action must be qualified by equitable considerations to prevent undue hardship upon a buyer.[71] Additionally, nothing in the statute should modify such rights as the buyer may otherwise be entitled to under tort, contract, or equitable law. The legislature should place appropriate enforcement powers in the local governing unit and encourage their utilization. And, accordingly, as the governing unit takes the initiative in assuring realization of subdivision control objectives, the courts must seek to provide a minimum of injury and a maximum of redress for the lot purchaser.

INTERLOCKING DIRECTORATES: A STUDY IN DESULTORY REGULATION

Forty years ago, the Clayton Act became a part of the antitrust laws of this country.[1] However, it was not until 1953 that the Supreme Court of the United States was afforded an opportunity to construe Section 8 of the Act which prohibits a common director between competing corporations.[2] John A. Hancock, a partner in the Lehman Brothers Investment Company, served as a director on the boards of six corporations (W. T. Grant and S. H. Kress Companies; Sears, Roebuck and Company and Bond Stores, Incorporated; Kroger and Jewel Tea Companies). After unsuccessful attempts to persuade Hancock to resign from the boards of one of each of the three sets of competitors, the Department of Justice filed complaints alleging that he held these positions in violation of Section 8. Soon after, Hancock resigned from the Kress, Kroger, and Bond Companies, apparently terminating all objectionable interlocking directorates.[3] But this conclusion fails to contem-

71. This, where for one reason or another the rescinding of the buyer's purchase would produce an unfair burden upon him (as where he has built upon his lot), would be an excellent place for the plan commission to consider the over-all circumstances and, by weighing the respective benefits and burdens, seek to work out some fair and equitable solution before resort to the courts.

1. 38 STAT. 730 (1914), as amended, 15 U.S.C. § 12 *et seq.* (1946).

2. "No person at the same time shall be a director in any two or more corporations, and one of which has capital, surplus, and the undivided profits aggregating more than $1,000,000 engaged in whole or in part in commerce, other than banks . . . and common carriers subject to the Act to regulate commerce . . . if such corporations are or shall have been theretofore, by virtue of their business and location or operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws." 38 STAT. 732 (1914), 15 U.S.C. § 19 (1946).

3. The term interlocking directorate when used in a general sense embraces any interconnection between corporate entities. As used in this Note, interlocking directorate

plate the vertical interlocking relationship between Lehman Brothers and the other companies.[4] Substantively, the Court's opinion in *United States v. W. T. Grant and Company* contributed little because it was decided upon procedural grounds.[5] The case did, however, refocus attention upon the chronic, though unlitigated, problems created by the use of interlocking directorates.[6]

The interlocking directorate is a peculiar device of American business ingenuity, for it is not known, or at least not utilized, by commercial interests in other countries.[7] Even in this nation, the common law did not recognize the practice as a public wrong, for early cases on the subject are concerned solely with the law of corporations.[8] Prior to 1914,

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primarily refers to the practice of placing the personnel of one corporation in certain positions in another corporation in such a way as to join the two entities. The problems arising from interlocking directorates are the result of the enactment of public controls to limit or prohibit specific connections which are considered to be unhealthy arrangements in a competitive economy.

4. There are two types of interlocking directorates—horizontal and vertical. A horizontal interlock represents a link between companies operating in the same industry. A vertical interlock manifests an interrelationship between companies operating in different industries, *e.g.* a common director between a bank and a public utility.

5. 345 U.S. 629 (1953). After the defendants submitted affidavits disclosing the resignations, Hancock moved to dismiss on the grounds that the actions were moot. The district court granted the motion holding that there was not the slightest threat the defendants would attempt any future activity in violation of Section 8 of the Clayton Act. United States v. W. T. Grant Co., 112 F. Supp. 336 (S.D.N.Y. 1953). The government on appeal contended that the cases were not rendered moot by the resignations, and the district court in failing to grant injunctive relief against future violations had abused its discretion. A 7-2 majority of the Supreme Court agreed that the actions were not rendered moot; however, the Court affirmed the district court's decision on the theory that the government had not carried the burden of proving an abuse of discretion on the part of the trial court. This decision leaves the government without a remedy, for under Section 8 only injunctive relief is available. Yet, the possibility of future violations is more than idle speculation. Hancock no longer serves as a director in the Kress, Kroger, and Bond companies, but he is still in the employ of all three. See United States v. W. T. Grant, CCH TRADE REG. REP. (9th ed.) ¶ 67,493 (1953). See also similar comments concerning the *Grant* case presented in 22 U.S.L. WEEK 3013 (Sup. Ct. July 7, 1953).

6. The prohibition against competitors included within Section 8 is plainly ineffective. The restriction operates against the simplest type of interlock. Slight alterations either by substituting persons or changing the form of the interlocking arrangement are sufficient to avoid the proscription of Section 8. See Kramer, *Interlocking Directorships and the Clayton Act After 35 Years,* 59 YALE L.J. 1266, 1273 (1950); FEDERAL TRADE COMMISSION, REPORT ON INTERLOCKING DIRECTORATES 14 n.16 (1951) (hereafter cited as FTC REPORT).

The Attorney General announced to the Judicial Conference of the Fourth Circuit that he proposes to form a committee to study the antitrust laws. He recognized that the potential areas of the research were endless; yet, he specifically enumerated the impact of recent decisions on interlocking directorates as one example of the many problems to be considered. 21 U.S.L. WEEK 2651 (Gen. June 30, 1953).

7. Means, *Interlocking Directorates,* 8 ENCYC. SOC. SCI. 148 (1932).

8. At common law, when a majority or more of the directors serve two corporations, by the prevailing view, contracts between the two companies are not voidable merely by reason of the conflicting interests of the directors. The courts will scrutinize

however, interlocking directorates in certain industries did receive widespread publicity for their unscrupulously stifling effect on competition.[9] At that time, President Wilson requested Congressional action aimed at governmental control of the interlocking directorate to prevent the intertwining of personnel of large corporations. Wilson enumerated three relationships which required immediate regulation: borrowers and lenders, buyers and sellers, and competitors.[10] This situation, then, constituted the primary impetus behind the enactment of Section 8 of the Clayton Act.[11]

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the fairness and reasonableness of the transactions, and the burden of proof as to the fairness of disputed contracts is placed upon the party seeking to enforce it. Corsicana National Bank v. Johnson, 251 U.S. 68, 90 (1919). *Accord,* Thomas v. Brownville, Ft. K. & P. R. R., 109 U.S. 522, 524 (1883); Wardell v. Railroad Co., 103 U.S. 651, 658 (1880); Twin-Lick Oil Co. v. Marbury, 91 U.S. 587, 589 (1875). The problems in relation to the fiduciary obligations of directors dealing with the corporations for which they serve affect three main areas: (1) The fiduciary restrictions of the director may be grounds for invalidating contracts between him and his corporation; (2) profits made by the director in transactions with the corporation may be recovered by the corporation; and (3) profits made in transactions with third parties may be recovered depending on the benefit or opportunity to be gained and which the director is equitably bound to turn over to his corporation. See BALLANTINE, CORPORATIONS 170-184 (2d ed. 1946). Other writers, recognizing that a disqualification because a director is interested in both parties to a transaction is inadequate, take a more realistic position. BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 220-232 (1948). See also Douglas, *Directors Who Do Not Direct,* 47 HARV. L. REV. 1305 (1934); Note, 83 U. OF PA. L. REV. 56 (1934).

