BOOK REVIEWS

ANTITRUST AND AMERICAN BUSINESS ABROAD. By KINGMAN BREWSTER, JR. New York: McGraw-Hill Book Company, 1958. Pp. xxiv, 509. $12.00.

FOREIGN COMMERCE AND THE ANTITRUST LAWS. By WILBUR L. FUGATE. Boston: Little, Brown and Company, 1958. Pp. xxiii, 384. $16.00.

Herbert L. Packer †

Since the close of World War II, the consequence of our emerging anti-cartel policy has been a series of notable decisions applying the competitive premise of the Sherman Act[1] to a wide variety of international arrangements entered into by American entrepreneurs. *United States v. Imperial Chemical Ind., Ltd.*,[2] *United States v. General Elec. Co.*,[3] *Timken Roller Bearing Co. v. United States*,[4] and *United States v. Minnesota Mining & Mfg. Co.*,[5] to name only the best-known, have made it clear that American businessmen and their foreign collaborators are not free from the reach of antitrust. But these decisions have not resolved pervasive and long-standing questions about the extent of that reach, questions which continue to plague the courts in their application of antitrust to purely domestic transactions. Indeed, the international character of the problems treated in these cases has added a new dimension of uncertainty to the law. And the complaints from the victims of these uncertainties and, more particularly, from their counselors, together with the rejoinders of today's trust busters, have filled the pages of the law reviews.

For several years it has been obvious that there is a pressing need for a fundamental review of our antitrust policy in the light of the expanded role of American business in the world economic community. The *Report of the Attorney General's National Committee To Study the Antitrust Laws* exposed the problem and faithfully reflected the poverty of our thinking about it. Into the breach thus revealed now step two authors, one an academic antitrust scholar, the other a government antitrust lawyer.

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1. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1952).
2. 100 F. Supp. 504 (S.D.N.Y. 1951).
3. 82 F. Supp. 753 (D.N.J. 1949).
4. 341 U.S. 593 (1951).
5. 92 F. Supp. 947 (D. Mass. 1950).

Professor Brewster's book is the product of a study initiated by the Special Committee on Antitrust Laws and Foreign Trade of the Association of the Bar of the City of New York and financed by the Merrill Foundation for the Advancement of Financial Knowledge. Once again, then, we are indebted to that most public-spirited of bar groups for a searching examination of a problem of great current concern. For, it should be said at once, Brewster has given us a masterpiece of legal writing: brilliantly organized, incisive in its analysis, and written in a vein of lucidity that is all too rare in the literature of antitrust.

The book opens with a section entitled "The Sweep of the Problem, the Policy and the Law" which admirably fulfills its stage-setting promise. The opening chapter contains a page and a half of questions, captioned "Basic Judgments Which Cannot Be Avoided," which should be compulsory reading for legislators and enforcement officials. There are chapters sketching the history of antitrust in foreign commerce and giving a useful reminder about foreign interests in and reaction to the increasingly sharp bite of antitrust abroad. There follows a particularly valuable analysis of the knotty problems of legislative and judicial juisdiction in the foreign antitrust field, which includes the best account in print of *American Banana Co. v. United Fruit Co.*[6] and its sequelae. The chapter ends with a brief restatement which is characterized by the combination of boldness and caution with which Brewster treats the range of problems he has undertaken to examine. The last chapter in the opening section is entitled "Antitrust Concepts Applicable to Foreign Commerce." In it, the author necessarily examines antitrust concepts at large and succeeds in saying more about the interplay of per se restraints and the Rule of Reason than has been evinced by writings more explicitly devoted to such problems. So sure is the touch and so keen the insight that one hopes that Professor Brewster will some day give us his views on these problems as they affect the application of antitrust doctrine to domestic transactions.

