Buffalo Law Review

Volume 4 | Number 1 Article 81

10-1-1954

Lectures on Federal Antitrust Laws, University of Michigan Summer Institute on International and Comparative Law.

David R. Kochery
University at Buffalo School of Law

BOOK REVIEWS

LECTURES ON FEDERAL ANTITRUST LAWS, University of Michigan Summer Institute on International and Comparative Law: University of Michigan Law School, 1953. Pp. v—xiii, 3—321. $7.00.

In his Forward to this collection of papers delivered at the 1953 University of Michigan Law School Summer Institute, Professor Oppenheim states:

> In bringing about an adjustment of business conduct to the standards of the antitrust laws, the attorneys play a crucial role. For that reason, the Institute program emphasized the responsibility of the private practitioner and the government lawyer who is called upon to give legal counsel in this field of the law. This was done without neglect of fundamental concepts and with due regard for selection of topics and speakers in a manner which sought to achieve a balanced presentation of divergent viewpoints.[1]

Later, in his Introduction, he further states:

> So far as antitrust is concerned, legal precedents alone do not suffice for training in imaginative leadership to keep the spur of private emoluments attuned to the social goals of competitive endeavors. In the universities, the departments of law, economics, business administration and political science have a joint responsibility in this regard. Let us not forget that all is not learned in the classroom. The careers of self-made eminent government officials, lawyers and business executives attest to the valued contributions of those who labor in the vineyards of daily experience, which bridges the gap between theory and practice.
>
> . . .
>
> We should keep the windows of our minds open to constant reassessment of the relations between government and business under an antitrust policy avowedly designed to benefit the consuming public.[2]

In line with the avowed purpose of presenting a variety of viewpoints, then, the twenty-three papers published in this volume represent authors with the following backgrounds: eleven papers were presented by practicing lawyers (two with Government experience); four papers were presented by Government attorneys; three were presented by professors (two in law, one in economics); two were presented by men who both practice law and do some teaching; one paper was that of a corporation counsel; one of a

1. FEDERAL ANTI-TRUST LAWS v. (1953).
2. *Id.* at xii, xiii.

business executive; and one of a Government official. Despite the probable truthfulness of Professor Oppenheim's counsel that "all is not learned in the classroom", some may quarrel with the selection of such a small porportion of full-time teachers (three out of twenty-three), and particularly with the decision to include only one paper by an academic economist. This seems to fall somewhat short of "a balanced presentation of divergent viewpoints". What with running battles constantly going on among representatives of varied schools of economics, it would have seemed highly appropriate to have utilized this Summer Institute as a forum for more than a single viewpoint, albeit the viewpoint actually expressed be a highly challenging one.[3] Nonetheless, the presence of some excellent papers authored by some busy non-academicians certainly attests to the high competence of the professionals engaged in all facets of antitrust work, a competence which regularly manifests itself in the briefs and arguments tendered in antitrust litigation.

This book is intended to set forth analyses of the growth of antitrust law up to the present. As the Introduction informs us, "It concerns yesterday's antitrust. It is a prelude to antitrust tomorrow." Various headings throughout the volume describe particular facets of general antitrust law. One of the book's finest contributions is its final chapter—"Clinic on Practical Antitrust Problems".[4] The chapter is replete with graphs, tables, and excellent advice on the compilation and presentation of technical data in antitrust litigation. Adequate orientation in this specialized area is a *sine qua non* to the practitioner as well as to the antitrust instructor, and this particular portion of the book is a valuable supplement to one's over-all education in the problems of trying scientific issues of fact.[5]

The collection of papers which this book embodies does not purport to be a "compleat" treatise on any phase of the antitrust law. To the person who practices or teaches in the field, the symposium, for the most part, merely summarizes the discussions which have been raging since the decision in the *Alcoa* case down to the decision in the *Motion Pictures Advertising* case. And, generally, it adds little to his knowledge of the law, or, for that matter, to the disorder in which he probably finds his state of mind. For example, there is nothing new in the contentions that (a) the F. T. C. should hold hearings on questionable nation-wide practices and make recommendations for legislation just like a

3. *Id.* at 30-42.
4. *Id.* at 265-313.
5. Dession, *The Trial of Economic and Technological Issues of Fact*, 58 YALE L. J. 1019 (1949).

Congressional Committee;[6] (b) that there is too much judicial legislation in the antitrust field;[7] (c) that the Department of Justice should be given the subpoena power;[8] (d) that there is nothing inconsistent between the Rule of Reason and the *per se* rules, or that the Rule of Reason should be codified;[9] and (e) that antitrust violations should be divided up into (i) those acts specifically prohibited, (ii) those acts not specifically prohibited but to which the Rule of Reason should apply, and (iii) those acts which should be investigated although they do not appear to be present violations.[10] That these contentions *are* not new is no indictment of them: that they are *presented as being* new by people who should know better displays at least a lack of imagination, particularly before a gathering of the type at which these papers were read. One rather ingenious suggestion is made in one of these papers, *viz.*, that the criminal and treble-damage penalties should be imposed only when the violation has been *wilful*, because this requirement has been found to be an appropriate method of enforcing the revenue laws.[11] It is difficult to conceal this reviewer's doubts about the desirability of publishing what purports to be a symposium of scholarly papers when so many of them simply are not in the least scholarly. If a promise of publication is the only way to acquire the participation of the working bar and businessmen, then we are in a bad way indeed. In short, selected papers could and should be published, but not necessarily each and every one of them.

