

reactionary aspect). The family and professional background which prepared Hughes for these tasks and the spirit in which he performed them were likewise suggestive of a recurrent type of American that has strongly shaped our history. The weaknesses as well as the strengths of this tradition could be illuminated by an interpretive biography of Hughes which would be more sharply focused than is Mr. Perkins's. Other approaches might also prove revealing; Oscar Handlin in his Editor's Preface suggests a "corporation lawyer in politics" theme. The available biographies of Hughes still leave much room for further insight into the remarkable career of an elusively austere American statesman.

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MONOPOLIES AND RESTRICTIVE TRADE PRACTICES. By Michael Alberry, Q.C. and C. F. Fletcher-Cooke, M.P. London: Stevens & Sons Ltd., 1956. Pp. xvi, 185. \$4.65.

To lawyers and students interested in the development of antitrust laws outside the United States, the British Restrictive Trade Practices Act, 1956, which became law on August 2, 1956,¹ is a significant landmark. In contrast to the laissez-faire approach of the common law, the British Parliament has produced a tough, well-balanced, tightly drafted piece of legislation, which has as its basic theme the presumption that restrictive trade practices are contrary to the public interest. The act is set out in full in an appendix to this book, and its provisions are summarized and explained in detail by the authors.

The subject matter of the law falls into three parts. In Part I are set out the requirements for registration of restrictive agreements, the procedure for review by a new Restrictive Practices Court, and the substantive grounds upon which parties may overcome the presumption that all registrable restrictions are contrary to the public interest. In Part II are set out prohibitions against collective resale price maintenance and provisions for the enforcement of resale price conditions by suppliers against persons acquiring with notice. In Part III the 1948 Act (The Monopolies and Restrictive Practices [Inquiry and Control] Act, 1948)² is amended to exclude from the sphere of the Monopolies Commission the restrictive arrangements covered by the 1956 Act. This Part also includes requirements for registration of export agreements with the Board of Trade.

There are a number of features of this law which distinguish it from the American type of legislation. There are no criminal penalties except for failing to comply with notices given by the Registrar to furnish particulars, information and documents relating to registrable agreements or for knowingly

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1. 4 & 5 ELIZ. 2, c. 68.

2. 11 & 12 GEO. 6, c. 66.

or recklessly making false statements or for willfully destroying or suppressing documents which are required to be furnished to the Registrar. Nor does the act contain any prohibitions except in regard to collective resale price maintenance.

Parties to restrictive arrangements (whether or not they are enforceable by legal proceedings and whether or not they are in writing) are required to register particulars with the Registrar, who is given broad powers to conduct investigations where he "has reasonable cause to believe" that persons carrying on business within the United Kingdom are parties to agreements subject to registration. After restrictive arrangements have been registered they are brought before the new Restrictive Practices Court by the Registrar, the order being determined by the Board of Trade.

The court is a unique feature. It is a court of law and not an administrative tribunal, but it includes lay members as well as judges. One of the main issues during the legislative process in Parliament was the insistence by the Opposition that this subject could not adequately be dealt with by a court, but required administration by a special tribunal answerable through a Minister to Parliament. This approach was rejected by the Government.

Each case will be heard by a presiding judge and at least two other members. The "other members" are to be persons appointed by the Crown on the recommendation of the Lord Chancellor, being persons "appearing to the Lord Chancellor to be qualified by virtue of . . . knowledge of or experience in industry, commerce or public affairs." Questions of law (*e.g.*, the true construction of documents, the interpretation of provisions of the act, and the question whether an issue is one of law or fact) are for the judge to decide, with an appeal to the Court of Appeal. Questions of fact (the authors of this book say "questions of public interest are questions of fact")³ will be decided by a majority vote and no appeal will lie from decisions on such questions.

For the purposes of proceedings before the court, a registrable restriction is deemed to be contrary to the public interest unless the court is satisfied of any one or more of the circumstances set out in section 21. These circumstances are described as "gateways" by the authors.⁴ Briefly put, they cover restrictions reasonably necessary to protect the public against injury in connection with the consumption, installation or use of goods; those which provide some specific and substantial benefits or advantages which would be denied to the public if they were removed; those reasonably necessary to counteract measures taken by others; those reasonably necessary to enable sellers or buyers to cope with monopolies or trade combinations; restrictions the removal of which would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area in which a substantial portion of the trade or industry is situated; restrictions the removal of which would be likely to cause a reduction in the volume or earnings of the export business which

3. P. 59.

4. P. 43.

is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business of the trade or business involved; and those reasonably required in connection with the maintenance of other restrictions which are found by the court not to be contrary to the public interest.