9. Brandeis, *How the Combiners Combine,* Harper's Weekly, Nov. 29, 1913. Commenting in the next article of the series, Mr. Brandeis terms the interlocking directorate as the most potent instrument of the trust. Brandeis, *The Endless Chain,* Harper's Weekly, Dec. 6, 1913. This nine article argument presented by Brandeis concerning the existence of a "money trust" and the evils resulting from trusts upon big business played an important role in stimulating sufficient public interest to force Congressional action on supplementary antitrust legislation. Samuel Untermyer, writing in criticism of the pending antitrust act, argued that interlocking directorates and holding companies should constitute the most important part of the new antitrust program. Untermyer, *Completing the Antitrust Programme,* 199 NORTH AM. REV. 528 (1914). See the suggestions made by the Money Trust Committee in regard to concentration of money and credit. Comment, 21 J. POL. ECON. 355-357 (1914).

10. SEN. REP. No. 698, 63d Cong., 2d Sess. 14 (1914), quoted the President's message. Legislation is needed ". . . which will effectually prohibit and prevent . . . interlockings of the *personnel* of the directorates of great corporations—banks and railroads, industrial, commercial, and public-service bodies—as in effect result in making those who borrow and those who lend practically one and the same, those who sell and those who buy but the same persons trading with one another under different names and in different combinations, and those who affect to compete in fact partners and masters of some whole field of business." Wilson accepted the ideas expounded by Brandeis concerning regulation of large corporations. See BARCK AND BLAKE, SINCE 1900 76 (1950). Presidential messages have played an important part in influencing the Supreme Court's opinion on legislative history behind statutory provisions. See Shapiro v. United States, 335 U.S. 1, 8 (1947); New York Central R. R. v. Winfield, 244 U.S. 147, 150 (1917); Johnson v. Southern Pac. Co., 196 U.S. 1, 19 (1904).

11. Both the Republican and Democratic parties advocated revision and strengthening of the antitrust laws in their election platforms of 1912. The Republicans favored the prohibition of enumerated practices. The Democrats pledged their backing to forbid

The success of the above legislation has been, at best, nominal. The Act's failure is particularly apparent when the statute is examined in the light of reports dealing with the current prevalence of interlocking directorates.[12] One of these surveys discloses that the most common type of interlock connects a bank to an industrial corporation; the second most widespread interlock in today's economy links a buyer to a seller.[13] Although the committees which drafted the interlocking directorate provisions of the Clayton Act believed that they had complied with President Wilson's requests,[14] his appeal specifically mentioned the borrower-lender and buyer-seller relationships which are contemporaneously so prevalent. Another examination of existing interlocks reveals that of the 1,000 persons holding directorships in the nation's largest corporations, 32 men are holding five or more.[15] Yet, the President's message

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interlocking directorates and other specifically named tactics. 51 CONG. REC. 14213 (1914).

12. Section 8 of the Clayton Act prohibiting a common director between competitors went unenforced until 1947 when a Justice Department examination disclosed the existence of a number of illegal interlocks. The Antitrust Division tried to force wholesale compliance with Section 8 by using publicity to expose persons violating the prohibition. See Kramer, *supra* note 6, at 1270. Reasons for lack of enforcement of all antitrust laws and possible ways to correct it are stated in HANDLER, INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER 90-100 (TNEC Monograph 38, 1941). "Unfortunately, all antitrust law enforcement under any plan depends on the public attitude. It does not make much difference what your instrument for carrying out antitrust policy is, it will not be effective unless there is a strong demand." Arnold, *The Effectiveness of the Federal Antitrust Laws: A Symposium,* 39 AM. ECON. REV. 689, 690 (1949).

13. The FTC's major conclusions based upon its inquiry into interlocking directorates stemming from the 1,000 largest corporations are as follows: (1) In 1946, there were a substantial number of interlocking directorates, and it is probable that they were being used to reduce competition. (2) Some of the existing interlocks were in direct violation of Section 8 of the Clayton Act. The majority were not. (3) Most of the interlocks not unlawful under Section 8 were capable of reducing competition. (4) Each interlock had independent significance or existed to strengthen and supplement others. (5) The most common were vertical interlocks. FTC REPORT 35-36 (1951).

This Note has utilized these findings because they represent the most comprehensive recent analysis; the credibility of the report is not challenged.

14. "The importance of the legislation embodied in § 9 of this bill cannot be overestimated. The concentration of wealth, money, and property in the United States under the control and in the hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions." SEN REP. No. 698, 63d Cong., 2d Sess. 16 (1914). See also H. R. REP. No. 627, 63d Cong., 2d Sess. 18 (1914). Although this comment may have seemed a bit exaggerated 40 years ago, problems arising from just such an evolution are the main consideration of Berle and Means in their treatise. See BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 352-357 (1948). But see Kaplan and Kahn, *Big Business in a Competitive Society,* Fortune, Feb. 1953, § 2.

15. The 32 men hold directorships in 160 of the largest manufacturing corporations and in 85 of the largest nonmanufacturing concerns. Of these 32 men, 20 are bankers, about evenly divided between commercial banks and investment houses. The partners in two leading investment concerns, Lehman Brothers and Goldman, Sach & Co., hold directorships in 35 and 29 respectively of the largest corporations. Kramer, *supra* note 6, at 1274. Bankers are credited with being the worst offenders because of their

calling for Clayton Act regulation of interlocking directorates was aimed at preventing the intertwining of personnel of large corporations.

The Clayton Act's failure adequately to regulate interlocking directorates arises in large part from a basic inconsistency in the statute's treatment of the problem. Section 8 contains provisions which prohibit horizontal interlocks between banks[16] and restrict similar arrangements between competitors in nonregulated industries.[17] In contrast to these

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use of interlocking directorates to reach surreptitous results. *See* United States v. W. T. Grant & Co., 345 U.S. 629, 636 (1953) (dissent); Brandeis, *Big Men and Little Business,* Harper's Weekly, Jan. 3, 1914; *Hearings before Temporary National Economic Committee on Investigation and Concentration of Economic Power, Investment Banking,* 75th Cong., 2d Sess. Pts. 22, 23, 24 (1939); *Hearings before Committee on the Judiciary on Trust Legislation,* 63d Cong., 2d Sess., Vol. 2 (1914).

16. "No private banker or director, officer, or employee of any member bank of the Federal Reserve System . . . shall be at the same time a director, officer, or employee of any other bank . . . except that the Board of Governors of the Federal Reserve System may by regulation permit such services as a director, officer, or employee of not more than one other such institution. . . ." 38 STAT. 732 (1914), as amended, 15 U.S.C. § 19 (1946).

