THE UNFAIR TRADING AND PROFIT CONTROL ACT: AN AMERICAN'S VIEW.*

Study of Western Australia's Unfair Trading and Profit Control Act is a startling experience for an American lawyer. In it he may see mirrored some of his country's most dearly-held ideals, some of its doubts and more than one of its mistakes.

Some of the Act uses language identical to our economic "charter of freedom", the Sherman Act.[1] Some of the Act resembles our Federal Trade Commission Act, whose meaning is still mysteriously unfolding after 44 years of interpretation. Other portions of the Act resemble all too closely our highly controversial Robinson-Patman Act, and there is even a hint that the Act may be intended to allow some version of our anomalous "Fair Trade" resale-price-maintenance laws. Some aspects of the Act are different, and stand out the more clearly because of the close similarities in other respects.

This commentary will undertake: first, a general comparison; second, a discussion of the chief substantive provisions of the Act in light of American experience; and third, an analysis of the *Cockburn Cement* decision. For the reasons already stated, the discussion cannot hope to be entirely free of bias, and therefore occasional notes supply references to other American writings on what seem to the author to be controversial points.

GENERAL COMPARISON.

For many years, the American antitrust policy lived in a world of its own. Canada actually had enacted an antitrust law one year previously to the Sherman Act of 1890, but this law languished from inattention virtually until World War II.[2] Among European nations, only Norway seems to have paid serious attention to a policy of this sort, its first law dating from the 1920's.[3] England, whose common law originated the magic phrase, "restraint of trade",[4] evolved no important public law on the subject until very recently.

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1 In Appalachian Coals, Inc. v. United States, (1933) 288 U.S. 344, at 359-60 the Supreme Court referred to the Sherman Act as a "charter of freedom" with "a generality and adaptability comparable to that found to be desireable in constitutional provisions."

2 See FRIEDMANN, ANTITRUST LAWS (1956), 3 (chapter on Canada by Blair).

3 *Ibid.*, at 281 (chapter on Norway by Eckhoff).

4 SANDERSON, RESTRAINT OF TRADE IN ENGLISH LAW (1926); Mitchel v. Reynolds, (1711) 1 P. Wms. 181, 24 E.R. 347.

Since World War II, however, nation after nation has enacted one or more laws designed to deal with restrictive trade practices, cartels and other intrusions upon competition and free market operation. Perhaps the most comprehensive of these is the German Cartel Statute of 1957. Others include the English Restrictive Trade Practices Act of 1956, the Irish Act of 1953, the South African Act of 1955 and other post-war legislation in Japan, Austria, France, Sweden, the Netherlands, as well as the regulations under the Treaty of the European Coal and Steel Community.[5]

In both comprehensiveness and severity of sanctions, the American and Canadian laws substantially exceed the laws of any of these nations. The three basic American statutes are the Sherman Act of 1890, the Clayton Act of 1914 (as amended by the Robinson-Patman Act of 1936 and the Celler-Kefauver Act of 1950), and the Federal Trade Commission Act of 1914. The Sherman Act deals in sweeping outright prohibition of combinations in restraint of trade (section 1) and monopolizing, or attempting or combining to monopolize (section 2), with criminal, equitable and private damage remedies concurrently available in the federal courts as sanctions.[6] The Clayton Act applies equitable and damage remedies through the courts, as well as administrative "cease and desist" orders through the Federal Trade Commission and other agencies, to price discrimination (section 2), exclusive-dealing agreements (section 3), mergers (section 7) and interlocking directorates (section 8).

In addition, the Federal Trade Commission Act provides for administrative hearings and "cease and desist" orders against "unfair methods of competition" and "unfair or deceptive acts or practices" (section 5). This law, it has been held, applies to all conduct which would violate the Sherman or Clayton Acts (thus duplicating those laws). More importantly, it also applies to conduct which does not rise to the level of violation of those laws, but which represents an "incipient" threat to competition, or which is "unfair" to competitors

5 See generally, FRIEDMANN, ANTITRUST LAWS (1956); Goldstein, *Effect of Foreign Antitrust Laws on United States Business,* 1958 INSTITUTE ON ANTITRUST LAWS, (Southwestern Legal Found., Dallas, Tex. 1958) 199; on the Coal and Steel Community, see Lang, *Trade Regulations in the Treaty Establishing the European Coal and Steel Community*, (1958) 52 NORTHWESTERN U. L. REV. 761.

6 At first, the Supreme Court held that the Act literally condemned "every" restraint of trade, United States v. Trans-Missouri Freight Ass'n, (1897) 166 U.S. 290. This view was moderated by announcement of the "Rule of Reason" in Standard Oil Co. of New Jersey v. United States, (1911) 221 U.S. 1.

or "deceptive" to the public in a tortious, unethical or immoral sense.[7] Except for certain partially-exempted industries which are specially regulated, such as transportation and utilities, all American private business, where some effect on interstate commerce can be found, is subject to this system of overlapping statutes and dual judicial and administrative enforcement.[8]

The Western Australian Act appears to come much closer than any of the European laws to the sweeping general coverage of the American statutes, for it too deals with restraint of trade, monopolizing, unfair practices and price discrimination. The only significant substantive omissions appear to be lack of the particularized treatment given by the Clayton Act to exclusive-dealing agreements, mergers and interlocking directorates, but as will presently be pointed out it is quite possible that the Act covers these matters in other ways. The Act also provides lenient treatment for sole distributorships, which enjoy no comparable American statutory exemption. It seems not intended to reach individual, as distinguished from combined, unfair business conduct falling short of monopolistic behaviour, as contrasted with the Federal Trade Commission Act. On the other hand, it exceeds the American laws by avoiding the express exemption for vertical resale-price-maintenance controls allowed by the Miller-Tydings Amendment of 1938 to the Sherman Act, and the McGuire Amendment of 1952 to the Federal Trade Commission Act. Further, the Act introduces a novel treatment of the taking of an "unfair profit."

