prevalent at the time.

How can you contend that it is in restraint of trade; they are left at liberty to charge what they like, though not more than each other? And by the agreement, particular days and times for each to run in the week are fixed. This is merely a convenient way of arranging two concerns that might otherwise ruin each other.

If Hearn v. Griffin had not already done so, the legal green light to very nearly any form of private business regulating the English economy was given in 1824 in the case of Dickens v. Evans. The court upheld an agreement between three box and trunk manufacturers dividing England and Wales into three parts, one of which was assigned to each of the contracting parties for life, the parties agreeing not to compete with one
another in the assigned territories. In addition, the agreement provided that the parties would not purchase any chests in Oxford at a higher price than 6d. or 3d. each. The court agreed that the validity of the agreement was to be determined by the reasonableness test established in Mitchell v. Reynolds. And the court concluded that the agreement was reasonable because, after all, other box and trunk manufacturers could come into the assigned territories; and, furthermore, the court added, this was a proper way for business to behave for they could get operating economies they otherwise would probably find impossible. And, very importantly, the court adopted the "reasonableness" test for its purposes even though in the Mitchell case Macclesfield had explicitly stated that for the test to be applied all the restraint agreed to must be ancillary to another, a primary valid contract. In Wickens v. Evans the agreement (and extensive it was; exceeding Hearn v. Griffin's price regulating agreement by dividing territories and establishing basing points) was made solely to limit competition not to protect, for example, the purchase of a business which was the case in Mitchell v. Reynolds.

In 1831 in Horner v. Graves (14) and in 1837 in Hitchcock v. Coker (13), further inroads into the reasonableness test of the Mitchell v. Reynolds case (which had held that the agreement would be void if the restraint
were general rather than particular and that the consideration needs be "good" and adequate) were made by Tindall, C. J. In the latter case, Tindall said: "It is enough, as it appears to us, that when there actually is a consideration for the bargain; and that such consideration is a legal consideration, and of some value."

In short, the test of "adequacy" of consideration was being applied in restraint of trade contracts as in all other contracts; that is to say, the difference in value of what is received from what is given is rarely if ever an issue. In the former case, Tindall further relaxed the reasonableness test in agreements not to compete thusly:

... the greater question is, whether this is a reasonable restraint of trade. And we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the grounds of public policy.

The geographical area of non-competition was increased greatly in 1869 with the rendering of the decision in Leather Cloth Co. v. Lorsant (19). Wherein the vendors agreed upon selling certain manufacturing process patents to vendees that they (vendors) would not compete
with the same process in any part of Europe. The court said that it was unaware of any law limiting the size of the area where restraint was to be observed. The test was, it held, the nature of the subject matter which determined the reasonableness or unreasonableness of the restraint. This particular agreement was upheld.

The nineteenth century development of the rule of reason relative to ancillary agreements had, thusly, gone through a steady process of relaxation until it was quite obvious by mid-century that, depending on the subject matter, a business rival could be disposed of or otherwise effectively have his skills withdrawn over almost any conceivable length of time and in an almost unlimited area. The final development of the rule awaited the decision in the famous Nordenfelt case (25) in 1894 which will be discussed, along with the Mogul case (24), below.

In the meanwhile combinatory agreements of a nature similar to those found in Hearn v. Griffin (12) and Dickens v. Evans (34) were being put to the test of courtroom duel. These agreements typically concerned the setting of prices, division of markets, pooling arrangements, agreements not to re-enter competitive business, etc. In short, the kind of agreements the modern businessman enters in order to better administer his part of the economy. It cannot be over-emphasized
here that the law regarding trade regulation that developed in England during the nineteenth century was exclusively private law. Private in the sense that after *King v. Waddington* there were simply no arrangements between businessmen, short of out-and-out criminal conspiracy or violence to another's person or property (and the records do not indicate that this ever occurred), which would subject them to government regulation.

The problem, given such a state of affairs, facing the courts normally took the following form: A, B, and C would enter into an agreement to divide a certain territory between them, each agreeing not to enter the others' territory and further agreeing not to sell below a certain price in any territory, and finally they might or might not agree on a damages clause, i.e., how much would have to be forfeited in the event one or more broke the agreement. Then if, say, C violated the agreement and was sued by the others he generally would plead that the agreement was a violation of law as being in restraint of trade and therefore unenforceable and therefore he (C) should not be liable for damages. Clearly the agreement violated that restraint of trade the common law had *professed* to abhor since time immemorial; but, the question arose, should C be allowed to have received the benefits of the agreement while they were all (perhaps, in all likelihood, for a good long while)
abiding by it but still violate it with impunity? In each case, either explicitly or implicitly, the issue was quickly determined that if the agreement were a restraint of trade the violator indeed would breach with impunity. But were all agreements between businessmen restraints? The answer, of course, as the cases already examined clearly show, was an emphatic, "no"--if the agreement were reasonable. What were reasonable restraints? Some reasonable ones were division of territories, price setting, activities where economics were gained and "ruinous" competition was halted (12; 34).