The legislative development of restrictions prohibiting interlocking directorates among banking institutions exemplifies the misunderstanding surrounding the problem. In original form, Section 8 of the Clayton Act absolutely prohibited the interlocking of directorates between certain classes of banking concerns. This prohibition was found to be unnecessarily severe, and, in 1916, Congress granted discretionary power to the Federal Reserve Board to permit interlocking directorates between a member bank and not more than two other banks, provided such banks were not in substantial competition. Absence of substantial competition should not have been the basis for allowing the interlock. The test should have been whether or not such ties injuriously affected the public interest by discouraging interbank competition or restricting credit available to borrowers. Consequently, an amendment was passed by the 70th Congress giving the Federal Reserve Board discretionary power to permit interlocking directorates between any three banks, if it was not incompatible with the public interest. The Board could revoke such permits when the public interest so required. In 1933, another amendment was passed prohibiting the interlocking of commercial banks with investment concerns. Finally in 1935, Section 8 assumed its present form. The class of banking institutions referred to in Section 8 was broadened to cover all member banks of the Federal Reserve System. The Board's power to issue permits when a particular interlock was not incompatible with the public interest was removed. In its place the Board could allow service in but one additional bank. Beyond that the interloeking of directorates of financial institutions is permissible only in the case of certain noncompetitive relationships specifically set out in the statute. H. R. Doc. No. 599, 81st Cong., 2d Sess. 101 (1950).

17. The second prohibition of Section 8 applies to all competing corporations of prescribed size engaged in interstate commerce, excluding common carriers and banks. As additional prohibitions were enacted to curb interlocking of members of particular industries, such companies were exempted from Section 8 restrictions. This tendency to pass general prohibitions and then add later restrictions of special application has resulted in many problems. See Note, 28 IND. L.J. 194 (1953). Nonregulated industries subject to Section 8 restrictions involve an almost arbitrary classification. Liquor processing companies and aircraft manufacturers generally are thought of as operating in competitive industries. However, they are not included within the term nonregulated industries as used in this discussion because they are subject to statutes of limited application and thus exempt from Section 8.

One major problem of the Section 8 prohibition against competitors relates to the interpretation to be given the disputed "so that" clause. "No person at the same time limitations, Section 10 of the Clayton Act regulates, anomalously, vertical links between common carriers and their suppliers.[18]

Upon analysis, these three provisions disclose patent discrepancies which impede any understanding of the interlocking directorate problem. The regulations applicable to banks and those pertaining to nonregulated industries are essentially the same; however, the former is more extensive as to the types of positions which it includes, *i.e.*, officers, directors, and employees. The latter provision only prohibits an individual from serving as a director in two competing organizations. Neither of these provisions attempts to prevent the use of a series of vertical interlocks to achieve the same practical result as that accomplished by a horizontal interlock. For example, Hancock, functioning as a partner of the Lehman investment house, continued as director of the W. T. Grant, Sears, Roebuck, and Jewel Tea Companies. However, it is not unlawful for another member of the Lehman firm to serve on the boards of the Kress, Kroger, and Bond Companies, thereby attaining the same end. This may be styled an indirect interlocking relationship.[19] On the other hand,

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shall be a director in any two or more corporations . . . if such corporations are . . . competitors, *so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws*." (emphasis added) 38 STAT. 732 (1914), 15 U.S.C. § 19 (1946). A district court judge recently faced with the dilemma of defining this phrase, United States v. Sears, Roebuck & Co., 111 F. Supp. 614 (S.D.N.Y. 1953), which amounts to determining the standard of legality to be applied against the interlocking of two competitors, readily accepted the government's per se test in preference to the merger test advocated by the defense. The proponents of the merger test interpreted the "so that" clause to be a limitation upon the word competitors, and they took the position that only common directors between companies competing in a substantial degree should be illegal. The per se advocates arrive at an opposite view by taking the position that all price agreements between companies competing in any degree are unlawful; therefore, if two companies cannot agree as to price, they cannot be tied together by a common director. For an analysis of the problems arising under either construction, see Kramer, *supra* note 6, at 1268. See also a recent case note supporting the decision. 54 COL. L. REV. 130 (1954). It seems to be mere folly to attempt to resolve the many problems arising under the "so that" clause when the prohibition established by the whole provision can be so easily evaded. Attention should be directed to the problem of revitalizing all the restrictions.

18. "No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce . . . with another corporation . . . when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager or purchasing or selling officer of, or who has any substantial interest in, such other corporations. . . ." 38 STAT. 734 (1914), 15 U.S.C. § 20 (1946). *In re* Missouri Pac. R. R., 13 F. Supp. 888, 892 (E.D. Mo. 1935). This case carefully analyzes the subjects and inconsistencies within the Section.

19. This is not an entirely hypothetical example. See Kramer, *supra* note 6, at 1266 n.1. It appears to be sound business policy to put as many members on different boards as possible. Banks have long utilized a practice of placing men representing large customers or stockholders upon their board of directors. See WESTERFIELD, BANKING PRINCIPLES AND PRACTICE 395 (1927).

the limitations found in Section 10 do forbid vertical links between a common carrier and its suppliers;[20] yet, the Clayton Act as originally passed did not regulate horizontal interlocking among common carriers.[21]

Making more difficult the understanding of the statutory scheme regulating interlocking directorates is the administration of these laws by four different agencies. The Federal Trade Commission and the Attorney General are charged with enforcing compliance with Section 8 provisions pertaining to nonregulated industries. The Interstate Commerce Commission has sole authority to administer Section 10 restrictions, notwithstanding that, in most instances, the suppliers of common carriers are also subject to the jurisdiction of the FTC. Finally, the banking provisions of Section 8 are enforced by the Federal Reserve Board.[22]

While the Clayton Act's treatment of interlocking directorates is inconsistent, later attempts by Congress to alleviate the problem by including piecemeal provisions in subsequent regulatory acts have resulted in chaos. These restrictions prohibit vertical interlocks between banks and holding companies,[23] horizontal links among communications companies,[24] vertical and horizontal interlocks of public utilities,[25] vertical

20. For a more detailed analysis of the discrepancies between Sections 8 and 10, see FTC REPORT 12-13 (1951).

21. The Transportation Act of 1920 amended the Interstate Commerce Act to prohibit a person from being an officer or director in more than one carrier unless the ICC authorized such an interlock after finding that neither public nor private interest would be adversely affected. 41 STAT. 494 (1920), 49 U.S.C. § 20a (12) (1946).

22. Section 11 of the Clayton Act is the enforcement provision. Authority is vested in the several agencies to enforce compliance with the various provisions wherever applicable. 38 STAT. 734 (1914), as amended, 15 U.S.C. § 21 (1946). United States attorneys are charged with preventing and restraining violations of the Act. 38 STAT. 736 (1914), 15 U.S.C. § 25 (1946). The existing confusion concerning the overlapping jurisdiction between the Federal Trade Commission and the Department of Justice under present antitrust regulation was aptly commented upon in the remarks made by Lowell B. Mason, a member of the Commission. ". . . [A]re we 'with him' or 'agin him' in this fight? . . . It's about time we had a suit to quiet title between the position of the Department of Justice and the Federal Trade Commission." ANTITRUST LAW SYMPOSIUM 26 (1950 ed.).

23. ". . . [N]o registered holding company . . . shall have, as an officer or director thereof, any executive officer, director, partner, appointee or representative of any bank . . . or representative of any corporation a majority of whose stock, having the unrestricted right to vote for the election of directors, is owned by any bank . . . except in such cases as rules and regulations prescribed by the commission may permit. . . ." 49 STAT. 830 (1935), 15 U.S.C. § 79q(c) (1946). This Act appears to be formulated with the primary objective of eliminating interrelations between banks and holding companies. The latter portion of this prohibition is drafted in terms sufficient to attack the use of inoperative corporations, *i.e.* fictional entities, to avoid statutory restrictions.

