BOOK REVIEWS

The Anti-Trust Law of United States of America, by A. D. Neale, being Volume 19 of the Economic and Social Studies of the National Institute of Economic and Social Research, London. Cambridge U.P., 1960, xiii and 516pp. with "Index of Cases". (£2/5/0 sterling.)

Abe Fortas,[1] who contributes a Foreword to this volume, calls it a "short" book that is a "sound guide through the wilderness of anti-trust precedents, and a perceptive index to its philosophy". No one should think, however, that this book is only to be praised because it is "short" (comparatively), and is by a *British* author, published in Britain, on American anti-trust law. This is an able and well rounded general account of the American laws by any standard, American or foreign, economist's or lawyer's.

Mr. Neale, a British civil servant, did his basic work for it as a Commonwealth Fund Fellow in the United States in 1952, where he was given research facilities at the Federal Trade Commission in Washington, and much kindly interest and help from its officials and from those of the Department of Justice. The achievement is thus also a tribute to the value for all concerned of co-operation by government agencies and personnel in giving generous access, facilities and counsel to foreign scholars who come to study some problem of their host country. The lesson is worth the notice of our own State and Commonwealth authorities, in view of the hospitality we extend each year to a substantial number of Fulbright and other scholars. In addition, of course, the Commonwealth Government has mooted the early enactment of a new federal anti-monopolies law after nearly sixty years of merely paper controls.

The United Kingdom Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, and Restrictive Trade Practices Act, 1956, were both passed before the appearance of this book. This is a pity, since Neale's work (in the present opinion) combines better than anything before, an account of the technical legal framework of America's anti-trust laws, with a realistic exploration of the social, economic and political policies which its enforcement can be said to further.[2] Apart from the author's own insights, this may be due to the

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[1] A. B. (Southwestern), LL.B.(Yale). Formerly Visiting Professor of Law, Yale University, 1946-47, Acting General Counsel, National Power Policy Commission 1941, Under-Secretary of the Interior, 1942-46, Assistant Director, Corporate Reorganisation Study, 1934-37, and holder of many other public offices, and author of many articles in legal and general periodicals.

[2] Of course there was ample literature for the British draftsmen to consult. See e.g. *Bigness and Concentration of Economic Power: A Case Study of General Motors Corporation (1956) (U.S. Govt. Publ.)*; C. D. Edwards, *Maintaining Competition* (1949); J. K. Galbraith, "Monopoly and Concentration of Economic Power" in H. S. Ellis, *A Survey of Contemporary Economics* (1948) 99-128; A. D. H. Kaplan, *Big Enterprise in a Competitive System* (1954); E. H. Chamberlin (ed.), *Monopoly and Competition and*

era in the history of the Sherman Act at which Mr. Neale worked, the post-World War II era. For this has perhaps been the first prolonged period in which the anti-trust law has "shaken down" to its jobs.[3]

With only one or two slight recessions, the years following World War II have seen a constant growth of the American gross national product, and a continuance of the concentration of production and distribution in the great corporations. The 1949 Report of the Federal Trade Commission on the Concentration of Productive Facilities in the United States as at 1947, showed that half of the physical assets used in manufacturing in the United States were owned by but a 100 companies, 3 or 4 of them in many industries owning 60% or more of such assets.[4] History had shown, not only that the giants could supply goods at reasonable prices, but even, rather paradoxically, that some of them had to "pull" their competitive punches by maintaining a price above what their savings in production costs would permit. Otherwise, the inability of their competitors to match their reductions would leave them with such market hegemony as to invite the unkind attention of the anti-trust dragon. Whatever the "curse of bigness" might be, it did not necessarily involve the soaking of the consumer. This, and other problems have stimulated a re-examination of the notion of competition as the rationale of the anti-trust law, in the contemporary era. It is, above all, for Neale's insights into this rationale that all who think of adventuring anew into this area of social control, should study this book.