Greater differences appear in the remedies and procedures of the two sets of laws. Overall, the Western Australian Act has no self-operating effect but awaits declaration by the Commissioner, prior to which no wrong is committed. All of the American laws, on the other hand, purport to lay down what is right and wrong from the outset, and the Sherman Act seems so sure of what is wrong that it provides criminal as well as civil penalties. When Congress passed this law, it was not legislating some mere notion of economic theory, but was reacting politically to an enormous popular alarm over the

[7] Federal Trade Commission v. Motion Picture Advertising Service Co., (1953) 344 U.S. 392.

[8] There is no definitive textbook or treatise on American antitrust law which is generally accepted. The nearest thing is the REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955), which was prepared by a large committee of lawyers, professors and economists appointed by the Attorney General. The Report is advisory and is not an official statement of Government policy; it has substantial standing, however, as an authoritative statement of existing law as to many subjects.

rapid growth of "trusts" (close integrations of competitors through transfer of stock to a trustee) and "conspiracies" to fix prices, pool profits, allocate territories and customers and otherwise regulate trade.[9] In the face of what it believed morally wrong, Congress thought first in terms of indictment, fine and jail, with additional punitive damage awards to innocent victims.[10] It was sheer Providence that the Act also contained authorization to the federal courts to use their equity powers to "prevent and restrain" violations, thus opening the way to subsequent judicial experimentation with various kinds of decrees which have shaped, more than any other remedies, the economic course of American industry.

An equally serious, but less impassioned Congress of 24 years later added the Clayton and Federal Trade Commission Acts to supplement the Sherman Act, this time resisting the temptation to use criminal sanctions for the new provisions.[11] The chief procedural contribution of this legislation was creation of the Commission, to act concurrently with the federal courts, and armed with extremely broad powers of investigation.

By contrast, the Western Australian remedies seem mild indeed, and the conclusion is irresistible that the Act was the product of a calmer legislative temper. Evidently the Commissioner is to act on his own volition, and until he does act nothing may be done by any one else. When he acts, he may order the "declared" trader to stop his unfair trading and not to commit unfair trading in the future. He may also give certain affirmative directions as to price, methods of sale and localities of sale. The procedure thus resembles most closely that of the Federal Trade Commission. No alternative approach exists for the Government, or for aggrieved private parties. Nor is there apparent authority to resort to more comprehensive equitable remedies used by the American courts to restore competition, including such things as compulsory patent licensing, dedication of trademarks, forced disclosure of trade and technical information, divestiture of capital stock or assets, division of offending firms into separate parts, or even outright dissolution.

9 See THORELLI, THE FEDERAL ANTITRUST POLICY — ORIGINATION OF AN AMERICAN TRADITION (1954); Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, (1956) 23 U. OF CHI. L. REV. 221.

10 Use of the criminal prosecution is still frequent, especially in restraint of trade cases involving *"per se"* offences. Sometimes the Government files both a criminal and a civil case. Private damage and injunctive suits may also be maintained without regard to Government action.

11 See HENDERSON, THE FEDERAL TRADE COMMISSION (1924).

In at least one respect, the less drastic remedies of the Western Australian Act might actually increase the strength of the law. Milder sanctions could make for bolder factual and legal conclusions, encouraged by knowledge that what is decided will not lead to criminal punishment or set the stage for severe damage judgments or corporate dissolution. Perhaps the relatively free-handed approach evidently taken by the Commissioner in the *Cockburn Cement Case* reflected consciousness that no handcuffs or judgment execution process dangled from the administrative arm. On the other hand, Mr. Justice Wolff's reversal, with its considerable concern for the good purpose and propriety of the company's actions, seems more in tune with American court review of judgments under the much more severe Sherman Act.

For whatever it may be worth, it may be noted that the American Supreme Court in reviewing Federal Trade Commission orders exercises much more self-restraint than appears in the *Cockburn Cement* opinion. The Court almost never reverses Commission findings of fact, and it also shows great respect for the Commission's conclusions of law, though it is not bound by them.[12] This is doubtless due in part to the somewhat more limited scope of judicial review provided for in the Federal Trade Commission Act; but it is also influenced by a policy of encouraging the Commission and by the fact that Commission orders are solely remedial and prospective and are not themselves a foundation for any damage or criminal action. On the other hand, the Supreme Court jealously guards its great discretion in the Sherman Act field and does not hesitate to ride roughshod over lower court decisions under this statute.[13]

The Western Australian Act lacks the profound prophylactic effect to be gained from criminal, damage and plenary equitable remedies; the Sherman Act's effectiveness is as much due to the power it represents as to the cases actually brought. Further strength in the American policy has undoubtedly been gained from the prestige resulting from enforcement of the policy by the Attorney General in the federal courts. And the important dissolution and divestiture decrees of the courts in basic industries such as oil, explosives, fruit, meat, tobacco, railroads and many others have undoubtedly had a vital effect upon the evolution of the American economy.

It is true that had the Commissioner's conclusions in the *Cockburn Cement Case* been sustained, effective relief could have been

12 Federal Trade Commission v. Cement Institute, (1948) 333 U.S. 683.
13 For example, see the opinion in United States v. E. I. du Pont de Nemours, General Motors Corp. et al, (1957) 353 U.S. 593.

obtained through a direction cancelling the agreement between Cockburn and Swan. But what could the Commissioner have done had Swan previously gone out of existence? The final goal of any antitrust policy is presumably to prevent the consequences of monopoly power. When consummate illegal monopoly in a single firm exists, there ought to be power to deal with it.

Therefore, comparison suggests the desirability of enlarging the remedial powers of the Commissioner, or of making provision for exercise of broad equitable powers by the court itself. Criminal and damage sanctions would seem inappropriate to the Act's present scheme, however, and in any event the case for them is considerably weaker on the merits than is the case for more comprehensive remedial measures.

INTERPRETATION OF THE ACT.