Section two of the book contains material that will be of the most immediate interest to lawyers who find themselves with a counseling problem in the foreign antitrust field. Here the author exhibits at its height his talent for inventing meaningful ways to organize data which, in less skilled hands, would appear as a welter of unrelated details. His basic approach is succinctly stated and deserves to be quoted:

> "Basically, there are three ways the American manufacturing or extractive company may try to do business abroad. First, it may try to sell abroad what it makes in the United States. Second, it may license some firm abroad to use its patents, processes, skills, know-how, trademarks, or good will; taking its cut in fees or royalties or perhaps the earnings on minority shares in the licensee. Third, it may go into business for itself abroad by acquiring control in or establishing a foreign manufacturing enterprise." (pp. 100-01).

6. 213 U.S. 347 (1909).

In the three chapters following, Professor Brewster examines in turn each of the three devices—exports, licensing, ownership—in their several aspects. Under the "Exports" heading, he treats cooperation among American exporters, including the Webb-Pomerene Association device, and individual American exporter's agreements with foreigners. Under the heading of "Licenses," he deals with the exploitation of intangibles—patents, trademarks, and unpatented information. This integrated approach has substantial advantages over the conventional *seriatim* examination of these devices in terms of the legal label attached to them; for it reveals the underlying similarity of the considerations involved. In the chapter on "Ownership," Professor Brewster considers the various devices by which an American company or companies can acquire a stake in enterprise abroad. Here he gives us a rewarding treatment of the intra-enterprise conspiracy problem as highlighted by the *Timken* decision. He rejects (rightly, in my opinion) the notion that the case throws doubts on the legality of restrictive arrangements among commonly-owned entities. In addressing himself to Justice Jackson's famous dissent [7] he says:

> "Although Supreme Court dicta and dissenting opinions' interpretations of majority opinions cannot be passed off lightly, especially in an area where Congress in effect has delegated to the courts a quasi-legislative power, the language quoted was not necessary for decision of the case before the Court or to an analysis of its holding. . . . If there is validity left in the ancient exercise of rationalizing and distinguishing cases in the light of their facts, *Timken* would not support, let alone compel, attack on all forms of competitive protection of an American parent and its wholly controlled foreign subsidiary." (pp. 182-83).

And Professor Brewster concludes with an admirably acute analysis of *Timken's* antecedents, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons* [8] and *United States v. Yellow Cab Co.*,[9] in which he demonstrates the thinness of any assumed precedential basis for the intra-enterprise conspiracy doctrine.

Throughout the three chapters dealing with devices for doing business abroad, the author is careful to state the business justification for each of the measures under scrutiny and to frame his appraisal of its validity in terms which take the asserted justification into account. Put another way, he gives us a series of exercises in the application of the Rule of Reason in which the emphasis is, as it should be, on Reason rather than Rule. If judges and counsel alike were to use the author's analytical model, we would see a good deal less of the facile dogmatizing which is the bane of

7. 341 U.S. at 606.
8. 340 U.S. 211 (1951).
9. 332 U.S. 218 (1947).

antitrust. And it would be a rare judge or lawyer with a foreign antitrust problem who could not find at least a starting point for fruitful thinking about his problem in these three chapters of Brewster's book.

Space precludes detailed description of the rest of the book. There is a good chapter on remedies and an interesting account of the impact of antitrust on American enterprise, as gleaned from interviews with businessmen, government officials, and their counselors. Finally, there is section three, which looks to the future. Here one finds chapters dealing with alternative approaches to the jurisdictional problem, with the definition of substantive legal standards, with devices for advance approval, and with the coordination of foreign antitrust policy among various agencies of government thought to have an interest. Finally, Professor Brewster gives us his own recommendations. He makes only two proposals for legislative change: repeal of the Webb-Pomerene Act ("A proper interpretation of the Sherman Act . . . would make the Webb Act unnecessary except to the extent that it is unjustified.") (p. 455) and authority for the President to grant exemption from antitrust where essential to national security, after consultation with the National Security Council and report to the appropriate senatorial committees in executive session. For the rest, he counsels bringing the State Department into the picture before suit is filed in cases involving "foreign conduct, rights, properties or parties" (p. 444) and again, before relief is sought in such cases; and he sets forth a series of criteria which should be taken into account before a decision to prosecute is made or before judges determine liability or decree relief. As a concomitant, he decries the use of per se criteria of illegality.