His work, however, covers the systematics as well as problematics. We are introduced gently enough into the general relations between the Sherman Act, 1890, s.1 (restraint of trade) and s.2 (monopolising), and the Clayton Act, 1914, s.3 (exclusive dealing tying contracts) and s.2 (price discrimination), the latter as amended by the Robinson-Patman Act (pp.1-31). He identifies so-called *per se* anti-trust rules as reasonably well-settled, and covering with little difficulty price-fixing agreements, including common understandings to follow a price leader; agreements to divide up markets; and agreements barring the way to new entrants into industry, that is, exclusive dealing agreements. These overlap considerably with the theoretical range of the common law policies against restraint of trade, if the judges had really set their hands to making them effective. Under the statute they have been made effective, and Neale observes soberly "that if anti-trust consisted of nothing else but this prohibition, it would still be by far the most rigorous anti-monopoly law in the world" (p.426).[5]

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their Regulation (1954); *Report of the Attorney-General's National Committee to Study the Antitrust Laws* (1955); E. H. Chamberlin, *The Theory of Monopolistic Competition* (1932); R. F. Harrod, *Economic Essays* (1952) 111-187 (on imperfect competition); W. Fellner, *Competition among the Few: Oligopoly and Similar Market Structures* (1949); J. K. Galbraith, *The Affluent Society* (1959); K. Brewster, Jr., "Enforceable Competition . . ." (1956) 46 *Am. Econ. Rev.* 482. For a short account of the recent U.K. developments see R. Stevens, "Experience and Experiment in the Legal Control of Competition in the U.K." (1961) 70 *Yale L. J.* 867-904, which also includes a full bibliography of the English literature and cases.

[3] At the risk of over-generalisation, we may say that the 1890-1914 period was taken up with settling the most elementary questions about the law's ambit; in the post-World War I period, the "boom" time administrations were little interested in it, while the "new deal" administration made the traumatic re-examination of the relations of government, capital, and labour, and prepared the stage for contemporary anti-trust law enforcement, with an important focus on administrative oversight, and economic expertise, and on specialised task forces which could at any rate begin to match the resources of the corporate giants.

[4] For earlier statistical data, see National Resources Committee, *Structure of the American Economy* (1939). For British figures, see A. Maizels, "The Structure of British Industry" (1945) 108 *Jo. Royal Statistical Society* 142, and I. M. D. Little and R. Evely, "Some Aspects of the Structure of British Industry 1935-51", *Manchester Statistical Society Paper*, 12 February, 1958.

[5] And see for his full treatment of the *per se* rules, 23-31, 34-54, 65-77, 185-215, 455-46.

Beyond the *per se* offences, the judicially invented rider on the statute, known as the "rule of reason", dominates. This "little bit of layman's language" has been as important (and as intractable) in the American courts as the words "absolutely free" in our High Court and in the Privy Council. The American judges have used the notion to set some sensible limit to the kind of "restraint of trade" civilly and criminally sanctioned by the Act. In general its gist is that restraints are culpable when accompanied by an intent to impair competition or to monopolise.[6] How this intent is to be recognised became a matter of debate if not of mystery. Judge Learned Hand in the still leading *Alcoa Case (U.S.* v. *Aluminium Co. of America)*[7] distinguished monopoly produced merely by greater efficiency, from "monopolising", the latter involving a "positive drive" to control the market or exclude others from it. The earlier test of Chief Justice White in the *Standard Oil Case,* which turned on whether the defendant had departed from "normal methods of industrial development",[8] was (Mr. Neale thinks) stricter than Judge Learned Hand's. Under the latter there could be an offence of "monopolising", even if all that the defendant did was "to keep doubling and re-doubling its capacity before others entered the field".[9] Yet Judge Learned Hand also thought a defendant might still be innocent if he did "not seek, but cannot avoid the control of the market".