It goes without saying that the interpretation of the substantive provisions of the Act is a matter to be approached in light of the economic conditions and policies and the business mores of Western Australia. Words like "monopolization" and "restraint of trade" may have universal book definitions, but they are hardly of the same real significance everywhere. An example can be found in the decision in the *Cockburn Cement Case,* where Wolff S.P.J. seems to have concluded that the State's economy might not be able to support two efficient cement companies. Such a conclusion, though suggested hypothetically in the *Aluminum Case,*[14] has never been reached on the facts in an American antitrust case, to the author's knowledge. There is an unspoken assumption that a nation of 170,000,000 people can support at least two of anything, except possibly in a dying industry.

What follows here by way of interpretation of the Act in light of American principles and experience must therefore be made subject throughout to the dictates of Western Australian realities.

Does the Act cover individual unfair conduct?

The only conduct against which the Commissioner is authorized to proceed is "unfair trading" (section 29). Had the statute refrained from definitions, this phrase alone might have been ample to encompass the whole field of restraint, monopolization and unfair competitive conduct, whether done in combination or individually. The web of definitions in section 8, however, seems virtually to preclude appli-

[14] United States v. Aluminum Co. of America, 148 F.2d 416, at 430 (2d Cir. 1945).

cation of the Act to individual "unfair" business conduct other than monopolistic behaviour or price discrimination. This follows from the fact that "unfair trading" is given a series of meanings, each of which is in turn defined in terms of contract, agreement or combination, except for the monopoly and price-discrimination offences. The only apparent exception is the narrow one provided by the clauses on "attempting" and "aiding" which seem to contemplate application to one who has sought to enter into a prohibited contract or agreement.

An incongruity exists in the fact that one of the definitions of "unfair trading" is "acting in combination with any other person or as a member of a combine in doing any of the matters mentioned in" the preceding definitions. Literally this seems to mean that it is unfair trading to combine to combine. Since this is evident nonsense, a reconciliation is imperative, either by treating this clause as an unintended superfluity, or instead by using it as evidence of Parliamentary intent to make "unfair trading" cover more than combination.

To the author, the question is an important one, since American experience has been that there is a real need for some regulation of individual conduct which is incompatible with a healthy competitive system though not rising to the level at which it can be called an "attempt to monopolize" under the Sherman Act. Section 5 of the Federal Trade Commission Act fills this gap. Under its prohibition of "unfair methods of competition and unfair or deceptive acts or practices" the Commission has dealt with a long array of "unfair" individual acts.[15] These may be classified informally into three types: (1) predatory business torts for which the common law has not seemed to give a sufficient remedy, such as inducement of breach of contract, appropriation of trade secrets, commercial bribery, harassment and molestation, various kinds of coercive behaviour, etc.; (2) dishonest methods of advertising and sale and various forms of misrepresentation which hurt honest competitors and deceive the public; and (3) mis-use of market power through tie-in sales and other devices amounting to the equivalent of "restraint of trade." The danger in all of this is that the Commission might go so far as unduly to hamper competition in the name of protecting it. For this danger, judicial review is probably an adequate protection.[16]

Unfair profit.

The role to be played by the "unfair profit" concept is not entirely

15 For a list of unfair acts prohibited in Federal Trade Commission cases, see any recent Annual Report of the Commission.

16 Compare, however, Simon, *The Case Against the Federal Trade Commission*, (1952) 19 U. OF CHI. L. REV. 297.

clear. By definition, "unfair profit" must be the result of an "unfair trading method", or in other words must result from an agreement in restraint of trade, a resale-price-maintenance agreement, monopolization or price discrimination. Since all of these things are themselves independently made unfair, what useful purpose does the concept serve?

Despite the circularity of the definitions, perhaps the idea is that the Commissioner may decide that any agreement or association constitutes "unfair trading" if it results in "unfair profit." In American cases involving price-fixing and other comparable *"per se"* restraints of trade, data on prices and profits are liberally used as circumstantial evidence of the existence of conspiracy where the conspiracy itself is disputed.[17] In such cases, however, the courts do not inquire into the reasonableness of the results once the conspiracy is established. In fact, the Supreme Court has emphatically stated that it will not inquire into whether the prices fixed are "reasonable."[18] It might be possible to have an American case involving a combination to do something which did not fall into one of the *"per se"* categories with respect to which evidence of unreasonable prices or profits would become a determinant of illegality,[19] although it is to be doubted whether any case could rest upon such a test alone.

It seems more likely that the "unfair profit" idea in the Western Australian Act is meant to be more remedial than substantive. Since the Commissioner does not possess power to destroy a consummate monopoly, it follows that he should have power at least to regulate its prices and profits. The remedy section of the Act (section 32) gives him this power, and the "unfair profit" test of section 8 supplies the standard for its exercise.

The *Cockburn Cement Case,* however, suggests some weaknesses in this approach. For all practical purposes, Cockburn seems to possess a monopoly of cement. Having found that the company had monopolized, the Commissioner went on to find the existence of unfair profit, presumably as a prelude to regulation of the company's prices. By

17 An excellent example of proof of conspiracy entirely from proof of market behaviour is American Tobacco Co. v. United States, (1946) 328 U.S. 781, where three cigarette manufacturers were convicted of conspiracy in restraint of trade and to monopolize.

18 United States v. Trenton Potteries Co., (1927) 273 U.S. 392.

19 A possible example is American Column & Lumber Co. v. United States, (1921) 257 U.S. 377; a trade association engaged in collecting and disseminating detailed statistics on its members' business was held to be a combination in restraint of trade, in part on the basis of the fact that lumber prices rose substantially after the programme began to operate.

holding that there was no illegal monopoly, however, Wolff S.P.J. destroyed any basis for future price regulation. If the demand for cement should greatly increase next year, Cockburn may be in a position to raise its prices and its profits to unreasonable levels with impunity. It would appear therefore that making price control dependent upon illegal restraint or monopolization is unwise. The dichotomy in American economic policy suggests a different solution: concerns which are subject to the antitrust laws are free to make their own price and other decisions on the theory that a competitive market is an adequate safeguard; concerns which are not subject to the antitrust laws, such as transportation and utility companies, have their prices regulated by administrative agencies under standards having nothing to do with legal or illegal behaviour.