Even if a restriction can be brought within one of these gateways, the court must still be satisfied, as provided in what the authors of this book refer to as the "tailpiece," that the restriction is not unreasonable, having regard for the balance between the circumstances which have been established and any detriment to the public and others which results or may result from the operation of the restriction. Here, as the authors point out, "the Court's task is extraordinarily wide and therefore very difficult, although not altogether novel."⁵

Another unusual feature is the protection afforded to resale price maintenance conditions. Although agreements for the enforcement of resale price maintenance by collective pressure are made unlawful (but not criminal), individual price maintenance is not only lawful but, "by way of exception to the general law," price maintenance conditions may be enforced by ordinary legal proceedings against persons who, though not parties to the agreements imposing such conditions, acquired the goods with notice of the conditions.

By Part III of the act the Monopolies Commission, as it is now called, continues to have power to investigate monopoly conditions. No illegality attaches to conditions or arrangements condemned by the Monopolies Commission, however, unless or until they are prohibited by Statutory Orders approved by both Houses of Parliament. Even then no criminal proceedings may be brought against anyone infringing an Order. Moreover, as the authors point out, no Order may apply to a "foreigner" as regards his conduct outside the United Kingdom unless he carries on business in the United Kingdom. In this respect they say "British law is less ambitious" than the American practice, which they describe as "extremely grasping."⁶

Even though Statutory Orders under the 1948 Act, as amended, may reach acts performed abroad where monopoly conditions are found to be existing in regard to export arrangements, the new 1956 Act is careful to exclude restrictions which relate exclusively to the supply of goods by export (these must now be registered with the Board of Trade), to the production or processing of goods abroad, to the acquisition of goods to be delivered abroad and not imported into the United Kingdom, and to the supply of goods to be delivered abroad otherwise than by export.

The authors suggest that the policy behind these exceptions "is based partly upon the less tender concern which the Government may reasonably feel for the foreign consumer as opposed to the home consumer, and partly upon the practical difficulties which might face the Court in obtaining full evidence

5. P. 54.

6. P. 100.

in respect of which to judge such matters."⁷ They might have added that careful consideration was given by the Government, as the debates in Parliament disclose, to the limits which comity and international law impose upon extra-territorial attempts to apply antitrust laws. The British approach to this aspect of territoriality is sensible and pays due regard to considerations of good international behavior which are unfortunately at times disregarded by courts in the United States.

The provisions of this new British law are ably summarized and explained by Messrs. Alberry and Fletcher-Cooke. In the preface they say that their book was written during the passage of the act as a bill through Parliament and that "as each new sheaf of Government amendments was unloosed stage after stage . . . the book was duly rewritten."⁸ This "exhausting race with the legislators" may have, as they feel, produced "inevitable imperfections." It is true that there are three misprints in the last paragraphs on page 20, where in the second and third sentences references to sections 8 and 7 should be transposed. These misprints will no doubt be eliminated in the next edition. Otherwise, no imperfections are apparent in this readable and intelligent guide.

Any exposition of a new law which appears almost simultaneously with its enactment must necessarily be limited in scope. In this case, however, there are many helpful comments on particular sections, many references to decisions of British and even American courts on the practice in this field and many interpretations of particular words and phrases. Moreover, not only the 1956 Act and the 1948 Act as amended are set out in full, but the authors have included also summaries of the fifteen Reports of the Monopolies Commission up to July 1956, and an interesting chapter on the effect of this act upon the tort of conspiracy and the doctrine of restraint of trade.

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BARRIERS TO NEW COMPETITION. By Joe S. Bain. Cambridge: Harvard University Press, 1956. Pp. xi, 329. \$5.50.

ALL too frequently in the past the market structure of a given industry has been appraised solely on the basis of the existing firms and their behavior in relation to each other. In *Barriers to New Competition* Professor Bain calls for building into the analytical framework of market behavior the effects of "potential competition." He suggests that the roster of factors determining the competitiveness of a given industry is incomplete unless one considers entrepreneurial behavior in the light of possible entrants into the industry. Furthermore, there is feedback to this behavior since motivation exists to erect barriers to new competition; hence, the "height" of these barriers may

7. P. 30.

8. P. v.

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