The difficulties are further compounded when the degree of control of the market is a function not of the progress, or policy, of one corporation but of the combined bigness of a few ostensibly independent ones — the so-called oligopoly situation.[10] The terms of s.2 of the Sherman Act are wide enough to embrace this situation, but here facts do not permit clean-cut solutions. Indeed in some areas of business the emergence of oligopoly may be a necessary basis for effective competition, since in the presence of one or two big units many small units may have to combine if they are to compete at all with the big ones. Here, too, the test of illegality requires either some kind of collusion between the big units which thus emerge, for instance in price leadership, or an intent to exclude others from entering the industry. At this time of writing (April 1962) the Kennedy administration is threatening proceedings against the steel companies which presumably will be on grounds of price leadership. In short, the test of the legality of oligopoly under the Sherman Act is still intent to restrain or monopolise; the intention to oligopolise is not enough.

American experience also displays that there is much that is not self-evident about the range of activities which an anti-trust law should catch. Uncertainties remain even after 70 years. Labour is exempt, on the ground "that the labour of a human being is not a commodity or article of commerce" (Clayton Act, s.6). But this does not protect combinations of trade unions and employers to suppress or eliminate competition. Public utilities are exempt as subject to other special regulatory commissions. The Clayton Act exempts agricultural marketing. Insurance and banking services are subject to federal anti-trust law when not regulated by state law. Boxing and theatre promotions were first caught only in 1945, professional baseball promotion in 1954.

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[6] See esp. 13-22, 95ff., 123ff. Neale's analysis of the pivotal case of *Standard Oil Co.* v. *U.S.* (1911) 221 U.S. 1, in relation to earlier cases, is on 99-108.

[7] (1945) 148 F.2d 416.

[8] And see the author's penetrating comparison of the views of Chief Justice Taft in the early *Addyston Pipe Case* (1899) 175 U.S. 211 (on which the earlier decisions proceeded), with the basic judgment of Chief Justice White in the *Standard Oil Case* (1910) 221 U.S. 1 (Neale, 13-23).

[9] See also Neale, 439-442, where he points out (what is well known) that some firms are believed already to "pull their punches" for fear that success will involve them in violation. Yet despite this strict test, Neale's prognosis is that no radical revision of industrial structures, e.g. as to inequalities of size and power, may be expected from the anti-trust law. See p. 442.

[10] See Neale's discussion of this area at 160-184, 442-48, where see esp. 443, 447.

Many of the uncertainties of American anti-trust law spring from confusion or conflict as to anti-trust objectives. It is easy to say that if we contemplate introducing a real anti-trust law we should have our objectives clear. In the nature of things such a law, if it is to be more than a paper tiger, will be opposed by powerful sections of the community. Support for its passage must be marshalled and different groups of supporters will have different notions of what is the evil to be struck at. Particular objectives, too clearly stated, may forfeit some of the support necessary for passage. What is more, the varying exigencies of public economic policy may demand flexibility for manœuvre in enforcement.

Some of the author's most instructive pages concern this matter.[11] Neale sees the American basic drive in the successful enforcement area as a demand that private persons should not wield excessive amounts of economic power, and that those who attempt to do so should be checked by law. But a number of supporting forces in American society were also of decisive influence, including political radicalism and the trust-busting campaigns, lobbies for small business interests, and generally distrust for all unchecked power. This last (Neale thinks) "is a more deep-rooted and persistent motive . . . than any economic belief or any radical political trend" (p.422). The resultant of these forces is further modified by the importance both to big business and to the enforcement agencies of having rules that are fair and feasible, or — in a current short term — "compliable".[12]

All this has moved quite far from the assumptions of the common law policies against restraint of trade, if we think that these are concerned with economic progress. The whole trend of American judicial decision is to avoid making enforcement depend on economic judgment. Both "the rule of reason" and the related stress on the *intent* to monopolise, are an escape from the need to balance economic considerations in particular cases.[13] The *per se* offences themselves also are enforced without reference to economic *pros* and *cons* in the particular case, despite argument that they should be only presumptively illegal subject to rebuttal by a showing of economic justification; and the test of intent is mooted even for this area. The intent is inferred where the effects of the agreement are inescapably restrictive; but otherwise Neale thinks that "the rule of reason" requires even here that "by rational inquiry the court shall establish the true character of intent".[14]