Agreements in restraint of trade.

The Act's use of the language of "restraint of trade" potentially opens an extremely wide area of application. It is not known whether the Act is intended to have the same breadth as the similar phraseology in section 1 of the Sherman Act. If it is, it applies to any contract, combination, conspiracy, agreement, association or other form of joint action between any two or more persons which unduly or unreasonably limits competition. Throughout the history of the Sherman Act, this prohibition has had far greater use than the monopoly provisions of the Act.

A catalogue of the many kinds of business agreements which have been held to be illegal restraint of trade would cover many pages. "Restraint of trade" has long since outgrown its early common law meaning of a simple covenant not to compete between two traders. It may arise from agreement between actual competitors, between non-competitors in the same industry,[20] between buyer and seller,[21] between employer and employee,[22] and even between non-traders where the aim is to destroy the competition of others.[23] It may be

20 Associated Press v. United States, (1945) 326 U.S. 1, news organization composed of member newspapers from various parts of nation was held to be operating in restraint of trade by discriminating as to membership against applicants who were in competion with members.

21 International Salt Co. v. United States, (1947) 332 U.S. 392, salt manufacturer required buyers to buy salt from it as a condition of obtaining leases of salt-vending machinery.

22 Allen Bradley Co. v. International Brotherhood of Electrical Workers, (1945) 325 U.S. 797, combination between union and employers was held illegal.

23 American Medical Ass'n v. United States, (1943) 317 U.S. 519, medical society was convicted of restraining trade of a group health organization;

found subjectively in the elimination of competition between the members of the combination, and it may also be found in the elimination of competition which is external to the combination.[24] It may exist in the form of loose conspiracy or agreement; in the form of closer association such as a partnership, a joint enterprise or a trade association; or even in the form of integration through a trust, holding company, or outright merger.

Restraint of trade may be found as to a wide variety of purposes and effects, including such typical examples as price fixing,[25] resale-price maintenance,[26] division of trade territory,[27] allocation of customers and suppliers,[28] division of fields of activity,[29] limitation of supply or output,[30] restriction of channels of distribution,[31] exclusive-dealing agreements,[32] tying agreements[33] and boycotts.[34] It has even been found to exist in an agreement of all members of an industry

the Supreme Court held that it was unnecessary to decide whether medicine is a "trade" since the defendants restrained the activities of an organization which was engaged in "trade."

24 This dual application of the concept is discussed in an article by the author, *Conspiracy and the Antitrust Laws*, (1950) 44 ILL. L. REV. 743. Price-fixing cases are a classic example of subjective restraint; boycott cases are external restraints.

25 United States v. Trenton Potteries Co., (1927) 273 U.S. 392; United States v. Socony-Vacuum Oil Co., (1940) 310 U.S. 150.

26 Dr. Miles Medical Co. v. John D. Park & Sons Co., (1911) 220 U.S. 373, resale-price-maintenance contracts held illegal; Federal Trade Commission v. Beech-Nut Packing Co., (1922) 257 U.S. 441, illegal combination between manufacturer and dealers to maintain resale prices.

27 Timken Roller Bearing Co. v. United States, (1951) 341 U.S. 593, illegal division of world markets for roller bearings.

28 United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898), allocation of customers and territories.

29 United States v. Masonite Corp., (1942) 316 U.S. 265; the case also included price fixing.

30 United States v. Socony-Vacuum Oil Co., (1940) 310 U.S. 150, major oil companies bought up surplus gasoline from small companies in order to keep it off the market and thus raise prices.

31 Eastern States Retail Lumber Ass'n v. United States, (1914) 234 U.S. 600, association of retail lumber dealers "blacklisted" wholesalers who sold direct to consumers.

32 Federal Trade Commission v. Motion Picture Advertising Service Co., (1953) 344 U.S. 392; most exclusive-dealing cases are dealt with under section 3 of the Clayton Act, provided the agreement meets that section's tests — an agreement by the buyer that he will not deal with a competitor of the seller. Converse agreements by the seller not to sell to competitors of the buyer are not covered by the Clayton Act.

33 Northern Pacific Railway Co. v. United States, (1958) 356 U.S. 1; illegal clauses in deeds and leases of property by the railroad requiring grantees and lessees to ship goods over the railroad's line in preference to other carriers.

34 Fashion Originators Guild of America v. Federal Trade Commission, (1941) 312 U.S. 457.

to use a standard form of contract which included an exclusive method of settling disputes by arbitration,[35] in an agreement to share trade statistics[36] and in an agreement not to engage in price discrimation.[37] It has been found in a variety of mergers, consolidations, capital-stock acquisitions and other forms of integration.[38] And it has even been found in the arrangement between a parent corporation and its wholly-owned subsidiary as to their methods of sale and prices (known as "intra-enterprise conspiracy").[39]

The concept includes the subject-matter of sections 3, 7 and 8 of the Clayton Act (respectively, exclusive-dealing agreements, corporate-stock-and-asset acquisitions, and interlocking directorates among competitors). What these sections add to the Sherman Act are lower standards of proof of effect on competition, rather than new substantive coverage. Consequently, if the American meaning is given to the Western Australian phrase, the Act can be made to apply to exclusive-dealing agreements and to mergers and acquisitions, as well as to the other forms of restraint.

In 1911, in the *Standard Oil Case*,[40] the Supreme Court settled a long controversy by holding that the Sherman Act does not make illegal every restraining agreement, but only those agreements which unreasonably restrict competition.[41] This so-called "Rule of Reason" has had many interpretations, and the Supreme Court has not followed a fully consistent course. Although the result has been a good deal of uncertainty as to the application of the law, the "Rule" has enabled the courts to exercise full judgment and discretion in carrying out the general policy of the law and in adapting its rulings to changing circumstances.

As was to be expected, certain types of restraints came to be called "*per se*" unreasonable because of their presumed inherent in-

35 Paramount Famous Lasky Corp. v. United States, (1930) 282 U.S. 30.

36 American Column & Lumber Co. v. United States, (1921) 257 U.S. 377, and several other cases.

37 Sugar Institute, Inc. v. United States, (1936) 297 U.S. 553, agreement of sugar refiners not to deviate from their own individual price announcements held illegal.