24. ". . . [I]t shall be unlawful for any person to hold the position of officer or director of more than one carrier . . . unless such holding shall have been authorized by order of the commission. . . ." 48 STAT. 1074 (1934), 47 U.S.C. § 212 (1946).

25. ". . . [I]t shall be unlawful for any person to hold the position of officer or

and horizontal arrangements within the liquor industry,[26] and all interlocking relationships affecting carriers or manufacturers within the purview of the Civil Aeronautics Act.[27] In each of these regulatory acts, however, the appropriate agency is empowered to authorize interlocking directorates upon compliance with certain requirements set forth in the statutes.[28]

A comparison of the interlocking directorate provisions enacted after the passage of the Clayton Act reveals that each restriction differs as to persons covered by the regulation,[29] the type of interlocking ar-

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director of more than one public utility or to hold the position of officer or director of a public utility and the position of officer or director of any bank . . . or officer or director of any company supplying electrical equipment to such public utility, unless the holding of such positions shall have been authorized by order of the Commission. . . ." 49 STAT. 856 (1935), 16 U.S.C. § 825d(b) (1946).

26. ". . . [I]t shall be unlawful for any individual to take office . . . as an officer or director of any company, if his doing so would make him an officer or director of more than one company engaged in business as a distiller, rectifier, or blender of distilled spirits, or of any such company and of a company which is an affiliate of any company engaged in business . . . of distilled spirits, or of more than one company which is an affiliate . . . unless prior to taking such office, application made by such individual . . . has been granted. . . ." 49 STAT. 986 (1935), 27 U.S.C. § 208(a) (1946).

27. ". . . [I]t shall be unlawful, unless such relationship shall have been approved by order of the Board . . .

"(1) For any air carrier to have and retain an officer or director who is an officer, or director, or member, or who as a stockholder holds a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

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"(3) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics." 52 STAT. 1001 (1938), 49 U.S.C. § 489(a) (1946).

These are but two of the six prohibitions contained in this provision stating what interlocking arrangements constitute violations of the statute. This Section represents a comprehensive attack on interlocking directorates adversely affecting the aeronautics industry.

28. The statutes prohibit the specified relationships unless the arrangements are approved by the commission or board upon due showing in the form and manner prescribed by them. *E.g.*, 49 STAT. 856 (1935), 16 U.S.C. § 825d(b) (1946). By the terms of the statutes, each regulatory body appears to be vested with power to prescribe the procedure which must be followed by the parties seeking authorization of forbidden arrangements.

29. Prohibitions pertaining to public utilities, 49 STAT. 854 (1935), 16 U.S.C. § 825 (1946), communications companies, 48 STAT. 1074 (1934), 47 U.S.C. § 212 (1946), liquor companies, 49 STAT. 986 (1935), 27 U.S.C. § 208 (1946), and horizontal interlocking between common carriers, 41 STAT. 494 (1920), 49 U.S.C. § 20a (12) (1946), apply to officers and directors. The restrictions applicable to competitors pertain only to directors. 38 STAT. 732 (1914), 15 U.S.C. § 19 (1946). Regulation of transactions arising from vertical interlocks of common carriers with their suppliers applies to directors, managers, officers, agents, or any person who has a substantial interest in the supplier linked with a carrier. 38 STAT. 734 (1914), 15 U.S.C. § 20 (1946). Restrictions applicable to banking institutions operate against directors, officers, and employees. 38 STAT. 732 (1914), as amended, 15 U.S.C. § 19 (1946); see also 48 STAT. 194 (1933),

rangement prohibited,[30] and the test to be applied by the various agencies in determining whether or not authorization should be granted.[31] Despite the differences, however, the major difficulties created by these provisions are a result of the incompleteness with which each restriction treats the problem.[32] If horizontal interlocks are adequately regulated,

12 U.S.C. § 78 (1946). The interlocking directorate provision incorporated within the Civil Aeronautics Act is drafted in terms of officers, directors, representatives, nominees, and controlling stockholders. 52 STAT. 1001 (1938), 49 U.S.C. § 489 (1946). There is no apparent reason for the discrepancies in the classes of persons restricted under the various provisions.

30. Horizontal interlocking is prohibited between competitors or banks, 38 STAT. 732 (1914), as amended, 15 U.S.C. § 19 (1946), common carriers, 41 STAT. 494 (1920), 49 U.S.C. § 20a(12) (1946), public utilities, 49 STAT. 856 (1935), 16 U.S.C. § 825 (1946), communications companies, 48 STAT. 1074 (1934), 47 U.S.C. § 212 (1946), companies engaged in aeronautics, 52 STAT. 1001 (1938), 49 U.S.C. § 489 (1946), and liquor companies, 49 STAT. 986 (1935), 27 U.S.C. § 208 (1946). Vertical interlocking between buyers and sellers is regulated in relation to public utilities and electrical equipment suppliers, 49 STAT. 856 (1935), 16 U.S.C. § 825 (1946), common carriers and suppliers, 38 STAT. 734 (1914), 15 U.S.C. § 20 (1946), holding companies and banks, 49 STAT. 838 (1935), 15 U.S.C. § 79 (1946), and between the various companies engaged in the different stages of the liquor manufacturing process, 49 STAT. 986 (1935), 27 U.S.C. § 208 (1946). Vertical interlocking of borrowers and lenders is regulated by the restrictions applying to common carriers, 38 STAT. 734 (1914), 15 U.S.C. § 20 (1946), holding companies, 49 STAT. 838 (1935), 15 U.S.C. § 79 (1946), public utilities, 49 STAT. 856 (1935), 16 U.S.C. § 825 (1946), and by provision prohibiting linking between commercial banks and investment banks, 48 STAT. 194 (1933), 12 U.S.C. § 78 (1946).

31. There are five differently worded standards prescribed for the several agencies to apply in determining whether otherwise illegal interlocks might be authorized. The most common phrase is—"neither public nor private interest will be adversely affected." *E.g.*, 41 STAT. 494 (1920), 49 U.S.C. § 20a(12) (1946); 49 STAT. 856 (1935), 16 U.S.C. § 825 (1946); 48 STAT. 1074 (1934), 47 U.S.C. § 212 (1946). After 1935, no two standards adopted were worded exactly the same. Other tests presently in use are: (1) ". . . not adversely affecting the public interest or the interest of investors or consumers." 49 STAT. 830 (1935), 15 U.S.C. § 79q(c) (1946). (2) ". . . not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments." 48 STAT. 194 (1933), 12 U.S.C. § 78 (1946). (3) ". . . will not substantially restrain or prevent competition. . . ." 49 STAT. 986 (1935), 27 U.S.C. § 208 (1946). (4) ". . . the public interest will not be adversely affected. . . ." 52 STAT. 1001 (1938), 49 U.S.C. § 489 (1946). Since not one of these tests has been interpreted within the context of an interlocking directorate provision, only conjecture can be used in arguing that many of these tests mean essentially the same thing. While individual agencies have applied the tests, their operation is more mechanical than descriptive of what particular facts are sufficient to insure authorization and what circumstances will preclude it.