What this reviewer conceives to be another example of failing to present a balance of "divergent viewpoints" is the publishing of only one side of what have come to be rather controversial subjects in the antitrust field. For example, in addition to the distribution of papers weighted in favor of business, one paper is published which roundly condemns the Supreme Court's application of Section 2(f) of Robinson-Patman in the *Automatic Canteen* case.[12] Whatever the merits of the criticism of this decision, at least there is something to be said for the position that a monopsonist is just as big an economic threat as the monopolist. One finds no allusion to this latter argument in this book, and thus no discussion of the best way in which to handle the problem. Again, another paper chastises the Court[13] for upholding the

6. FEDERAL ANTI-TRUST LAWS 262 (1953).
7. *Id.* at 262.
8. *Id.* at 260.
9. *Id.* at 243-254, 231-242.
10. *Id.* at 259.
11. *Ibid.*
12. *Id.* at 140.
13. *F. T. C. v. Motion Picture Advertising Co.*, 344 U. S. 392 (1953).

F. T. C. finding that long-term requirements contracts have a definite impact on the market while one-year contracts may have no such impact.[14] This paper opines as how this is an abdication by the Court of its power of judicial review on matters of law, herein "unfair methods of competition". Without discussing that this is a difficult mixed fact-law question, the author simply embraces Justice Frankfurter's dissenting opinion without so much as a wink in the direction of the majority. And no other paper takes issue with this.

In addition, other subjects which would seem highly relevant to the type of institute represented here are the impact of labor union activity on the economy and on the general pricing systems; the delicate legal problem of primary jurisdiction; the general problem of controls on the economy; etc. Subjects like these and others are not touched upon. The chapter entitled "Quantity and Cumulative Volume Discounts"[15] begins and ends with a paper by separate representatives of the Federal Trade Commission. These papers are informative and disclose many of the policies and problems of that Commission. A reading of the papers in between, all of which more or less castigate the Commission, indicates that their authors just weren't listening.

On the credit side, many of the papers are excellent pieces of creative and intelligent work. Mr. Herbert A. Bergson's discussion of the real or imagined impact of the Sherman Act on America business interested in foreign investment and manufacture is an excellent treatment of a timely and rarely-analyzed problem in the antitrust field.[16] Professor Rahl's dissertation on the fair trade picture since the McGuire Act contains a highly interesting collection of current information.[17] Unfortunately, the Supreme Court has denied certiorari in the *Schwegmann-Lilly* case, so that Professor Rahl's hope of a decision on the constitutionality of the non-signer provision must await another day. Mr. John S. Coleman, president of Burroughs Corporation, is represented by a paper in which he discusses the role and aims of Business in the salubrious atmosphere of the Eisenhower administration.[18] This paper is both pleasantly disarming and expositive of an "advanced" view of Business toward foreign trade barriers—at least it seems to be a view of Mr. Coleman's friends in Business.

14. FEDERAL ANTI-TRUST LAWS 154 (1953).
15. *Id.* at 109-210.
16. *Id.* at 213-227.
17. *Id.* at 188-201.
18. *Id.* at 147-153.

This reviewer cannot but pay his ardent respects to what he conceives to be a gem of articulate creativeness—a gem not only in this volume but in any volume in which it might appear. Professor Kenneth S. Carlston's paper on the tests and evidence of monopoly[19] is intended to be a "restatement" of antitrust law in the area of monopoly. What he comes out with is a magnificent work of legal art, which is the result of craftsmanship and exactitude in the highest tradition of our profession. By setting forth five variables and twelve propositions, Professor Carlston has intertwined the legal and the economic, the practical and the theoretical, and has "restated" the law of Sherman Act monopoly in masterful style. The quality of his work is beyond reproach. The quantity of his work defies imagination. It strikes this reviewer that this paper, besides being a model for all lawyers, should certainly be read by antitrust economists. By doing so they may be enabled to better understand the problems and concepts which lawyers and judges must shoulder in the administration of the antitrust laws. Many lawyers sense that economists do not always realize that the administration of the law embodies imponderables quite apart from the cold rules of economics. Professor Carlston has done as much to blend the two disciplines in this paper as anyone who presently comes to mind.

Would that it could be here said that a lawyer or layman having merely a general interest in the subject of antitrust law will properly acquaint himself with the current problems and decisions by reading this collection of papers. The defenses of the F. T. C. and the Justice Department are barely adequate: the attacks upon them are for the most part emotional. The discussion of the Rule of Reason is at best haphazard, and, except for Professor Carlston's remarkable paper, the monopoly discussion is cursory and/or pedestrian. Aside from the papers already mentioned with approval, only the patent section remains for recommended reading,[20] particularly the papers on antitrust laws and patent, and on misuse of patents.[21] Otherwise, this book does not come up to the level of the symposia on antitrust of the New York State Bar Association.[22]

David R. Kochery

Assistant Professor of Law
University of Buffalo School of Law

19. *Id.* at 16-29.
20. *Id.* at 45-109.
21. *Id.* at 61, 71.
22. N. Y. STATE BAR ASSOCIATION, ANTITRUST LAW SYMPOSIUM (Commerce Clearing House 1949); N. Y. STATE BAR ASSOCIATION, HOW TO COMPLY WITH THE ANTITRUST LAWS (Commerce Clearing House 1954) (Van Cise and Dunn, eds.).