38 The first such case was the holding company consolidation of two railroads which was held illegal in Northern Securities Co. v. United States, (1904) 193 U.S. 197.

39 Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, (1951) 340 U.S. 211, agreement between Seagram and Calvert (wholly-owned subsidiary) to refuse to deal with liquor wholesalers who disobeyed instructions not to raise liquor prices.

40 Standard Oil Co. of New Jersey v. United States, (1911) 221 U.S. 1.

41 For discussion of the "Rule of Reason" see REPORT OF ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955), Ch. 1.

consistency with competition. As to these types, no inquiry is made into purpose or effect; proof of such an agreement establishes illegality. The current list of *"per se"* offences is price fixing,[42] division of territory,[43] allocation of customers,[44] boycotts[45] and agreements which tie sale of one product to another in which the seller has a dominant position.[46] As to other types of restraints, a full inquiry into history, purpose, effect and economic circumstances, is permitted in order to arrive at a judgment as to whether the restraint is unreasonable.[47] This inquiry is not supposed to go into considerations which are unrelated to competition, however; that is, a serious elimination of competition cannot be justified on the ground that some other policy than competition would be preferable.[48]

From this survey, it may be seen that a case such as the *Cockburn Cement Case* could well have been approached as a problem of restraint of trade, as distinguished from monopoly, with a consequent lower standard of effect on competition. The agreement of Cockburn to purchase Swan's entire output was in restraint of trade because Swan was thereby restrained from selling any cement in competition with Cockburn. The provision whereby Cockburn could determine the selling price of Swan cement was a price-fixing agreement. The establishment of Cement Sales as a joint selling agency for the two companies constituted a further type of restraint. The price-fixing feature would render the whole arrangement *"per se"* illegal in the United States; the other features would be evaluated as to whether under the particular circumstances they brought about an undue or unreasonable lessening of competition. The contention that no monopoly existed would be no defence, nor under modern American decisions would the unfortunate financial circumstances of Swan seem to supply a defence.[49]

42 United States v. Socony-Vacuum Oil Co., (1940) 310 U.S. 150.

43 Timken Roller Bearing Co. v. United States, (1951) 341 U.S. 593.

44 United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898), *aff'd.* (1899) 175 U.S. 211.

45 Associated Press v. United States, (1945) 326 U.S. 1.

46 Northern Pacific Ry. Co. v. United States, (1958) 356 U.S. 1.

47 For examples of exercise of the Rule of Reason see Board of Trade of Chicago v. United States, (1918) 246 U.S. 231, restriction on period of price-making on grain exchange held lawful; Appalachian Coals, Inc. v. United States, (1933) 288 U.S. 344, joint selling agency for coal companies having low share of market held reasonable; United States v. Columbia Steel Co., (1948) 334 U.S. 495, corporate acquisition upheld.

48 See note 41, *supra.*

49 See the opinion in United States v. Socony-Vacuum Oil Co., (1940) 310 U.S. 150.

The Commissioner may have elected not to proceed on a restraint of trade theory in the *Cockburn Cement Case* because of the limiting phrase in the Act requiring that the restraint be "contrary to the interest of the public", whereas the monopoly provision contains no such limitation.[50] This "public interest" standard, which also appears in the price-discrimination provision, is undefined. No such phrase appears in the Sherman Act, but the American "Rule of Reason" supplies a single, general standard in the form of a declaration that the purpose of the Act and therefore the public interest is to preserve competitive conditions. There is here obviously a device whereby the Commissioner and the Court can make any adjustment to public policy which is desired. Western Australia will have to decide whether to limit its conceptions in a comparable way, or to leave greater room for adjustment to other interests besides those of free competition.[51]

Resale-price maintenance.

Resale-price maintenance involves control by a seller of the price at which the goods he sells may be resold by purchasers thereof. Such control is sometimes desired by American manufacturers as a means of protecting the prestige of advertised brand-names against the supposed dangers of "loss leader" or cut-price sales by some dealers. It is also frequently desired by dealers themselves as a protection against price competition, and in this sense is merely an indirect device for horizontal price-fixing. Various methods have been used by different American firms to attempt resale-price control, including contract, threat of refusal to deal with price cutters, consignment sales and appointment of the dealer as an "agent" to whom price directions can be given.[52]

Control by threat of refusal to deal is rather ineffective and the consignment and agency methods are frequently too cumbersome and expensive. Consequently, contract has been the most desirable approach. It was early held under the Sherman Act, however, that a series of contracts between a single manufacturer and his dealers constituted illegal restraint of trade, since it amounted to the same

50 See opinions of Dwyer C.J. and Jackson J. in the Full Court's decision in the Cockburn Cement application for a writ of prohibition, (1957-58) 59 West. Aust. L.R. 54 and 62 respectively.

51 This article does not attempt a discussion of the Act's application to "the destruction . . . of . . . any industry the preservation of which is advantageous to the State."

52 The various methods of resale-price-maintenance are discussed in an article by the author, *Resale Price Maintenance, State Action and the Antitrust Laws,* (1951) 46 ILL. L. REV. 349, 383-84.

thing as a price conspiracy among the dealers.[53] Business groups, led by the retail druggists during the depression, secured passage of so-called "Fair Trade" Acts in 45 States legalizing resale-price contracts and further providing that prices set by contract would be binding upon non-contracting dealers in the product.[54] The same groups then secured passage of the Miller-Tydings Amendment to the Sherman Act in 1938, exempting Fair Trade controls for sales in States having Fair Trade Acts. In 1952, the McGuire Amendment to the Federal Trade Commission Act was passed to exempt the non-signer feature which had been held not covered by the earlier exemption.[55]

This whole series of laws is rather clearly antagonistic to the principles of antitrust policy and the Attorney General's National Committee to Study the Antitrust Laws recommended outright repeal in 1955.[56] Congress has not followed this recommendation, but meanwhile the Fair Trade system has begun to crack of its own weight under the pressures of competition, aided by decisions in several States that the Fair Trade Acts are invalid under State constitutional provisions.

