BOOK REVIEWS

ANTITRUST POLICIES

American Experience in Twenty Industries

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Antitrust policy and law is perhaps the one subject that, in the United States and Canada at least, unites businessmen, lawyers, economists and Civil Servants, and perhaps politicians too, in a fashion that is unique among the many areas of social experience where converging skills and interests are to be found. Indeed, in the relations of law and economics the antitrust laws are clearly distinctive because nowhere else in the English-speaking legal order is there to be found this impingement of legal rules upon economic thought and business practice and in turn of economic theory upon the formulations of law. In taxation and valuation questions, or wherever the accountant's skills are called in to aid the lawyer, economic criteria operate to fashion the legal rule or its interpretation; but even here the impact is modest compared with what is to be found in the relations between legal and economic ideas as they focus on antitrust problems and are in turn modified by contact with each other.

There is an essentially philosophical assumption that underlies that feature of our culture which has expressed itself in laws to prevent economic concentration and to encourage and preserve competition. The mythology of our society, to which Thurman Arnold referred a generation ago, persits in the folklore of a capitalism now modified by the welfare state; but this has not disturbed the essential premise. For that assumption declares that the freedom of men has many facets and economic freedom is by no means the least significant in our polity. Yet such freedom is not possible unless the government of our economy is the impersonal market instead of personal decisions of entrepreneurs with the power to fix a price or to allocate a market or to prevent an entry. Under such restrictive conditions not only is freedom in the wider political sense challenged but the initiative of men must decline as the spur of risk is removed and the marginal becomes the norm, protected as it is from the brute test of the market-place. For when so protected resources do not respond effectively to demands and such allocation may be less efficient than when directed by "competition". So goes the theory of the advantages of competition supported by both political faith and an economic rationale.

The model is dated and the mythology no longer entirely convincing. But though "imperfect competition" and "workable competition" are the newer models, the central belief of North America remains largely untouched by

these oracular or statistical disillusionments. There is still the belief that competition is a "good" thing and monopoly "bad". And who is to say that this instinct welling up as it does from a great complex of experience with the frontier, with the tariff, with the tendency of the strong to become stronger if left alone, who is to say that the instinct is not a sound one and that the continuing popularity of antitrust laws in the United States and Canada — except with the bruised businessman scraped by a prosecution or same other contact with the law — is not justified?

Yet how shall we test almost seventy years of experience in the United States and Canada with these policing rules to deter and to punish the too aggressive, the predatory, indeed all those who would mix a reduction of risk and the acquisition of power over resources in those appropriates amounts which if they did not achieve monopoly certainly reduced competition? The truth is that the measurement of the achievement of laws to preserve competition whether the Sherman, Clayton and Federal Trade Commission in the United States or the Criminal Code and Combines Investigation Act in Canada, is a formidable task. The "simple" test of course is to ask how far has the concentration of industry through mergers and similar devices altered since its high point in the years between 1885 and 1920. And yet while this question may be appropriate to the United States it has relatively less meaning for Canada where the "natural" monopolistic position because of a smaller market was considerably greater and where industrial development in the same period, indeed until recently, was proportionately so much less.

But to ask these questions only in the field of corporate integration is to omit large areas where "workable competition" in its many variants may have been stultified by business practices aimed at minimising risk and avoiding the perils of the market-place wherever possible — price collusion, marketing arrangements, exclusion of newcomers, patent suppression, and a score of related devices where the loose-knit combination operated to do as much or more damage as merger itself. Here the Canadian experience from 1925 on in some respects is almost as interesting as that of the United States. But again who is to say that in the non-merger area of attacks upon competition Canadian or United States law has been effective either as punishment or deterrent?

Yet such an approach is surely defeatist. Tools of measurement are increasingly available and the literature grows with efforts to at least describe the volume and variety of changes in the nature of competitive activity. Certainly one self-evident method is to examine those industries that have once come under the eye of the law and ask how have they behaved since or what did they do to change the patterns that theretofore had marked them down for public wrath. This question was by no means simple to answer when The 20th Century Fund undertook to pose it and obtained the services of Mr. Whitney in 1950 to examine the records of twenty industries where antitrust involve-

ments in one form or another had taken place over the past two or three generations. The cases were well chosen. Major industries such as meat packing, petroleum, chemical manufacturers, steel, paper, bituminous coal, automobiles and cotton textiles were studied for their detailed behaviour with respect to price, patents, mergers, industry, performance, inter-locking directorates, trade associations, etc. In addition another series were studied without perhaps the same mass of detail and without having the same historic importance perhaps but nevertheless valuable as case histories of famous antitrust suits; cast iron pipe; tobacco products; anthracite; aluminum; shoe machinery; motion pictures; tin cans; farm machinery; corn refining; cement; Pullman cars; and insurance. Professor Whitney's conclusions are cautious and by no means are uninhibited statements assuring the reader that but for the antitrust laws productivity and competition would have been fundamentally different. Nevertheless he goes far enough to make it clear that profoundly important results have come from antitrust law and policy and he suggests three major conclusions with respect to their effects. The first is that these rules have set up "a barrier against the cartelisation of American industry along European lines." While arrangements to cartelise may disintegrate in a highly competitive economy when independence appears to the advantage of one or more members of a cartel, he points out however that "the antitrust laws make it possible to break them up swiftly and certainly. Even if they escape detection, they tend to be less effective than European cartels which can function openly and often have government support."