So in 1851 in the Shrewsbury & Birmingham Railway Co. v. London & Northwestern Railway Co. case (31), a case wherein two former rivals agreed not to compete against each other for traffic over certain parts of their lines, the court upheld the restraint in the following language:

The defendant's counsel contended that it is injurious to the public by giving in effect a monopoly to the plaintiffs, and thereby depriving the public of the benefit that might be derived from competition. If this were so, and the parties proposed by their agreement to endeavor to prevent competition generally, there might be weight in the objection; but the effect of the agreement is only that the one company shall not compete or interfere with the other upon the particular line mentioned in the agreement. This is no more illegal than it would be for two persons engaged in trade to agree that one shall not exercise his trade nor compete with the other within a particular district.
To the argument that the agreement would injure shareholders because of the provision for dividing of profits, the court answered that: "... this arrangement may be greatly for the benefit of the shareholders; and without such cooperation of the two Companies perhaps no profit would be made."

And in Hare v. London & Northwestern Railway Co. (11), decided in 1861, an agreement between competing railroads for the pooling of profits was upheld even though it did not appear that the parties had any outside competition with which to contend. The sole basis for upholding the agreement seems to have been that it was desirable in the interest of preventing a ruinous competition, the court saying: "It is a mistaken notion, that the public is benefitted by pitting two railway companies against each other till one is ruined, the result being, at last, to raise the fares to the highest possible standard."a

The agreement sustained in the Hare case obviously went much farther than those involved in Hearn v. Griffin and Wickens v. Evans, in that in the former case the parties to the agreement had no outside competition, either present or prospective—in short they controlled

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The decision in both the railroad cases was reached entirely independent of any "natural monopoly" or "public utility" issues.
the market. Notwithstanding, the agreement was upheld, as was an agreement of exactly the same character in the Shrewsbury case.

And finally in Collins v. Locke (27), decided by the Privy Council in 1879, upheld an agreement among stevedores in the Port of Melbourne, Australia, insofar as it divided the stevedoring business of the port among them, specific customers being assigned to various parties to the agreement. The court relied on Mitchell v. Reynolds, once more applying the rule of that case to a non-ancillary contract. Clearly this agreement resulted in the elimination of price competition and all other competition between the parties thereto, and yet the agreement was upheld. The court said:

The objects which this agreement has in view are to parcel out the stevedoring business of the port amongst the parties to it, and so to prevent competition, at least amongst themselves, and also, it may be, to keep up the price to be paid for the work. Their Lordships are not prepared to say that an agreement, having these objects, is invalid if carried into effect by proper means, that is, by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade.

As the nineteenth century drew to a close, a case began making its way through British courts which resulted in the clearest exposition of the British law of the nineteenth century relative to restraints of trade generally, combinations in particular, and competition
as practical matter. "The fact is," the British authors of *Restrictive Trade Practices* state (35, p. 71), "the facts in the Mogul case provide one of the most complete examples among reported cases of restrictive practices of the modern type."

The facts in the case were as follows: Certain owners of ships, in order to secure a carrying trade exclusively for themselves and at their profitable rate, formed an association, and agreed that the number of ships to be sent by members of the association to the loading port, that the division of cargo and that the freight to be charged should be the subject of regulation between the owners. It was further agreed that a rebate of 5 per cent on the freight should be allowed to all shippers who shipped only with members; that agents of members should be prohibited on pain of dismissal from acting in the interests of competing shipowners; finally, it was agreed that any member should be at liberty to withdraw on giving notice. The plaintiffs, who were shipowners excluded from the association, sent ships to the loading port to endeavor to obtain cargoes. The association owners thereupon sent more ships to the port, underbid the plaintiffs, and reduced freight so low that the plaintiffs were obliged to carry at unremunerative rates. The owners also threatened to dismiss certain agents if they loaded the plaintiffs'
ships, and circulated a notice that the rebate of 5 per cent would not be allowed to any person who shipped cargoes on the plaintiff's vessels.

In the court of the first instance the court gave judgement for the defendants, holding that, while a wrongful and malicious combination to ruin a man in his trade might be ground for such an action, yet it could not see that the defendants had in fact passed the line which separated the reasonable and legitimate selfishness of traders from wrong and malice. That decision was upheld by the Court of Appeal although there was an interesting dissent holding that the concerted action of the defendants amounted to an indictable conspiracy. But Fry and Bowen, the majority justices in the Court of Appeals decision, wrote lengthy and instructive opinions. Bowen's opinions particularly were noted; and both his and Fry's majority opinions were upheld by the House of Lords on further appeal.

Bowen's opinion merits particular attention, for it has been recognized by all authoritative sources since as representing the British view concerning trade restraint generally (including views of monopoly, contracts in restraint of trade and combinations, conspiracies in the nature of a tort).

The following paragraphs extracted from Bowen's opinion reflect, then, the British attitude, in summary
fashion, relative to those areas. In the first paragraph, Bowen discusses the limits imposed by law on a trader in the conduct of his business. In the next, he discusses the common law relating to competition. In the third, he discusses combinations conspiring to restrain trade. In the final paragraph, Bowen summarizes his decision.

There seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the crown. His right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man can, whether trader or not, however, justify damaging another in his special business by fraud or misrepresentation. Intimidation, obstruction, molestation are forbidden; so is the intentional procurement of a violation of an individual right; contractual or other, always assuming there is no just cause for it. The intentional driving away of customers by a show of violence, the obstruction of actors on the stage by preconcerting hissing, the disturbance of wild fowl in decoys by firing of guns, the impeding or threatening of servants or workmen, the inducing of persons under personal contract to break their contract, are all instances of such forbidden acts. They have nothing more against the plaintiffs than to pursue to the bitter end a war of competition, waged in the interests of their own trade. . . .

To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection. . . . All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices in order by driving competition away to reap fuller harvest on profit in the future. . . . To attempt to limit English competition in this way would probably be as hopeless an endeavour as the experiment of King Canute.
On ordinary principles of law no such fetter on freedom of trade can, in my opinion, be warranted. A man is bound not to use his property so as to infringe upon another's right... sic utere tuo ut alienum non laedas. ... If engaged in actions which may involve dangers to others he ought, speaking generally, to take reasonable care to avoid endangering them. But there is surely no doctrine of law which compels him to use his property in a way that judges and juries may consider reasonable; if there is no such fetter upon the use of property known to English law, why should there be any such a fetter on trade? ...

The truth is that the combination of capital for the purposes of trade and competition is a very different thing from a combination of several persons against one, with a view to harm him, as falls under the head of indictable conspiracy. There is no just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause... is evidence... to use a technical expression... of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination be legitimately used in trade. To limit combinations of capital, when used for purposes of competition... would in the present day be impossible... would only be another method of attempting to set boundaries to the tides...

The substance of my view is this; that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities as I have above referred to, give rise to no cause of action at common law. I myself should deem it to be a misfortune, if we were to attempt to prescribe to the business world how honest and peaceable trade was to be carried on in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial "reasonableness" or of "normal" prices, or "fair freights" to which commercial adventures, otherwise innocent, were bound to conform.

The rule of reason regarding restraints imposed in ancillary agreements was set forth in the Nordenfelt
case (26), decided only two years after the Mogul case (1894). In that case Thorsten Nordenfelt had sold his business for a tremendous sum of money and agreed in turn not to enter into the manufacture or sale of weapons in any part of the world for twenty-five years. He violated his agreement and the court was asked to enjoin him from further violation. Nordenfelt, of course, claimed that the agreement was void as being a restraint of trade. The court held that the business naturally required a world market, since the principal buyers were various governments. Under such conditions the covenant not to re-enter this line of business could not be regarded as unreasonable. The court in the following language established the modern rule of reason (one which, recall, allowed them to hold a twenty-five year long, world wide restraint reasonable—an obvious invitation to establish a complete domination in a particular trade):

The true view in the present time, I think, is this: the public have an interest in every person’s carrying on his trade freely; so has the individual. All interference with individual liberty in action with trading, and all restraints in themselves; if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is sufficient justification, and indeed, it is the only justification if the restriction is reasonable, . . . reasonable that is, in the interest of the parties concerned and reasonable in the interest of the public, so framed and so guarded as to afford adequate protection to the party in
whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities.
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CHAPTER V

CONCLUSION

Those who nowadays would point to the law as justification of their attempts to create competition in the market place do so in error. That the law would be so used is, however, readily understandable, for since almost the dawn of recorded law in England the language used in both statutory and case law seems to indicate an unalterable opposition to all collusive and combinatorial activities which might interfere with or lessen competition.

It was, however, out of those early cases and statutes that the tradition of freedom of trade arose. But at that time freedom of trade meant something entirely different from the commonly accepted definitions of today. It did not mean the freedom to compete against the accepted monopolists of the day—the market privilege holders, the gilds, and later the free-wheeling monarchs during the mercantilistic era.

Yet, by the middle of the eighteenth century, freedom of trade had become deeply ingrained; so much so, in fact, that a series of early day "trust busting" cases arose
just prior to the bursting upon the scene of the industrial revolution. But in the first decade of that extraordinary nineteenth century, the courts adopted the "rule of reason" which itself had a long and respectable history after having been scholarly presented by Lord Macclesfield in 1711 in *Mitchel v. Reynolds*.

The adoption of the "rule of reason" turned effective control and regulation of the British economy over to the businessman. In case after case after case various ingenious combinatory and collusive schemes of market organization were presented to the courts. And almost without exception—barring actual criminal behavior—the agreements were upheld as being "reasonable."

Of course that did not mean that the law no longer opposed private organization of the market. And therein lay the real beauty of the "rule of reason." For while upholding combinatory and conspiratorial agreements the law could at one and the same time profess its traditional underlying devotion to the principles of competition.

Thus, during the nineteenth century—England's proudest—the law, far from fostering competition, protected the businessmen's market organizational efforts exactly as it had done centuries before with markets, gilds, and mercantilists.
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