Besides the prescribed standards, the Federal Reserve Board is empowered with absolute discretion to authorize one additional interlocking arrangement beyond statutory limits. 38 STAT. 732 (1914), as amended, 15 U.S.C. § 19 (1946).

32. For example, restrictions applicable to common carriers undertake to police all transactions between the carriers and interlocked suppliers. See note 18 *supra*. Regulation of public utilities only restricts dealings with electrical equipment suppliers and banks. See note 25 *supra*. Prohibitions against communications companies do not regulate any transactions with interlocked suppliers. See note 24 *supra*. All three are public monopolies, and if transactions should be regulated, or at least scrutinized in relation to common carriers, surely the same evils are present in dealings of the latter two when arising from similar interlocking relations.

vertical links are ignored. As a result, businessmen sincerely attempting to comply with these laws often encounter unnecessary shackles,[33] while others without such meritorious intentions utilize glaring omissions to gain unconscionable advantages.[34]

Where statutory regulation of vertical interlocking directorates has been attempted, at least four different methods have been employed. One mode is founded upon the theory of Section 10 of the Clayton Act in that all vertical interlocks are forbidden unless there is compliance with a prescribed procedure[35] established by the ICC to guarantee arm's length bargaining. For example, the Commission requires that a competitive bidding process be followed; thus, all potential suppliers are afforded an opportunity to furnish the carrier with goods and services. This method has the advantage of operating against the harm caused by an interlock regardless of the particular functions (director, officer, agent, or employee) which the individual performs in the connected companies. However, this device fails to regulate all transactions resulting from interlocking directorates. For instance, assume that X railroad has six directors who are also members of Y investment firm. Further, suppose that four other associates of the Y firm hold directorships in the Z railroad car manufacturing company. Regnlations utilized by this method do not apply to transactions between X and Z companies. But there can be little doubt that this arrangement is potentially any less harmful than a situation in which X and Z have mutual directors, officers, or employees.[36]

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33. Restrictions pertaining to bank directorates prevent men of wide banking experience from serving in other financial institutions which sorely need them. THE CONFERENCE BOARD, PUBLIC REGULATION OF COMPETITIVE PRACTICES IN BUSINESS ENTERPRISE 234 (3d ed. 1953). Management of noncompetitive companies is similarly restrained, *e.g.* public utilities, communications companies, and common carriers. Individuals skilled in the operations of any one of these three types of companies will forego the opportunity of giving public service in more than one rather than go to the trouble of trying to justify why they should be allowed to work in additional companies providing similar service, yet which are not competitors.

34. See Kramer, *supra* note 6, at 1273. The four leading electrical manufacturers—General Electric, Westinghouse, Western Electric, and Radio Corporation of America—have utilized statutory inconsistencies to maintain indirect interlocks with each other after direct links were prohibited. FTC REPORT 256-261 (1951).

35. Under Section 10 of the Clayton Act all purchases by a common carrier interlocked with a supplier must be made from the bidder whose offer is the most favorable to the common carrier. No bid can be accepted unless the names of the interested parties accompany it. 38 STAT. 734 (1914), 15 U.S.C. § 20 (1946). Competitive bidding regulations are prescribed by the Interstate Commerce Commission. All common carriers making purchases falling within the terms of Section 10 must report them within 30 days to the ICC. See 49 CODE FED. REGS. §§ 8.1-8.7 (1949).

36. This hypothetical example is probably more real than fictional. Of the 90 companies operating in the transportation equipment industry, 53 were directly or indirectly interlocked with other members of the industry. The 78 interlocked transportation companies, either by direct or indirect interlocks without the industry, maintained 720 interlocks with 389 companies in various industries. A total of 55 transportation

Another technique in current use prohibits vertical interlocking but provides the appropriate agency with power to authorize such arrangements when a specified standard has been met.[37] This procedure forces the parties who wish to maintain the interlock to justify it. Because the burden of justification is upon them rather than the agency, this method is widely used in present regulatory statutes. Unfortunately, the criterion in most of these acts speaks in terms of public or private interest being adversely affected. With such a vague standard to meet, businessmen may have an unnecessarily difficult task in attempting to justify the interlock they wish to maintain.

Under a third possible means of control, the Federal Trade Commission is empowered to institute proceedings which result in termination of any interlocking directorate constituting an unfair or deceptive trade practice.[38] Aside from the contention that this may be a misapplication of Section 5 of the Federal Trade Commission Act, an obvious difficulty is the provision's failure to specify a sufficiently definite criterion for determining violation.[39] This method represents the only restriction generally applicable to vertical interlocking among corporations in nonregulated industries.[40] Because this Section lodges broad discretion in the FTC, the agency could formulate a comprehensive pro-

equipment companies had 108 interlocks with banks. FTC REPORT 318-324 (1951). This report contains a summary of the interlocking relations maintained by all large companies operating in the major industries.

37. At least four different agencies are presently utilizing this method against some vertical interlocking of companies under their jurisdiction. The FPC, 49 STAT. 856 (1935), 16 U.S.C. § 825d (1946); SEC, 49 STAT. 838 (1935), 15 U.S.C. § 79q(c) (1946); Secretary of Treasury, 49 STAT. 986 (1935), 27 U.S.C. 208(a) (1946); CAB, 52 STAT. 1001 (1938), 49 U.S.C. § 489 (1946); and the Federal Reserve Board, 48 STAT. 194 (1933), 12 U.S.C. § 78 (1946).

38. This method is based upon the premise that Section 5 of the Federal Trade Commission Act has substantive content which has not been utilized against interlocking directorates not illegal under Section 8 of the Clayton Act. 38 STAT. 719 (1914), 15 U.S.C. § 45(b) (1946). The government might also attack interlocking directorates under the Sherman Act when it can prove that the interlocks have been used to restrain trade or create monopolies. 26 STAT. 209 (1890), as amended, 15 U.S.C. § 1 *et seq.* (1946). The *Morgan* case fiasco illustrates the difficulty of trying to introduce evidence sufficient to support a conviction under the Sherman Act for using interlocking directorates or any other competition eliminating practice. United States v. Morgan, 118 F. Supp. 621, (S.D.N.Y. 1953).

39. Section 5 empowers the FTC with authority to determine what constitutes an unfair method of competition. The Section has been upheld under the commerce clause authority. FTC v. P. Lorillard Co., 283 Fed. 999 (S.D.N.Y. 1922). See also Stafford v. Wallace, 258 U.S. 495 (1922); Ford Motor Co. v. FTC, 120 F.2d 175 (6th Cir. 1941), *cert. denied,* 314 U.S. 668 (1941); United States v. Basic Products Co., 260 Fed. 472 (W.D. Pa. 1919).

