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Brewster, Jr.: *Antitrust and American Business Abroad, and Fugate: Foreign Commerce and the Antitrust Laws*

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RECENT BOOKS

ANTITRUST AND AMERICAN BUSINESS ABROAD. By *Kingman Brewster, Jr.* New York: McGraw-Hill. 1958. Pp. xxiv, 509. \$12.00.

FOREIGN COMMERCE AND THE ANTITRUST LAWS. By *Wilbur L. Fugate.* Boston, Toronto: Little, Brown. 1958. Pp. xxiii, 384. \$16.00.

It may well be that, when one pierces deeply enough, any field of the law will reveal universals of profound significance. Yet some fields of the law touch more directly on the problems of our times than others; antitrust law is one such field. In antitrust law abroad, we are confronted not only with the control of the power of the economic institution in an industrially organized society, which is the central issue for antitrust law in the domestic sphere, but we are also faced with issues of policy and the law central to the integration of the international society. The publication almost simultaneously of these two texts is, therefore, an event of considerable importance. This review will be organized under the following topics: (1) degree to which objectives of each text are realized; (2) methodology; and (3) content.

1. *Objectives.* Fugate's work is one of the three volumes so far published in the Trade Regulations Series under the able editorship of Professor S. Chesterfield Oppenheim. Professor Oppenheim states in a foreword that "the goal set for each author is a text designed to present the law with the greatest possible clarification, as a guide for the general practitioner who has little experience in this field, for the economist or business executive who wants to be quickly oriented in one of the areas covered, and for the specialist who desires a ready reference tool." Each objective is here realized.

Brewster's work represents the outcome of a research project initiated by a special committee of the Association of the Bar of the city of New York. The committee "first thought of the study to fill a widely recognized need for an analysis of the law, an inquiry into the realities of the law's impact on business, and an appraisal of the effects of our antitrust policy on our relations with other nations." These objectives are admirably realized and, in addition, the work represents an outstanding contribution to the growth of law in this field, to legislative policy, and to research methodology.

2. *Methodology.* Fugate uses the traditional technique of defining the law through the interpretation of the written texts of the cases. The genesis of his volume was a doctoral thesis. The author has been a trial attorney in the Department of Justice for the past ten years. He has attacked a problem of enormous complexity in which there is a relatively small jurisprudence of decided cases, as compared with antitrust cases in interstate commerce. He is to be congratulated for the fidelity of purpose which he has brought to a task which was indeed arduous and demanding. All relevant opinions and consent decrees are brought to light and examined. Yet the product,

as an inevitable concomitant of the method, seems inconclusive, though this is not to deny the thoroughness and carefulness of the approach.

Case analysis, and case analysis alone, furnishes a guide to the prediction of the law in the degree that the jurisprudence is a product of current conditions and values and, in addition, is sufficiently extensive to probe to the heart of the issues involved. Case law is like a halftone or a TV screen. As the "dots" multiply, the faithfulness of the image of reality increases. Yet not even in such vastly litigated fields as contracts and torts do we always find an image sufficiently developed to indicate the answer to the case at hand.

The strength of the *Report of the Attorney General's National Committee To Study the Antitrust Laws* was derived in part from the extent of antitrust jurisprudence relating to interstate commerce on which it was based and in part from the depth of the experience of the members of the committee against which that jurisprudence was analyzed. For a vastly greater body of legal questions than those embodied in the decided cases had come before the members. This fact enabled an incisiveness, clarity and exactness of analysis which would not otherwise be possible. Moreover, the number of viewpoints represented in the membership of the committee, the number of minds brought to bear on the problems considered, were additional sources of strength. Yet even with these advantages, the study by the committee of the antitrust law abroad was one attendant with difficulty and preoccupied with doctrine rather than policy.¹