The federal laws contain a proviso that the exemption from the antitrust laws does not apply to agreements between persons who are in competition with each other; hence, such agreements are subject to the Sherman Act and are illegal as price-fixing arrangements. The Supreme Court has even held that Fair Trade agreements between a single manufacturer and his independent wholesalers are illegal where the manufacturer also does some of the wholesaling of the product himself, since he is then in competition with the independent wholesalers.[57]

Against this background, the resale-price-maintenance provision in the Western Australian Act is difficult to understand. Although it reads somewhat like the proviso in the American federal exemption, it has no comparable role to perform because the Western Australian Act contains no exemption for any kind of resale-price-maintenance agreement. The provision, therefore, seems to create an inference that agreements between a single manufacturer and his dealers would be lawful. Yet if the "restraint of trade" concept of the Act is given a

[53] Dr. Miles Medical Co. v. John D. Park & Sons Co., (1911) 220 U.S. 373.
[54] See note 52, *supra*
[55] Schwegmann Brothers v. Calvert Distillers Corp., (1951) 341 U.S. 384.
[56] REPORT OF ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955) 150-54.
[57] United States v. McKesson & Robbins, Inc. (1957) 351 U.S. 305.

meaning comparable to the American meaning, such agreements would be unlawful.

American academic and professional judgment runs strongly against the advisability of permitting resale-price controls as a matter of principle.[58] There is also some economic evidence available that Fair Trade prices are higher and are consequently inflationary.[59] In view of the purpose of the Western Australian Act to keep prices down, legalized resale-price maintenance would seem undesirable, and the Western Australian Act would be stronger if the ambiguity created by the present doubt-casting clause were removed.

Price discrimination.

The price-discrimination provisions of the Act are quite discomforting, since they are unmistakably a paraphrase of parts of the Robinson-Patman Act.

There is a substantial debate in the United States over whether the Robinson-Patman Act is compatible with free competition.[60] Its detractors contend that it harms competition by disabling sellers from flexibility in creating and meeting competitive situations.[61] Its defenders contend that it protects small business against destruction and also contributes to lower prices by forcing sellers to grant general, rather than selective, price reductions.[62] The fact is that we actually do not have very reliable evidence of the over-all impact of this controversial law.

Quite apart from the merits, however, most students are agreed that the Act in its present form is a vexatious example of extraordinarily poor draftsmanship. There have been so many lawsuits over almost every phrase in the Act that it has been called "the lawyer's full employment Act."

Actual business situations are far more complex and diverse than the simple generalizations of this law. One of the many available

58 The arguments, pro and con, are stated in (1956) 44 ILL. BAR. J. 754 *et seq.*

59 Bowman, *The Prerequisites and Effects of Resale Price Maintenance,* (1955) 22 U. OF CHI. L. REV. 825.

60 See Automatic Canteen Co. of America v. Federal Trade Commission, (1953) 346 U.S. 61.

61 Arguments are summarized in an article by the author, *Antitrust Policy in Distribution,* (1955) 104 U. OF PA. L. REV. 185.

62 See REPORT OF ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955), comment by Prof. Kahn, 185-86; *The Schwartz Dissent,* (1955) 1 ANTITRUST BULLETIN 37, 59.

examples is the problem of so-called "functional" price differentiations —different prices given by a single manufacturer to persons performing different market functions such as wholesaling, jobbing and retailing. If an efficient wholesaler passes on part of his discount to a retailer who competes with a retailer who has been charged a higher price directly by the manufacturer, for example, an "injury" to competition between the retailers may be found.[63] The manufacturer can keep out of this difficulty if he controls the wholesaler's resale price, or else stops selling either to the wholesaler or to the retailer. But none of these courses of action would seem desirable in a "free" economy where eternal stratification of distribution methods is to be abhorred.

Another example of great difficulty with such a law lies in the test of "like grade and quality", which is a theoretically essential standard for determination of the existence of discrimination. The Federal Trade Commission has taken the approach that products are of "like grade and quality" if their physical qualities are substantially identical, regardless of non-functional differences in consumer preference or brand popularity arising from differences in advertising and promotion.[64] To require identical pricing of goods having different popularity, however, is unrealistic from a marketing point of view. But almost impossible problems of administration arise if an attempt is made to distinguish products on a non-physical basis.

The Western Australian Act stops short of the Robinson-Patman Act by failing to include the defences and qualifications afforded by that Act. Foremost among these defences are those of cost justification and meeting the lower price of a competitor. Although these defences have been the subject of almost endless controversy,[65] some version of both would seem desirable in order to introduce at least a little adaptability to changing costs and fluid market conditions. Perhaps the Commissioner can read in such qualifications through imaginative application of the "public interest" qualification of sub-paragraph (i) of section 8 (d) of the Act. No such qualification is supplied for sub-paragraph (ii), however.

The fact of appearance of both sub-paragraphs in the Act, by virtue of the 1957 amendment, constitutes the final source of American embarrassment. Both sub-paragraphs deal with substantially the

[63] See, for example, Standard Oil Co. (Indiana) v. Federal Trade Commission, (1951) 340 U.S. 231; REPORT OF ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955) 204.

[64] See REPORT, *supra* note 63, at 156.

[65] *Ibid.*, at 171, 180.

same subject matter, but in confusingly different ways. The origin of both is to be found in the Robinson-Patman Act. The unhappy explanation is that two different bills in Congress were compromised by the indiscriminate expedient of enacting both—one as an amendment to section 2 of the Clayton Act, and the other as a separate new section.

With this sorry history, an American is in no position to offer any convincing prescription. But perhaps it is clear enough anyway that repeal of one or the other of the two provisions, if not of both, is worth consideration.

MONOPOLIZING AND THE COCKBURN CEMENT CASE.