40. There are exceptions to this statement. Corporations interlocked with companies within regulated industries are in some instances controlled by the provisions enacted to curb interlocks of the regulated industry, *e.g.* suppliers linked with common carriers. See note 18 *supra.* Liquor processing companies and aircraft manufacturers are also restricted by provision of special application. See note 17 *supra.*

gram to prevent harm to competition by restricting concerted activities among business rivals.[41]

A fourth method was discovered when the CAB utilized the interlocking directorate provisions of the Civil Aeronautics Act to prohibit an investment banker from serving as a director in an air carrier when a second partner of the same investment house was a director in another carrier.[42] This interpretation of the Act's provisions was affirmed by the circuit court, and the Supreme Court denied review of the case.[43] This represents the first time that a vertical interlocking directorate was forbidden because of the possibility that it could achieve the same results as would be accomplished through the use of a direct horizontal interlock.

Another technique which has been employed against horizontal interlocking could be applied to vertical arrangements. Certain individuals engaged in specified businesses are prohibited from serving in designated capacities in other companies. The rationale of such proscriptions parallels that of Section 8.[44]

The problems resulting from the existence of vertical interlocks are similar in many respects to those arising from horizontal interlocking directorates. While the actual effects of any single link are difficult to measure, obviously the force of a vertical interlock directly influences two industries; a horizontal is directly felt in only one. A vertical interlock has at least as great a competition reducing potential as a horizontal link.[45] However, the damaging effects resulting from a horizontal arrangement are usually more easily seen and understood than those aris-

41. Interlocking directorates are only one of many practices which can be used to eliminate competition. See note 60 *infra*. The FTC could formulate a policy to control all practices through the application of Section 5. In this manner any scheme devised to eliminate competition might be terminated as soon as it was discovered.

42. Such an application of this provision eliminates one of the most obvious loopholes contained in all preceding provisions. See notes 19 and 36 *supra* and accompanying text.

43. Lehman v. CAB, 209 F.2d 289 (D.C. Cir. 1953), *cert. denied*, 74 S. Ct. 513 (1954).

44. Section 8 as originally enacted absolutely prohibited the interlocking of banks and common directors between companies which were or had been competitors. Later amendments established exceptions to the bank restriction, allowing interlocks between classes of banks which were not generally considered to be competitors. A common director between competitors is illegal and cannot be authorized. See notes 2, 16, and 17 *supra*. Future regulation of vertical arrangements could be drafted along the same pattern. In this way men representing certain business interests could be excluded from serving in other industries.

45. A concentration within the banking industry has a direct effect upon all industries. Similarly, control of all the sources of a particular commodity which has no adequate substitute, *e.g.*, steel, may be acutely felt in many industries. Nonetheless, utilization of vertical interlocks allows control in one industry to be exercised in other industries. Therefore, attempts to monopolize a single industry presents serious antitrust problems but not as serious as the related problems arising from attempts to reduce competition in more than one industry.

ing from vertical links; consequently, the majority of the present restrictions attack horizontal relationships per se as the primary evil of the interlocking directorate practice. Supplemental measures following the Clayton Act prohibited horizontal interlocking between common carriers, public utilities, and communications companies. Ostensibly, these restrictions follow the theory imbedded in Section 8 forbidding horizontal links between competitors. However, the rationale of this Section in relation to business rivals can be justified either on the ground that the practice in itself affords the interlocked companies an unfair competitive advantage over other members of the same industry or that such arrangements evidence an intent sufficient to constitute an attempt to monopolize by controlling the amount or price of goods and services available.[46] Actually, however, common carriers, public utilities, and communications companies are not in competition, for they operate as public monopolies; thus, such organizations are not competitors within the purport of Section 8.[47]

46. A simplified, yet comprehensive, analysis of federal antitrust legislation and policy objectives has been written by S. Chester Oppenheim. See Oppenheim, *Federal Antitrust Legislation: Guideposts to A Revised National Antitrust Policy,* 50 MICH. L. REV. 1139 (1952). "The Sherman, Federal Trade Commission, and Clayton Acts comprise a set of principal federal statutes designed to *maintain* competition by insuring that competition will not be eliminated or drastically reduced. These controls correspond to the area generally described as restraints of trade, monopoly, and monopolistic practices. Section 5 of the Federal Trade Commission Act and the Robinson-Patman Act amendment to section 2 of the Clayton Act are also in some aspects part of a different set of federal statutes designed to *regulate* competition by marking out a plane of competitive rivalry to insure that the quality of competition is not impaired by the practices prohibited by these laws. These controls correspond to the area generally designated as unfair trade practices. Thus, the Federal Trade Commission Act prohibits unfair methods of competition and unfair or deceptive acts or practices and the Robinson-Patman Act proscribes various species of price and service discriminations.

"The distinction between these two sets of laws is not a watertight one. They constitute both opposite and complimentary phases of the public policy of fostering competition in open markets. The two sets of laws may be applicable separately or concurrently, depending upon the types of business conduct in issue in any particular case. Unfair methods of competition may be used to reinforce forbidden restraints of trade and monopoly. The effects of the unfair methods of competition may be measured by their impact upon the competitive system. In between, there may be a range of permissible business conduct that does not substantially injure or lessen competition and does not result in excessive competition." *Id.* at 1148-1149.

"Antitrust reflects the never-ending conflict between the desire for certainty and the desire for flexibility. . . . The desire for certainty motivates businessmen to insist upon explicit guides to what is lawful and what is unlawful in any given course of conduct. . . . At the same time, government's interest in expeditious enforcement of the antitrust laws similarly tempts it to seek certainty—this time in absolute rules of per se violation. There is . . . no paradox. . . ." *Id.* at 1149-1150.

The exact position of interlocking directorates within this framework is indeterminable.

47. Any company desirous of entering into any one of these three fields of business activity must first obtain a certificate of public convenience and necessity. 49 CODE FED. REGS. § 41 (Supp. 1953) (common carriers); 47 CODE FED. REGS. § 62 (Supp. 1953) (communications); 18 CODE FED. REGS. § 24 (1949) (public utilities). A company may withdraw from this activity only after securing approval of the agency. 49 CODE FED.

However, the justification for regulating vertical interlocks in these industries does closely parallel the rationale supporting Section 8 in that a vertical interlock may in itself afford the companies an unfair competitive advantage over their business rivals in both industries. The development of vertical interlocks may manifest an intent to monopolize by maintaining a preferential access to goods or services or to customers.[48] This attempt to monopolize may have direct consequences in each of the two industries in which the principals to the interlock compete. In this respect, vertical interlocks are analogous to horizontal interlocks, and regulation of the former may be justified upon the same basis as that sustaining Section 8 restrictions.

Another major problem presented by the existence of vertical interlocks concerns the abstract question of size. The inherent dangers of bigness were the primary arguments advanced by the proponents of Section 8.[49] Interlocking directorates between units operating in different levels of industries attain a magnitude where, if a complete merger of all the interlocked companies occurred, an entity of trust dimensions would result.[50] Because of the gigantic proportions of the arrangement, suffi-

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REGS. § 42 (Supp. 1953) (common carriers); 47 CODE FED. REGS. § 63 (Supp. 1953) (communications); 18 CODE FED. REGS. § 25 (1949) (public utilities).

48. There are at least three possible methods by which a company can utilize an interlocking directorate to obtain a better competitive position. Vertical interlocks may be formed to establish a preferential access to as many suppliers as possible and to maintain a working relationship with a sufficient number of consumers to guarantee a market for all products manufactured. Horizontal interlocks can be used to form a unified front against any newcomers to the industry and to enable complimentary business policies which aid all principals to the arrangement.