When the single scholar attacks a legal problem on the basis of the jurisprudence of cases, his personality and value system inevitably shape his appreciation of the data. Fugate is frank to confess this at the outset. He states that he "has generally taken a conservative view," that this is "the only safe course in giving advice" and that his "predilection may also stem from . . . [his] background of prosecution experience." The data, at best, are inconclusive in the sense that they can furnish only general guides for analysis of specific problems and can reveal only some of the major issues of policy and fundamental rules of law. For the courts are concerned with the pathology of conduct—the "must nots" of action which require remedial relief. The "musts" of action—the bold structuring of human conduct—must be left to the political and corporate institutions of society instead of the courts. The maelstrom of litigation tosses to the surface some of the salient facts and issues but the depths of the churning waters of life must be plumbed by different methods. When the cases are few and generally deal with only extreme situations of deviant conduct, which is usually the situation in antitrust decisions concerning foreign commerce of the United States, the task of the lone scholar becomes difficult indeed as he seeks answers to other than purely surface questions.

¹ Carlston, "Foreign Economic Policy and the Antitrust Laws," 40 MINN. L. REV. 125 at 143 (1956).

Here we come to some of the central problems in legal research today—and in raising these questions there is no intention whatever to refer to the authors under review: How can we enhance the objectivity of the scholar? How can we increase his sophistication, his awareness of the realities of life from which the judicial dramas are drawn? How can we successfully organize research, in the sense of drawing together a number of researchers working on a single project?

Brewster's study is, I believe, a landmark in legal research. It throws new light on all these questions.

The author is not the sole writer or the sole investigator; yet he remains the ultimate spokesman and the one person who assumes intellectual responsibility for the product. He is neither a prosecutor nor a defense advocate; he is a scholar, in this case working in one of the most extraordinary and outstanding academic communities of the world. He becomes the director of research of others. He is assisted by David G. Gill as associate director. Four research assistants enable his efforts to be employed in channels in which their full potentialities can be utilized; his "leg work" is done for him. The author acknowledges the contributions of four others to "identifiable parts of the work," namely, Sigmund Timberg, Steuart L. Pittman, John T. Noonan, Jr., and Professor Donald T. Trautman. In addition, "the larger issues of economic policy" were explored for a period of two weeks in a discussion and study group of "a group of business, academic, and former government economists" under "the hospitable direction of the Willard Thorps." The comments and criticisms of seven outstanding members of the academic community and three government counsel are acknowledged, as well as specific criticism of four leading practitioners.

Another factor providing depth is revealed in chapter 10 concerning "The Law's Impact on American Business Abroad." It appears that 366 "American companies and their counselors concerned with foreign business arrangements" were interviewed. The sampling techniques, methods of interviewing, and limitations upon results are stated. The net contribution is left for the reader to determine. In the opinion of this reviewer, the result is an outstanding contribution. It provides not only a most important documentation of essential information for the formulation of policy in the law but it also develops in the investigator himself a sophistication and understanding of the central issues of law in this field which would not be otherwise attainable. Here is the testing ground of case doctrine. Here is where the law must work. Here is where it must promote the contribution which America's enormous productive energy can make to the growth of world markets as well as America's share therein. If ever there was a field in which law needed to move from law in discourse to law in action, this is it. Jurisprudes have long talked of this need; Brewster does something about it.

The method of organizing legal research on a broad front, as one would

organize the preparation of the "big case," which is essentially Brewster's approach, should be more widely used. The single scholar given complete liberty and freedom—yes, this is essential—but also given resources, manpower, facilities is the way to enable the great contribution of the individual scholar to be brought forth in something less than a lifetime. When, for example, will the Ford Foundation move from its massive, institution-oriented grants to a procedure enabling the individual scholar to work fruitfully and with maximum efficiency on those fundamental questions in the forefront of knowledge which so vitally concern us? When will the support of legal research move from support of administration to support of creation?

Those who wish to pursue this question further should read pages 99-101. The essence of the author's approach is stated as follows:

"Because we want to focus on the perspective of the counselor, we start with the transaction rather than the law. . . . The law described in these chapters is the law which it seems to us a conscientious but not excessively timid counselor might properly use for the guidance of his client in planning and negotiating prospective transactions."