The second result has been to reduce the tendency to create monopolies by merger or otherwise; and although the Sherman Act was unable to halt the great merger movements of the 1890's, it did become in due course "a real barrier to consolidations intended to put firms in a dominating position in their industry". In recent years — particularly since the 1950 amendments to the Clayton Act which strengthened the law against mergers — while there had been more mergers than ever before, these in most cases have involved small companies or simply product or a geographic diversification. Third, the antitrust laws helped to maintain "both equality of opportunity and freedom of entry in industry — a never ending struggle in which there are bound to be defeats along with successes."

Finally Professor Whitney is prepared to state baldly that when the antitrust laws are viewed generally "their broad deterrent effect is more important than the visible effects of particular cases". Certainly apart from the general findings the actual consequences of the antitrust laws on many of the industries he examined were often direct and important. This was true for meat packing where antitrust investigations played a role in discouraging coercive and collusive behaviour; in petroleum where the Sherman Act helped to break up the Standard Oil monopoly and to shape the modern structure and behaviour of the present industry; in chemicals where the antitrust laws have made "a

moderate contribution to the amazing development of the chemical industry by breaking up the "powder trust" and by other prohibitions and directions to the industry, and similarly in steel and in paper; but far less so in bituminous coal, automobiles and cotton textiles where other factors operated to maintain extensive competition, as in coal and textiles, or to reduce the number of large manufacturers as in automobiles.

Curiously this kind of study has never been effectively undertaken in Canada although the raw material exists in part through the presence of almost two score reports inspired by enquiries under the Combines Investigation Act since 1925. Of course in only three cases have the subjects involved mergers while the remainder have been price, marketing, entry and simple collusive and coercive practices, on a close-knit or loose-knit basis, of several individual firms. But the detailed examination of these practices would make it possible for an imaginative research team to follow through either with material available in the Combines Branch or elsewhere in Government, in business itself or in business practices documentation already of a public nature.

Now it such an attempt were made what likely would be found? This question is very difficult to answer but one thing is certain — Canadian businessmen no less than their American colleagues are very sensitive to the presence of the antitrust laws. They resent aspects of these laws particularly the development of the *per se* doctrine which has simplified the tasks of judicial administration and of public policy definition by holding every combination to fix price or organise the market to be illegal wherever a preponderance of the industry is involved. This sensitivity to the law itself is equalled or perhaps exceeded by the resentment of the business community to the practice of publishing reports which, however carefully worded, seem to become findings of guilt before a court has spoken. But whatever may be the subjective reactions of business leaders to their individual brushes with the law there is surprisingly little unanimity in the business community as a whole with respect to the alternatives. Indeed, business leadership tends to accept the need for some legislation to regulate and preserve competition although it is difficult to know whether this genuflection is merely paying respects to the "conventional wisdom" or something more deeply felt.

In any case on the specific point as to whether the antitrust laws in Canada have had anything approximating the same effects on selected industries, or in general, as described in Professor Whitney's extremely important two-volume study, in this reviewer's opinion it may be said that by and large his conclusions could apply to the Canadian scene as well — but for one qualification. There is more likelihood of recurrence, or was until the recent changes in the Canadian penalties, than similar recurrence after legal action in the United States. Partly this would seem to be a procedural phenomenon because the "consent decree" method allows a measure of supervision by the courts that until the 1952 amendments in Canada was not possible here. There

may be other factors also that explain the likely recurrence of patterns once proscribed by conviction. Perhaps the less dynamic character of the Canadian economy in many respects, its tendency towards monopoly because of the smaller number of firms involved and a smaller market, corresponding difficulty of entry — all of these may be elements in the possibility of "recidivism" as compared with the situation in the United States.

I have omitted to mention how detailed were many of the industrial summaries prepared in these volumes often with the cooperation of the industry itself. It would be interesting to know how far Canadian industry would cooperate in the same way although no doubt many business leaders would take a similarly constructive, research view.

As long as we have pretentions towards a free economy and a free society we shall be interested in the antitrust laws less for what they directly achieve than for what they prevent. Professor Whitney's studies open up, as his sponsoring committee indicates, "new ground" and all students of the problem in Canada and elsewhere are indebted to him and The 20th Century Fund for this feast of data that will take much time for serious digestion if its full value is to be obtained by students and policy makers both in the United States and Canada.

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