49. See *Hearings before Committee on the Judiciary on Trust Legislation,* 63d Cong., 2d Sess., Vol. 2 (1914); Brandeis, *The Endless Chain,* Harper's Weekly, Dec. 6, 1913; *Report of the Pujo Committee,* reproduced in FTC REPORT 4 n.7 (1951). The main thesis of President Wilson's message also relates to the question of size. SEN. REP. No. 698, 63d Cong., 2d Sess. 14 (1914). President Wilson's contentions closely parallel the view adopted by Brandeis. "There used to be a certain glamour about big things. Anything big, simply because it was big, seemed to be good and great. We are now coming to see that big things may be very bad. . . ." GOLDMAN, THE WORDS OF JUSTICE BRANDEIS 37 (1953). Mr. Justice Douglas not only wrote the preface for Goldman's book but appears to expound the philosophy contained in the book wherever applicable. Compare the dissents in United States v. W. T. Grant & Co., 345 U.S. 629, 636 (1953), and United States v. Columbia Steel Co., 334 U.S. 495, 534 (1948).

50. A trust may be defined as a highly concentrated segment of the economy. Popular misunderstanding of antitrust terms—trust, monopolies, and restraints of trade—is a basic reason for many of the controversies about existing rules. See Robbins, *"Bigness," The Sherman Act, and Antitrust Policy,* 39 VA. L. REV. 907-911 (1953). See also note 46 *supra.*

The most able study of the Supreme Court's decisions involving industrial mergers was written by Handler. "No one can read the cases or study the recent mergers without feeling that the chief effect of the federal anti-trust laws in this field has been the prevention of complete domination—the consolidation movement has not been otherwise repressed." Handler, *Industrial Mergers and the Antitrust Laws,* 32 COL. L. REV. 179, 271 (1932). A later analysis is Zlinkoff and Barnard, *Mergers and the Antitrust Laws:*

cient power could be exercised in a manner so as to produce a ruinous effect on the entire competitive system. However, Congress failed to incorporate this proposition, bigness is bad, or the reasoning behind it, into the Clayton Act. Congress did, of course, partially succeed when they proscribed horizontal interlocking directorates.[51] They failed to recognize that vertical interlocks could be used to circumvent their restrictions.[52]

Yet, concern over size appears to be more academic than practical.[53] Few corporations would be desirous of maintaining interlocking arrangements with other concerns unless there was some financial advantage to be gained.[54] This could come from dealings between the two interlocked entities or between the linked concerns and a third party, *i.e.*, the indirect interlocking relationship.[55] As a practical consequence, then, most interlocks will not be instituted merely for the sake of associating with other corporations. Comprehensive regulation of individual interlocks would

The Columbia Steel Case, The Supreme Court and A Competitive Economy 1947 Term, 97 U. OF PA. L. REV. 151 (1948).

51. The use of horizontal interlocking directorates relates to the formation of vertical interlocks. See note 48 *supra* and accompanying text. Proscriptions of horizontal arrangements have only partially succeeded because statutory provisions can be easily avoided. See notes 6, 12, 19, 29 and 34 *supra*.

52. A series of vertical interlocks indirectly achieves the same end as a direct horizontal link. See notes 19 and 42 *supra* and accompanying text.

53. Levi, *The Antitrust Laws and Monopoly*, 14 U. OF CHI. L. REV. 152 (1947); Robbins, *"Bigness," The Sherman Act, and Antitrust Policy*, 39 VA. L. REV. 907 (1953); Rostow, *Problems of Size and Integration*, ANTITRUST LAW SYMPOSIUM 117 (1951 ed.); Osborn, *Efficiency and Profitability in Relation to Size*, 29 HARV. BUS. REV. 82 (1951); Adelman, *Is Big Business Getting Bigger?*, Fortune, Jan. 1952; Drucker, *How Big Is Too Big?*, Harper's Weekly, July, 1950. Mere size of a corporation does not in itself make the corporation a violator of the Sherman Antitrust Act. United States v. United States Steel Corp., 251 U.S. 417 (1920).

54. The advantages to be gained from interlocking directorates are threefold: (1) The quality of the board's effectiveness may be enhanced by obtaining men of wide experience with general business connections; (2) any transactions between corporations within the arrangement may be facilitated; (3) competition between the interlocked companies may be reduced or eliminated. See Means, *supra* note 7, at 148.

A fair evaluation of the significance of any one interlock of directors should recognize the distinction between different classes of directors. Generally the board of any large corporation is composed of four diverse types of individuals: (1) professional directors—persons who represent the interests of other corporations; (2) representatives of management, the operating officials of the company; (3) large stockholders or their designated representatives; (4) persons with acknowledged public prestige. See FTC REPORT 22 (1951). Where other personnel is used (*i.e.*, officers, employees, agents, representatives) to link the corporations, evaluation of individual interlocks must hinge upon the probable purpose for which the interlock is being used. Surely an interlock involving professional directors or other persons representing outside commercial interests must be more closely scrutinized than a link consisting of a class three or four director.

55. It is often necessary to go beyond the first or second set of interlocking relations to determine what transactions are directly or indirectly flowing from the arrangement. See note 36 *supra* and accompanying text.

be more effective and avoid the many complications implicit in utilizing a criterion of size.

Past experience with interlocking directorate regulation leaves much to be desired. Section 8, the foundation for all regulation in this area, has not attained the objectives for which it was enacted. Statutes adopted after the Clayton Act seemingly evidence a Congressional awareness of the Act's inadequacies; however, the additional legislation has only increased the difficulty of ascertaining a rational justification for the regulation. Further complicating the problem is the conflicting terminology describing the illegal practice,[56] the lack of integration of related statutes,[57] and the absence of affirmative enforcement.[58]

Admittedly, sufficient justification does exist for requiring regulation of interlocking directorates;[59] if effective control is to be achieved,[60] a comprehensive program must be formulated.[61] Initially, restrictions

56. There seems to be no reason for not having uniform proscriptions in related areas. See notes 29, 30, 31, and 32 *supra.*

57. Where all the interlocking takes place in one industry the regulatory agency has little difficulty since it has sufficient power to control all arrangements. When, however, the interlocking is between two or more industries, the inadequacies resulting from lack of proper authorization develop. For example, the provision within the Civil Aeronautics Act allows the CAB to control interlocking directorates between air carriers and all other common carriers. See note 27 *supra.* Yet, common carriers are subject to the jurisdiction of the ICC. On the other hand, communications companies maintaining vertical interlocks with suppliers or indirectly resulting in horizontal linking within the industry cannot be proceeded against by the FCC. See note 24 *supra.*

58. There has been little active enforcement of interlocking directorate restrictions. The FTC has compiled a report analyzing the interlocking directorates maintained by most of the corporations under its jurisdiction; see note 13 *supra.* The Department of Justice began enforcing Section 8 in 1947; see note 12 *supra.* All additional enforcement appears to have been the result of passive action; other agencies charged with forcing compliance with interlocking directorate provisions wait for the parties to seek authorization and then analyze the interlocking arrangement. There has been no publicized attempt by these agencies to seek out other possible illegal relationships subject to their jurisdiction.

