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THE BOTTLENECKS OF BUSINESS, by Thurman W. Arnold. Reynal & Hitchcock, New York, 1940. Pp. xi, 335. $2.50.

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Book Reviews

THE BOTTLENECKS OF BUSINESS, by Thurman W. Arnold. Reynal & Hitchcock, New York, 1940. Pp. xi, 335. $2.50.

As responsible head of the Anti-Trust Division of the Department of Justice, Thurman Arnold definitely had a bill of goods to sell in the writing of this book, and set himself soberly to that task. In contrast with such works as the *Folklore of Capitalism*, the present volume is staid and matter of fact. It lacks the flavor, the salty satire, of his earlier writings. It is a business-like effort to put over in nontechnical terms Arnold's conception of the philosophy of the anti-trust legislation and of the functions of anti-trust enforcement.

Insofar as the book reflects a new Arnold it may doubtless be explained in part by the following excerpt:

> "The practical reformer gains his ends with the least possible dislocation of existing institutions and the least possible shock to existing ideals. This does not produce a logical government, but it does get practical results. It is an art which is more familiar to the practical politician than to the student of government."[1]

The author freely indulges dogmatic assertion in developing his thesis. This puts it up to the reader to keep his mind on the thread of the general thesis instead of bristling at the sight of statements which he may reasonably challenge.[2] Nor need the

1. Page 92.

2. For example, we have his bald assertion that there is at present only one instrument which can accomplish any practical results in freeing the channels of trade and that is the Sherman Act. Page 91. I am not persuaded, for example, that a strong consumer's cooperative movement would have no practical results in freeing the channels of trade, quite apart from the anti-trust laws.

On page 136 Arnold says that the general purpose of legislation like the Miller-Tydings Act is to put unorganized business in a position to bargain collectively with great corporate enterprises. I had been harboring the notion that the objective was to protect the small independent in competing against the big chains, for example, and did not involve collective bargaining.

Arnold says that there is only one sensible test that we can apply to the privilege of organization, namely, does it increase the efficiency of production or distribution and pass the saving on to consumers? Page 125. But are we concerned simply with the efficiency of production and distribution and resultant savings to consumers? Doubtless it would be cheaper for the consumer to live in low cost apartment buildings, but we have a philosophy in this country that home ownership is to be fostered as a valuable social in-

reader expect meticulous scholarship.[8]

I believe it is fair to say that Arnold's principal theme runs about as follows. The preservation of our political democracy depends upon the existence of industrial democracy. Our basic problem in preserving industrial democracy is the problem of distribution. We have enormous productive capacity but we have let the weeds of restraint of trade and monopoly grow up to choke a free market and thereby to obstruct the free flow of goods. This has forced the government into resort to price fixing and subsidies. "The cause of spending to prime the pump is the destruction of a free market, and at the same time it is the reason why such spending never does prime the pump according to expectations." The highways of trade are clogged by "economic toll bridges" which exist in industries like tobacco manufacture where there is no price competition among the major companies and the actual competition takes the form of adding unnecessary luxuries to the distribution system. In case of cigarettes these luxuries take the form of expensive "hokum" advertising. In the distribution of gasoline they may take the form of fancy filling

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stitution. The proponents of fair trade laws, moreover, can reasonably contend that the maintenance of an economic condition in which small enterprise can survive is a desideratum which transcends any differentials of lower costs and greater efficiency favoring the big fellow.

We are told on page 270 that "the *Schechter* case remains as a bulwark for a free market and not as a limitation on governmental power where the facts show that power is needed." I wonder whether that case has much to do with a free market. Title I of the National Industrial Recovery Act was not too well drawn and thus was peculiarly vulnerable under the doctrine of non-delegability of legislative power. Arnold adds that broad general legislation which impairs the competitive market is still forbidden. I do not know of anything in the Constitution or its judicial articulation that sustains such a conclusion. The cases sustain very broad delegation of legislative power; the N.I.R.A. involved, on the other hand, what was in substance an unqualified delegation that simply went out of bounds.

3. Arnold says on page 129 that the anti-trust law does not affect the activities of individuals. As a practical matter that is doubtless largely the case, but as a matter of statutory coverage, Section 2 of the Sherman Act expressly provides that every person who shall monopolize or attempt to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be guilty of a misdemeanor.