In the first case under the Act, the Commissioner charged and found that Cockburn Cement had "monopolized" the production and sale of portland cement in Western Australia. This occurred as a result of agreements between Cockburn and Swan, the only other cement producer in the State, whereby Cockburn virtually controlled Swan's output, prices and sales. The arrangement put an end to a short period of competition between the two, which had begun with the organization of Cockburn as a competitor to Swan during a period of increasing demand for cement.

On appeal, Wolff S.P.J. set aside the Commissioner's findings in an opinion which seems to come down to two fundamental propositions: (1) that it had not been shown that Cockburn possessed monopoly power; and (2) that even if Cockburn had a monopoly, it was not an illegal one because of the circumstances of its origin.

It took American antitrust evolution many years to arrive at this level of the problem of policy. It is perhaps unfortunate that the new Western Australian Act should have begun there. Monopoly and monopolization are extremely unwieldy concepts to manage. For many years American prosecutors avoided grappling outright with pure monopoly problems, a choice made easier by the fact that the huge American market has seemed to make large single-firm monopoly extremely rare, at least on the industrial level. This approach has been advantageous in permitting judgment to be nurtured by experience without making antitrust policy face an ultimate test in every case. The few early monopoly cases, such as *Standard Oil* and *American Tobacco,* were easily disposed of because of the unsavoury record of the defendant firms.[66]

[66] Standard Oil Co. of New Jersey v. United States, (1911) 221 U.S. 1; United States v. American Tobacco Co., (1911) 221 U.S. 106.

Most of the Sherman Act cases have been concerned with restraints of trade; that is, the concern of the law has been primarily with conduct which threatens monopoly or which brings about some of its effects, rather than with the final evil itself. Restraint of trade can be handled on a right-or-wrong basis much more easily than monopoly because a prerequisite for its existence is an agreement, combination or conspiracy; the mind can focus upon the combination and uproot it as a separate and unnecessary evil without having to determine what would have to be done if there were only the acts of a single firm to deal with.

Of course, the hard cases could not be put off forever. But the hardest problem facing the American policy has not been that of monopoly, but rather that of concentration of economic power in a few firms in major industries—the problem of oligopoly. Hard as it is to evaluate, oligopoly is easier to deal with than monopoly. For one thing, oligopoly does offer the consumer some choices not present in monopoly; it is therefore a bit easier to be complacent in its presence. Second, some of the worst oligopoly problems can be handled by traditional restraint of trade theories, in that a conspiracy can sometimes be shown. Cases like the 1946 *American Tobacco Case*,[67] the *Paramount Pictures Case*,[68] the *Cement Institute Case*,[69] the *Hartford Empire (Glass) Case*,[70] the *U.S. Gypsum Case*[71] and many other modern "big" industry cases have been handled as "conspiracy" problems. As to oligopoly cases involving no conspiracy, the policy has had little to say.

In modern times, only two important pure single-firm monopoly decisions have been rendered by a final court of appeal—the *Aluminum Case*,[72] and the *du Pont Cellophane Case*.[73] For purposes of appraising this phase of the law three other cases which have something to add should also be considered—the 1946 *American Tobacco* decision;[74] the *Griffith Case*;[75] and the *United Shoe Machinery* decision.[76] These cases have dealt in some way with the three key prob-

67 American Tobacco Co. v. United States, (1946) 328 U.S. 781.
68 United States v. Paramount Pictures, Inc., (1948) 334 U.S. 131.
69 Federal Trade Commission v. Cement Institute, (1948) 333 U.S. 683.
70 United States v. Hartford Empire Co., (1945) 323 U.S. 386, 324 U.S. 570.
71 United States v. U.S. Gypsum Co., (1948) 333 U.S. 364.
72 United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
73 United States v. E. I. du Pont de Nemours & Co., (1956) 351 U.S. 377.
74 (1946) 328 U.S. 781.
75 United States v. Griffith Amusement Co., (1948) 334 U.S. 100.
76 United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, (1954) 347 U.S. 521.

lems of monopoly: (1) when does a firm possess a monopoly? (2) does "monopolization" have an additional behavioural element? (3) is some kind of "reasonableness" (good purpose, superior skill, beneficial results) a defence?

The *Cockburn Cement Case* also dealt with all three of these questions. Wolff S.P.J. correctly noted considerable uncertainty in American law on some of these questions, and indeed expressed himself with polite understatement as to these uncertainties. On the first question of determining the existence of monopoly power, however, it would appear that the opinion may have misconstrued the state of the authorities. This is not to say that Wolff S.P.J. relied upon American law, but his opinion does imply that it was influenced by the *du Pont Cellophane* decision. That decision was that du Pont possessed no monopoly despite its high percentage of the cellophane supply, because cellophane had to compete with a number of other flexible wrapping materials such as polyethylene sheet, Saran wrap, pliofilm, glassine, wax paper, etc. This decision did not declare a legal principle that whenever there are substitutes for a product, the product has no monopoly. Apart from water, air and salt, no product could ever have a monopoly in this sense. The decision was that on the particular facts there was a high degree of "cross-elasticity of demand" between the other wrapping materials and cellophane; that is, that relatively small changes in the price of cellophane would shift customers, and therefore there was actual price competition between the various products.

The *Cellophane* decision has been heavily criticized as to its economic conclusions, but in any event, it would not seem in accord with the broad proposition of the *Cockburn* decision that Cockburn possessed no monopoly because of the inroads on the cement market being made by glass, aluminium, plastics and wood. Such products doubtless prevent cement manufacturers from having complete freedom to raise their prices at will, in the same way that coal limits fuel oil, ball games limit attendance at movies, candy limits ice cream and walking limits riding. The Supreme Court in the *Cellophane Case* stated "one can think of building materials as in commodity competition but one could hardly say that brick competed with steel or wood or cement or stone in the meaning of Sherman Act litigation; the products are too different. This is the inter-industry competition emphasized by some economists."[77]

The Supreme Court's distinction between building materials and wrapping materials is rather inarticulate; the reason is that the dif-

[77] 351 U.S. 377, at 393.

ference is one of degree and not one of principle. In a question of degree, there is no substitute for a full factual inquiry, which was made in the *Cellophane Case*. We can only speculate upon what such an inquiry would show in the Western Australian cement business. It would certainly show many uses for cement in which the other materials are not adequate substitutes; it might show that as to some other uses, cement gives way to substitutes only when cement prices reach the top of a substantial price range beneath which cement can be priced at will—i.e., that cross-elasticity is low; it might even show that some of the falling demand for cement in Western Australia was due to already unduly high prices.