59. See notes 9, 10, 14 and 49 *supra.*

60. Revitalization of proscriptions against interlocking directorates is only a first step in the struggle to prevent concerted activity among competitors. Stock or asset ownership, price agreements, tying agreements, pooling arrangements, and countless other practices have been used to reduce competition. See EULER, MANUAL OF MONOPOLIES AND FEDERAL ANTI-TRUST LAWS (1929). Attacking and attempting to solve the problems arising from one isolated practice in an analysis tends to oversimplify the actual situation.

61. Surprisingly enough, minority reports evaluating the proposed legislation which later was enacted as the Clayton Act disclosed basic shortcomings of the prohibitions. The criticisms were well founded when viewed in relation to present interlocking directorate arrangements. "The so-called antitrust bill reported by the committee is a distinct disappointment to those who sincerely desire to destroy private monopoly. The question of the suppression of trusts receives only incidental consideration. Instead of directly dealing with the trust problem, which was the original program, the committee has turned to side issues, such as discriminations in price, exclusive contracts, and use of injunctions. . . . These subjects are treated irrespective of the question of restraint of trade or of monopoly; such vague phraseology is employed and so many exceptions are made that it becomes doubtful whether it is harm or benefit that results. In so far as this bill

should not be directed at the personnel used in effectuating the interlock or at the particular form it adopts, for the success of the plan rests upon recognition of the fact that the prime consideration is the damaging effect such arrangements can have upon competition through the concerted actions of the interlocked companies. With this end in mind, all interlocking could be effectively controlled by amending present provisions so that they will agree with the theory of the restrictions contained in the Civil Aeronautics Act.[62] Such a program has the advantage of regulating all direct, as well as indirect, horizontal arrangements accomplished through the use of a series of vertical interlocks. To expedite this policy, regulatory acts should be amended to permit each agency to determine and remedy the detrimental effects of any interlock involving organizations under its jurisdiction. For example, in addition to investigating the harmful effects of all horizontal interlocks between public utilities, the Federal Power Commission should carefully examine the impact of vertical arrangements between a supplier and a utility upon other public utilities. Further, the Federal Trade Commission should be authorized to investigate these relationships between public utilities and suppliers to discover the effect of such links upon competition between the interlocked supplier and its business rivals.[63] Finally, either agency should be empowered to prohibit the contemplated interlock if it would produce harmful consequences in either industry.[64]

Moreover, in regulated industries interlocks should be forbidden; however, the appropriate agency should be authorized to validate an interlock if the parties wishing to maintain the arrangement can justify it.[65] When dealing with existing interlocks, which are not presently un-

touches the problem of private monopoly at all, it legislates in an arbitrary way against the form of the evil and not against the substance. This bill as a whole will afford little relief to the people from the oppressions of the trust." H. R. REP. No. 627, 63d Cong., 2d Sess. Pt. 3, 1 (1914). See also SEN. REP. No. 698, 63d Cong., 2d Sess. 14-16 (1914).

62. The section should not be followed verbatim because the enactment of six slightly differently worded restrictions all directed at the same evil causes needless confusion. One, or at most, two prohibitions should be sufficient—one applying to the companies, the other to individuals. See note 42 *supra* and accompanying text.

63. If the interlocked supplier is a bank, the Federal Reserve Board or the Securities and Exchange Commission should control the relationship rather than the Federal Trade Commission; the SEC should regulate investment firms, while the FRB concerns itself with commercial banks.

64. While this proposal is severe in its treatment of the parties trying to justify any interlocking arrangement, it is necessary. Under existing enforcement machinery, any single agency is best prepared to evaluate the actual effects only within its own industry since it does not have sufficient information or authorization to ascertain the results upon companies in other industries.

65. Formulation of a test to be applied in determining whether or not authorization should be granted presents many difficult problems. The standard must be general enough to allow needed flexibility, yet, at the same time, definite enough to enable some guideposts as to what must be proved. One thing is certain, present standards, although read-

lawful under Section 8, between corporations in nonregulated industries, the initial task of ascertaining the competition reducing potential of the schemes should be delegated to the FTC.[66]

Competition and predatory practices cannot long coexist. Effective control of the problem posed by interlocking directorates awaits Congressional action.

INCOMPETENT EVIDENCE IN NONJURY TRIALS: OUGHT WE PRESUME THAT IT HAS NO EFFECT?

During the course of a jury trial the judge is charged with the duties of ruling on the admissibility of evidence offered by the parties[1]

ing well, are used more as a label than a description of what is actually pertinent to the prohibition desired. See note 31 *supra.*

66. At present, inspection of existing interlocking is in the main superficial. For example, the conclusions of the FTC's report on interlocking directorates speaks in terms of possible use or potential results. See note 13 *supra.* These arrangements could be more critically evaluated by wiser utilization of the broad investigatory powers granted in Section 6 of the Federal Trade Commission Act. 38 STAT. 721 (1914), 15 U.S.C. § 46 (1946).

1. Disquisition with regard to the law of evidence has generally concerned its relation to litigation in the trial stage. See, *e.g., A Symposium On Evidence,* 5 VAND. L. REV. 275 (1952); HARV. L. REV., SELECTED ESSAYS ON THE LAW OF EVIDENCE (4th ed. 1949). At that level it is subject to greater notice due to its determinative effect upon what may be introduced. A case cannot be prepared or presented by an attorney until he has ascertained whether the evidence available is competent in the eyes of the law. Relevant and persuasive as facts may be, unless they meet the requirements of the law of evidence which have been established by centuries of legal proceedings, they are of no use in a court of law. "The term 'Evidence' imports the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. It embraces the rules of law governing the admissibility or rejection of proffered proof and the weight to be given to proof that is admitted." Phillips, *A Symposium On Evidence, Forward,* 5 VAND. L. REV. 275 (1952). See also 1 WIGMORE, EVIDENCE § 1 (3d ed. 1940).

These requirements permit only evidence which is thought most likely to be relied upon by "men of serious affairs" to be heard. *See* Tyne Co. v. NLRB, 125 F.2d 832, 835 (7th Cir. 1942). Through strict and rigid application they purport to keep from the jury that which is considered most likely to confuse and least likely to be true. See 1 WIGMORE, EVIDENCE § 4b (3d ed. 1940); THAYER, EVIDENCE 509 (1898). "The dominant influence of the jury upon the content of many of the traditional rules is abundantly clear. Basic in many rules is the idea that untrained jurors should not be exposed to the relevant but possibly misleading evidence." Davis, *An Approach To Problems Of Evidence In The Administrative Process,* 55 HARV. L. REV. 364, 371 (1942); Davis, *Evidence Reform: The Administrative Process Leads The Way,* 34 MINN. L. REV. 581, 584 n.17 and accompanying text (1950); Stone, *The Decline of Jury Trial and The Law of Evidence,* 3 RES JUDICATAE 144 (1947). But see Morgan, *The Jury And The Exclusionary Rules Of Evidence,* 4 U. OF CHI. L. REV. 247 (1937); Morgan, *Some Observations Concerning A Model Code of Evidence,* 89 U. OF PA. L. REV. 145, 147 (1940).

The jury, when it has heard all of the competent evidence, arrives at a verdict, and an appellate court, after being convinced that the evidentiary rules have been followed