Mr. Fugate's book traverses much of the same ground as does Professor Brewster's, but with greater emphasis on what the courts have said and less on what it all means. It is a solid, competent, somewhat pedestrian job. Where Brewster inquires, Fugate states. That might be thought to make his book somewhat more useful than Brewster's for the practitioner who wants to know the answer. The contrary seems to me to be the case. One eminent practitioner in the field has already voiced his misgivings about the utility of the Fugate book in terms which suggest that the missing ingredient is an exposition of the underlying factual problems.[10] It is here that Brewster shines, both absolutely and by comparison. His grasp of economic facts and his ability to use those facts to give content to legal doctrine are precisely the qualities that are required for the solution of real-world antitrust problems. Here, as elsewhere, there is nothing more "practical" than a sound grasp of theory.

It may not be amiss to conclude this review of two books dealing with aspects of competitive economic behavior with the observation that Professor Brewster's publisher seems to have a sounder grasp of the principles of price competition than does Mr. Fugate's.

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10. Gesell, Book Review, 44 VA. L. REV. 665 (1958).

FORGING A NEW SWORD. By WILLIAM R. KINTNER, IN ASSOCIATION WITH JOSEPH I. COFFEY AND RAYMOND J. ALBRIGHT. New York: Harper & Brothers, 1958. Pp. xiv, 238. $4.50.

WAR AND PEACE IN THE SPACE AGE. By Lt. Gen. JAMES M. GAVIN. New York: Harper & Brothers, 1958. Pp. x, 304. $5.00.

Telford Taylor †

These books, alike in subject and purpose, are matched opposites in tone and temper. Both explore the shortcomings of our military organization and leadership, and recommend corrective measures. But Colonel Kintner's work is cautiously contrived within the framework of military subordination, while General Gavin's is the outburst of a man driven to open revolt. Emotionally and tactically antipodal, the two books' essential parallelism is the more remarkable.

The expression "decision-making process" has been overworked in recent years, and perhaps is not as precise as its first users thought; all conscious action is "decision-made" in a broad sense. But the phrase has a legitimate use as a description of the way in which the managers of large institutions reach, or fail to reach, decisions. Ever since 1940, the United States has been a government in a chronic condition of military-diplomatic emergency. In many respects, the executive branch has been poorly designed to cope with the headlong rush of strategic problems that has engulfed the Pentagon and Foggy Bottom. What can be done to improve the management?

Colonel Kintner's analysis culminates (pp. 219-22) in a "program for consideration" that chiefly concerns the organizational structure of the Department of Defense. His recommendations bear a strong resemblance to those embodied in the President's plan for reorganization of the Department of Defense presented to and, with numerous amendments, enacted by the last Congress. Among the important features of Colonel Kintner's program which have thus won legislative approval and are now embodied in the defense establishment are:

1. Elimination of the individual service (Army, Navy and Air Force) chiefs from the chain of command from the President to the forces in the field, so that orders from the Secretary of Defense are now transmitted directly to the field commanders; and

2. Enlargement and integration of the Joint Staff so as to constitute a truly interservice body of expert military advisors to the Joint Chiefs of Staff, instead of separate delegations each representing the views of its own service.

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Army and numerous government posts, is the author of Sword and Swastika, Grand

Some of the Kintner recommendations—for example his proposal that the service chiefs should no longer sit as members of the Joint Chiefs of Staff—were not adopted. The President, too, was disappointed in some of the amendments to his bill which Congress insisted on making, and issued a pungent statement condemning these changes,[1] especially the legislators' insistence that the individual service secretaries and chiefs should be free to present their own views to Congress, even when in conflict with those of the Secretary of Defense.

There were others who thought that neither the Kintner program nor the President's bill went far enough in the direction of service unification. Mr. Thomas Finletter, formerly Secretary of the Air Force, publicly favored merger of the services and abolition of the service secretaries and the Joint Chiefs of Staff.[2] If there be merit in such sweeping changes, nevertheless no other major military power has taken these steps, and there is no significant support in Congress for total unification. Indeed, when the much less far-reaching provisions of the President's bill were first publicized, the reaction in the House of Representatives was so sharply critical that for a time the enactment of any new military legislation seemed doubtful.