On page 169 the author refers to the Statute of Frauds as the law which prevents oral representations from being used to vary the terms of written contracts. Doubtless he meant to refer to the so-called parol evidence rule.

On page 194 he refers to an estimated saving of about ten million dollars a year to milk consumers of Chicago resulting from the Department of Justice's court victory which freed the retail stores in Chicago to sell milk at competitive prices. Yet in a memorandum of an economic consultant of the Division which is quoted with general approval by Mr. Arnold, it is stated that more than half of the milk in Chicago was, in 1940, being bought from stores and the annual saving to store consumers was at least three or four million dollars.

stations, free maps and a lot of unnecessary but expensive services. The only available instrument that we have for freeing the channels of trade is the Sherman Act. This is so because the act fits into traditional patterns of thought; it involves broad generalities, which make for adaptability to changing conditions, and the interpretation and application of which are suited to the peculiar genius of our judiciary, the only agency to which our people are willing to entrust such responsibility. In other words, the act is a politically practical method of action. But its generality does not defeat its effectiveness because an adequately supported policing authority such as the Anti-Trust Division, which is pursuing a clearly enunciated policy of enforcement, can achieve reasonable certainty in administration if business people will submit their plans to the policemen before acting on them. The deterring prospect of a criminal prosecution looms before those who do not make a previous submission, whereas those who do, so far as the government is concerned, face only the prospect of an injunction suit having somewhat the same friendly attributes as a declaratory judgment proceeding. Resort to an injunction suit and the availability of the device of the "consent decree" make it possible for the people who are acting in good faith and who put their problem before the Division to obtain the certainty desired for the security of business transactions. An adequate police force operated in this wise can, with the support of a strong, informed consumer movement, assure us a relatively free market.

The Division's procedure under the Sherman Act, which I have barely more than adumbrated in the preceding paragraph, is set forth at length by Mr. Arnold. Possibly the two most significant features of this procedure are the invitation to business to submit to the Division beforehand proposed arrangements that might run afoul the Sherman Act and resort to penal sanctions only where the submission procedure is not pursued in good faith. In case of submission Arnold would tell those affected that the proposal, on its face, violated the anti-trust laws and that a criminal prosecution would follow if it were put into effect, or that the government was unable to say definitely whether the arrangement would be an unreasonable restraint of trade if carried out, as the case might be. In the latter type of situation, if large capital outlay would be entailed by the proposal the Department of Justice would play ball to the extent of bringing an action for an injunction in which the legality of the proposal

could be tried and an arrangement within the legal pale could be worked out by consent decree. It is only in cases of this sort that Arnold would normally use a consent decree. (He is also agreeable to using it in the more troublesome cases where violations of the act not involving "moral turpitude" have been committed by parties acting under the old enforcement regime who had come forward with a positive plan to eliminate the conditions in the industry which brought about the illegal practices.) He speaks disparagingly of the use by his predecessors of the consent decree as a means of condoning past violations of the anti-trust laws and then feebly excuses such conduct on the ground that Congress had failed to provide funds for enforcement.

There is something appealing about Arnold's procedure; the application of the Sherman Act is a relatively unpredictable sort of thing and people look upon violations of the act not in the same moral terms as ordinary crimes. Thus a lefthanded sort of criminal law declaratory judgment procedure has its appeal in such cases. But it does impose a tremendous responsibility upon the enforcement officers and places in their hands great potential power. Arnold addresses himself to this aspect of the matter and it may be that his idea of proceeding completely in the open and letting all interested parties be heard *amici curiae* in consent decree matters offers a sufficient safeguard.

A chapter is devoted to the problem of maintaining a free market in time of national emergency or war. Arnold thinks that a free market is extremely important to effective economic mobilization in the present emergency and, from a long range standpoint, is calculated to leave us in a stronger position to make the readjustment that must be accomplished after the war. He responds to the need for various types of concentrated action among business men by saying that in time of emergency combinations may become "reasonable" because of the necessities of national defense. He is prepared to deal with the matter by relying on a responsible government department to make a factual determination in any given case that a particular combination or agreement is essential to national defense. Subject to this qualification he would insist on his normal procedure of a previous submission to the Anti-Trust Division of any proposed business arrangement which might be near the legal fence erected by the anti-trust laws.