Insofar as American analogies are concerned, Mr. Justice Wolff's decision is somewhat less questionable on the question of whether Cockburn had "monopolized." (This statement is subject to the important qualification, already expressed earlier, that American law would probably have avoided this issue to begin with by approaching the relationship between Cockburn and Swan as a problem of restraint of trade.) Treating Cockburn as a possessor of a sole-firm monopoly, the question is whether the circumstances of origin of this monopoly would prevent its being regarded as "monopolization." Wolff S.P.J. decided that the present state of demand for cement was such that the economy would probably not support two competing cement companies, and that the less efficient company, Swan, would have succumbed. Under the circumstances, he indicated that Cockburn's arrangement with Swan was a "genuine salvage operation", that it saved the stockholders from a great loss and that it was beneficial to the public in that it preserved productive capacity. He overturned findings that Cockburn had been guilty of questionable tactics in a number of instances. And he stated that under the law, declaration of a trader for monopolizing should "be reserved for cases where there is a flagrant disregard for business ethics, or oppressive conduct." The latter statement seems an unaccountably strict standard for a law which has no punitive effect and which was enacted primarily with economic purposes in mind.

The rest of the above approach cannot be said clearly to be different from American theories, since we have never had a monopoly case quite like the *Cockburn* situation. It does seem fairly certain that the benefits to stockholders and to the public from such a "salvage operation" would provide no defence, since the benefit dictated by the Sherman Act is that to be provided by competition, which is thought to be the right way to protect the public interest, overriding the interests of stockholders. The Commissioner in the *Cockburn Case*

thought that competition was possible, and it may be that the Judge had too little faith in it. Even if continued competition would undoubtedly mean Swan's extinction, this might be preferable to the present state of affairs. Under the present organised control, an admittedly inefficient plant has been preserved, whereas the evident judgment of the market has been that it should be eliminated and its assets (money, machinery, buildings, etc.) put to better uses in their present form or through liquidation. Further, by virtue of preserving Swan, Western Australia now has cement capacity almost double the demand; this excess capacity would be a tremendous deterrent to entry of a new firm in the event that demand should increase; in other words, the arrangement's most pernicious possibility is that it will assure monopoly for many years to come, a possibility which would have been reduced had competition been permitted to take its course, and its toll.

On the other hand, there are elements in the rationale of the opinion which undoubtedly would find some support in American cases. Judge Hand's opinion in the *Aluminum Case,* which certainly emphasized an economic approach to monopoly, nevertheless raised some doubts as to whether a firm could be said to have "monopolized" where its monopoly was "thrust upon" it by circumstances beyond its control.[78] Further, he seemed to imply that a firm which survives alone because of "superior skill, foresight and industry" may not be guilty of monopolizing. Judge Wyzanski in the *United Shoe Machinery Case* said that Judge Hand had reserved and did not decide these questions.[79] The opinion of Justice Reed in the *du Pont Cellophane Case,* after reference to legislative history that the Act was not meant to apply to monopoly acquired by fair means, seemed to approve a "superior skill" defence. The same opinion reached a high point of vacillation a few pages later, however, when the Court said that there can be no such thing as "reasonable" monopoly.[80] The earlier opinion of the Court in the *Griffith Case,* a monopoly-conspiracy case, wobbled in much the same way.[81]

It seems almost certain that the *Cockburn Case,* if analyzed as a combination problem, would not have been decided the same way in America. Had Cockburn gone on to compete with Swan (in a fair and lawful manner) and had Swan then failed, however, a stage would have been reached where American vacillation over monopoly law

78 148 F.2d 416, at 430.
79 110 F. Supp. 295, at 341.
80 351 U.S. 377, 393; compare with discussion at 390-392.
81 (1948) 334 U.S. 100.

would have had to end in a clear choice between condemning or allowing "monopoly by superior skill." But that would not be this case, for there competition would have been allowed to operate. Here, Cockburn has forestalled competition's verdict, and it will never be known for sure whether Cockburn would ever have gained monopoly by "superior skill."

CONCLUSION.

Perhaps too much time has been spent here in discussion of American decisions. An antitrust policy must be made to fit the needs and circumstances of the society in which it operates, or it will quickly become an instrument of oppression. Resting as it does upon the basic principle of faith in freedom of enterprise, its doubts should probably be resolved in favour of private decisions, when it is clear that no better yardstick is at hand. Working out yardsticks for a policy which must comprehend so much needs time, experience, patience, sympathy and ingenuity.

One American lesson is clear, however. Whatever this article may have done by way of exposing American doubts and troubles with antitrust policy, it should only end with expression of the firm belief that the effort is extraordinarily worthwhile.[82]

JAMES A. RAHL.*

82 Since the above article was written the proceedings taken under the Western Australian Act (with the exception of the findings of the Commissioner for Unfair Trading) have been reported as follows: The Queen v. William John Wallwork Ex parte Cockburn Cement Pty. Ltd., Cement Sales Pty. Ltd., Swan Portland Cement Ltd., (1957-58) 59 West Aust. L.R. 49 (applications to the Western Australian Full Court for rules absolute for writs of Prohibition against the Commissioner). Cockburn Cement Pty. Ltd. v. William John Wallwork, (1957-58) 59 West. Aust. L.R. 72 (application for special leave to appeal to High Court of Australia from the discharge of the rule nisi for prohibition by Full Court of Western Australia). Cockburn Cement Pty. Ltd. v. William John Wallwork, (1957-58) 59 West. Aust. L.R. 75 (appeal to Supreme Court of Western Australia against the findings of the Commissioner).—Ed.

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