This disagreement echoed the rivalry between the President, as Commander in Chief, and the Congress, as custodian of the national purse, for control of the military establishment. Despite all the legislative grumbling about "interservice rivalry," Congress is deeply suspicious of military unification; service individualism facilitates legislative access to information and enhances congressional influence. Fear of a single-voiced and monolithic Department of Defense underlay the outcry against a "Prussian-type" general staff which, it was said, would be fostered by the President's plan of reorganization.

But, as General Gavin points out (pp. 262-64), there is no historical validity to the charge of Prussianism. Neither under the Kaiser nor under Hitler was there ever a single German general staff over all the services. Indeed, the lack of effective interservice planning and operational coordination was a weakness of the German military system. "In summary," says General Gavin, "Germany did not lose both wars because of a well-organized efficient staff system. . . . She lost it among other reasons because she lacked this very thing." (p. 264). In organizational terms, accordingly, General Gavin is of Colonel Kintner's general school of thought, and he quotes (p. 259) *Forging a New Sword* with explicit approval.

But General Gavin's book carries the reader far beyond the walls of the Pentagon into the realm of missiles, nuclear weapons, space warfare, and grand strategy. His writing is feverish, highly personalized and, alas, hasty. Many large questions are discussed, but few are sufficiently developed to satisfy a reflective reader. Doubtless, a more tempered and

1. N.Y. Times, May 29, 1958, p. 1, col. 3.
2. *Id.*, May 5, 1958, p. 7, col. 1.

contemplative presentation would not have reached so wide a public; the sudden and almost brutal impact of the book may justify its breathless pace.

General Gavin contends that the Department of Defense has been in the hands of men who believe that national security can most economically and effectively be safeguarded by a capacity for massive nuclear bombardment of the Soviet Union. By no means does he advocate any relinquishment of this capability, but he is deeply convinced that primary reliance on strategic bombardment is causing the military establishment to become inflexible, musclebound, and vulnerable to surprise.

The debate between the prophets of "limited war" and "total war" has been raging for over a decade, and bids fair to be with us for years to come, unless sooner terminated by a terribly pragmatic answer. The merit of General Gavin's analysis is his recognition that prophecy is a dangerous game for generals and diplomats and that common prudence, therefore, requires that we be capable of both "limited" and "total" military operations. Otherwise, unfriendly powers are all too likely to precipitate the sort of hostilities for which we are unprepared. According to General Gavin, Secretary of Defense Charles Wilson once remarked that the United States "cannot afford to fight limited wars" but only "a big war." (p. 124). If this statement is authentic and accurately quoted, Mr. Wilson's wisdom is that of the man who jumped into the bramble bush.

General Gavin's thinking leads him to some unusual and trenchant observations about the Korean War. He is no partisan of the view that the geographical scope of the war should have been expanded into the "sanctuary beyond the Yalu." By this road, he says, "there was little prospect of victory . . . short of total war, and this we did not want." (p. 124). The real lesson of Korea was that "we have neglected to develop and provide the technical means of winning anything but a . . . total nuclear war." What are those means? Tactical nuclear weapons and the modern airborne assault and reconnaissance forces that are now called "sky cavalry."

Applying this lesson to current political and military issues, General Gavin makes a strong case (pp. 235-36) for nuclear armament of the NATO forces, including those of West Germany. Mr. George Kennan and his "disengagement" thesis are not explicitly mentioned, but it is plain that General Gavin is in total disagreement, for he believes that only by nuclear armament can Western Europe defend itself against the Soviet Union. His analysis of the problem is a reminder that "unilateral disarmament" covers more than the dismantling of existing forces. The failure to take positive steps dictated by an informed strategic outlook may be just as dangerous to national security.