In this reviewer's opinion, Brewster has not abdicated his role of a professor in so orienting his study. He remains the conscientious, objective scholar but in his case he is faithful to the underlying facts as well as to the words of the cases.

3. *Content.* Before proceeding to some brief observations concerning the content and contribution of each of these works, an overall impression should be recorded for whatever it is worth.

This reviewer has been vouchsafed the privilege of practicing, teaching and writing in the fields of both antitrust law and international law. As he read the studies under review, the phenomenon of order seeking law could be observed—a phenomenon which antitrust law abroad could be seen to share with international law. For there has come into being an international economy of increasing scope, steadily overshadowing the members of that society and steadily reflecting the growth of international institutions. Corporate bodies may possess a municipal law incorporation, situs or seat, but they are international in character. Transactions increasingly ignore state lines, and contracts cease to be "domestic" or "foreign" but become international. The unpredictability of the application of conflicts rules to such transactions and contracts leads to increased reliance on express choice of law by contracting parties and contractual reliance on commercial arbitration. Steadily, with the erosive power of a glacier, the growing order of the international economy demands law.

In international law, this fact is only dimly being realized in the jurisprudence. International legislation, viz., commercial treaties and specialized international agencies, become primary means for order under law. In antitrust law abroad, we search for jurisdictional formulas for the extra-territorial exercise of national power. We see the struggle of a national

or municipal formulation of law to accommodate itself to, and at least partially control, international phenomena. It is like unto a chemical experiment seeking to create a new emulsion. The two liquid compounds boil and form fluid patterns of dark and light. Will they coalesce into a new and harmonious order? Can national law seeking to protect the national interest in the international arena successfully solve the conflicts of laws problems which it engenders and provide order and predictability?

Coming now to a brief review of the contents of each book, Brewster's work is divided into three sections. The first is entitled "The Sweep of the Problem, the Policy and the Law," the second is "The Law's Impact on Specific Arrangements: Business Purposes and Legal Risks in Exports, Licensing, and Ownership of Foreign Enterprise," and the third is "Alternative Views and Possible Adjustments." Each chapter ends with an annotated bibliography of selected references which will be found to be most helpful. The final chapter contains a number of recommendations as to enforcement procedures and legislation which should be most seriously considered. This reviewer would enthusiastically support all but one of them and, as to that one, is persuaded that an excellent case is made demanding the most careful consideration.

It is to be hoped that busy judges will take occasion to acquaint themselves with Brewster's analysis and findings before their decision of any antitrust case concerning foreign commerce. Most assuredly practitioners will not fail to consult it in any problem, whether in counseling or in litigation. If its words are heeded, the probability of a sound growth of antitrust law in this most important field will be unquestionably increased.

The thoroughness of the approach of Brewster will be indicated if, by way of sample in the chapter on licenses, we note some of the topics separately discussed under the heading of the licensing of unpatented information. These are restraints on disclosure, covenants not to compete, the ancillary doctrine applied to know-how, product limitations, requirements and tying features, output agreements, exclusive know-how license provisions, mutual restraint, reciprocal exchanges of know-how, and know-how associated with patents.

The above sampling demonstrates the value of Brewster's announced approach—"we start with the transaction rather than the law."

Fugate's study moves from a broad statement of the elementary principles concerning the nature and interpretation of the antitrust laws in general to a detailed examination primarily of the domestic cases relating to the exercise of antitrust jurisdiction abroad, though a few international precedents are mentioned. The remaining chapters of the text examine the problems to be encountered in this field, cite and discuss the relevant cases and summarize the law.

In general, the Fugate text is a thorough piece of work, it covers the teaching of the cases and indicates the general principles to be applied. It reflects the virtues and the limitations of its methodology. On the other

hand, the Brewster text carefully explores most of the practical questions likely to arise. It combines practicality with wisdom and even statesmanship. It is to be hoped that judges and legislators, as well as practitioners, will listen to his words.

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