We agree that by the stress on intent the courts avoid somewhat calculating economic *pros* and *cons*. There is perhaps, however, a certain lay credulity in Mr. Neale's unquestioning assumption that intent is always a real ultimate fact to be found rather than, quite often, something imputed to a defendant whom the court thinks guilty. With this caveat warranted, the real gist of Neale's point would be merely that the courts strive very hard to avoid confronting economic policy issues. And he reminds us that "there is nothing in the form of basic Sherman Act prohibition . . . to ensure that it operates to produce optimum economic results". Good or bad economic consequences are not the criterion, and a collusive restraint will be caught even if no economic harm results.[15]

To say that the courts have eschewed economic judgment is not to say they would have done better if they had not. So much controversy, for example, surrounds any asserted relation between the size and the efficiency of economic

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[11] See esp. 469ff.

[12] See K. Brewster, Jr., "Enforceable Competition: Unruly Reason or Reasonable Rules" (1956) 46 *Am. Econ. Rev.* 482. And see generally Neale, 419-424.

[13] Pp. 427ff.

[14] Pp. 430-432.

[15] P. 470. And *cf.* 500.

units,[16] that sound results would require expert inquiry into the complex and ramifying merits of each firm and kind of business involved. By hewing to the level of actual or attributable intent, the courts can still discipline great units which adopt exclusionary practices against smaller ones; but, short of "monopolising" situations, they do not destroy large units *merely* on the ground of size. There is a "perpetual dilemma" in relation to mergers and acquisitions under s.7 of the Clayton Act, as to how far the size of merging units, and the economic effects of the new combination, are to be taken into account.[17]

The author indeed points out that even the very objective of preserving competition has proved an inadequate guide. If "competition" is set as an objective, it has to be qualified by some such term as "adequate", and the question then arises whether the standard aimed at[18] should be "pure" competition, "workable" competition, or "effective" competition. And these standards have been so intractable to clarification that, in the end, to ascertain what is an objectionable restraint of trade you have to refer to "nothing less than the whole body of case-law". "Competition", in any case (the author thinks) is not an apt concept for use in analysing economic efficiency, even if the latter were an anti-trust objective. The concept of mobility, that is, the ease of the flow of resources to employments of maximum utility, would be better. Competition often does not promote mobility; it is a fallacy of economists' thinking in terms of "perfect competition" (which in fact never exists), to assume that *all* competition does.

The author detects certain broad differences in long-term British and American approaches.[19] First, in their attitudes to power, Americans tend to try to disperse and check it by general rules to be applied by judges; whereas the British facilitate its exercise, but try to check particular abuses of it, often by administrative supervision. Second, and consequentially, since British attitudes are less anxious about private economic power as such, attention is concentrated on the results of its exercise. They are thus readier to broach the economic merits of monopoly problems. The British Acts have concentrated broadly on the more concrete areas of restrictive practices covered by the *per se* offences of the American anti-trust law. They are patterned on administrative rather than judicial enforcement. Under the 1956 Act, s.21, the seven grounds, on each of which the presumption that restrictive practices are against public interest may be reviewed make the practice not "unreasonable" on balance. They thus seem to require it to be shown that in some particular respect the economic advantage of the restriction outweighs the detriment. And the Restrictive Practices Court includes for this reason lay members from industry and public affairs, along with High Court Judges. One would have liked to have a more detailed assessment from Mr. Neale of the objectives and efficacy of the new English system, but no doubt too little time had elapsed to make this possible. Certainly English lawyers and administrators, as well as Australian, would be infinitely in his debt if in due course he produced a study of the English experiments, parallel to the present important book.

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[16] See pp. 470-74, and *cf.* J. Stone, *The Province and Function of Law* (1946) 643ff.
[17] See Neale, 440-455, 500.
[18] See generally Neale, 475-503.
[19] See pp. 472, 475ff.
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