Are "conservative" Republicans more wedded to the Wilson-Dulles philosophy of massive retaliation than "liberal" Democrats? General Gavin thinks so (pp. 250-53) and his classification is at least superficially

plausible. Perhaps it is unrealistic to try to isolate military issues from the infection of politics, but in this context surely such expressions as "liberal" and "conservative" are clumsy verbal tools. What seems more pertinent and valid to this reviewer is the underlying assumption in both the Kintner and Gavin books that broad issues of military strategy belong in the arena of public information and debate, just as much as those of economics and civil liberties.

PUBLIC HEALTH LAWS OF PENNSYLVANIA: A STUDY OF THE LAWS OF THE COMMONWEALTH OF PENNSYLVANIA RELATING TO PUBLIC HEALTH. EDITED BY DAVID STAHL. Pittsburgh: School of Law, University of Pittsburgh, 1958. Pp. xxix, 767.

Israel Packel †

The popular notion of the lawyer conceives of him as perpetually in the posture of litigation. While this is perhaps his most dramatic pose, it gives the public a most limited and distorted conception of the broad functions of the legal profession. In the field of public health, the public's attention is fixed by the case of the violator who escapes by virtue of the ingenuity of his counsel's argument that when a statute says "food" it does not mean "beverages." Little attention is given to the labor of lawyers in properly planning, formulating and drafting legislation for the benefit of the public. The public, unfortunately, does not comprehend the important role of the lawyer in implementing social, economic and scientific advances.

Part of the program to achieve better public health should include some means for conveying to the public an appreciation of the interdisciplinary communion and research of the type embodied in this book. Group study by physicians, lawyers and health officers will produce better laws, improved administration and increased compliance with minimum, or better than minimum, standards. This study by the Public Health Law Research Project of the University of Pittsburgh School of Law, in which the University of Pennsylvania Institute of Local and State Government participated, has already brought to Pennsylvania the Local Health Administration Law of 1951 and codifications of the law relating to vital statistics and disease prevention and control. It has also produced a Hospital Act which, however, has not yet been adopted by the legislature.

The book, as symbolic of such important research, has its place; but it cannot be said that the place is on a lawyer's shelf. The editor acknowl-

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edges that the book is not written primarily for lawyers. Separate chapters of the book cover the fields of vital statistics; disease control; hospitals; foods; drugs; school, industrial and child health; housing sanitation; and pollution of air and water. Regrettably, these subjects are not correlated in their treatment so as to give a lawyer much more than he can conveniently get out of Purdon's statutes. The lawyer will probably want to rely on the statutes themselves, in their most recent form, and on the regulations, most recently issued by the various agencies. In the main, the cases discussed in the book appear in the annotations of Purdon.

However, lawyers will be interested, particularly because of the activities of the current Pennsylvania Commission on Constitutional Revision, in several references to constitutional questions in the field of public health. Constitutional blocks should not stand in the way of the effective use of the law to keep up with progress in other disciplines. Judicial interpretations as to constitutional limitations on the delegation of legislative power might be clarified by an express constitutional provision so that there can be no question as to the validity of legislative incorporation by reference of uniform standards (p. 180). Thus, the reference could be to standards of the federal government, of the United Nations or of any nonprofit scientific organization. The book points out the critical constitutional problem presented by article III, section 27, which prohibits any state office from inspecting or measuring any commodity and concludes: "If there ever was any proper justification for this provision in the State Constitution, it has since vanished." (p. 252). There is also posed the constitutional problems presented by sections 1, 8 and 9 of article I with respect to the power to inspect and to take samples in a compliance program (p. 257). Sound changes in the constitution will eradicate thorny legislative and administrative problems in the field of public health.

Each chapter of the book deals with a particular area in the crazy-quilt pattern of public health legislation in Pennsylvania. What is needed, however, is not a mere positional codification; but rather a coordinated codification. This would produce not only clarity and uniformity in draftsmanship, but would afford a base for a more coordinated and better supervised system for the administration of the law. The work embodied in this book has successfully led the way, but what these times truly require is a continuing reappraisal by a research team, in which all the disciplines are represented, to enable the law relating to public health to be better attuned to the particular needs of the individual, the community and the state.