Things have moved very fast since this volume was published. At the present writing the President has just proclaimed

an unlimited national emergency and a critical juncture in the war seems to be at hand. If we are to play adequately the rôle which the President conceives for us, there doubtless will have to be a greater compromise of normal anti-trust procedure than Arnold anticipated. In addition, moreover, the government may have to place ceilings on prices even in normally highly competitive fields because defense demands are for the present taxing productive capacity. In other words, the regulative forces of competition may not under such extraordinary circumstances serve to keep prices in bounds.

It certainly served Arnold well as a matter of direct, unwavering, emphatic exposition to insist that there is only one sensible test which we can apply to the privilege of organization, namely, "does it increase the efficiency of production or distribution and pass the savings on to consumers?" But the difficulty here is that he is thinking in terms of one desideratum which does not necessarily groove with the congeries of others cherished by various groups in our society. Arnold has stated the competitive idea in very strong terms. He has said: "There is discipline and there is efficiency in a business economy which has accepted the yoke of a totalitarian state. There is a better discipline and efficiency in a business economy which is willing to accept the hazards of competition that is really tough and which does not demand that anyone guarantee its profits against lower prices to consumers. But there is neither discipline nor efficiency in an economy that is half way between." But are we in a position to assert aggressively and uncompromisingly the doctrine that rivalry is the life of trade and its corollary that the devil may take the hindmost? Our whole economic structure is encrusted with a complex growth of subsidies and special privileges recognized by federal as well as state law. We have but to point to the situation of the American farmer to provide a sufficient illustration of this observation. For good measure, that ancient subsidy, the tariff, may be thrown in. Our social legislation of recent years, moreover, hardly jibes with the philosophy that the devil may take the hindmost. Surely such factors as these cast complicating shadows over the picture which Mr. Arnold has painted in such bright, simple lines.

The "curse of bigness" is simply brushed aside. Size, says Arnold, is not per se an evil. This is mighty casual talk. Bigness carries with it great economic power and the very dominant posi-

tion of large concerns and the finance-minded character of their leadership are at odds with the competitive system.

Arnold devotes a chapter to describing the service his division has performed by way of obtaining clarification of the anti-trust laws. He refers to five recent leading cases in which the courts, as he sees it, have eliminated five sources of confusion in the enforcement of the Sherman Act in the lower federal courts.[4] Since that time his batting average in the Supreme Court has slumped rather badly. Thus, at the present term, the Supreme Court has in the *Hutcheson* case[5] seriously damaged the symmetry of Arnold's program by so reading the Norris-LaGuardia Act into the Sherman Act as to render it a substantial modification of the penal provisions of the Sherman Act as applied to labor. The case involved a jurisdictional dispute between two labor organizations in the course of which a strike was called by Union *B* against an employer which had entered into a contract with a recognized Union, *A*. It was Arnold's position, of course, that such a strike was not protected even by Section 20 of the Clayton Act but the Court in upholding the defendants was not content to beat him on that ground; it proceeded to extend the Norris-LaGuardia Act to penal sanctions as well as to relief by injunction. Well might Arnold fume about such a decision. He had devoted a chapter of his book to restraints of trade by labor in which he had refused to coddle labor but instead had taken the straightforward attitude that labor is on an even footing with capital in the matter of responsibility for unreasonable restraints of trade. One can well sympathize with him over this badly strained interpretation of the Norris-LaGuardia Act which precludes even-handed application of the penal provisions of the anti-trust laws.

In its latest anti-trust decision the Supreme Court has handed Arnold another set-back by ruling that the government is not a "person" within the contemplation of that provision of the Sherman Act giving the remedy of a civil action for treble damages to

4. United States v. Borden Co., 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939); United States v. American Medical Association, 110 F. (2d) 703 (App. D.C. 1940); Ethyl Gasoline Corporation v. United States, 309 U.S. 436, 60 S.Ct. 618, 84 L.Ed. 852 (1940); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1131 (1940), discussed in Note (1941) 3 LOUISIANA LAW REVIEW 241. One wonders just how much clarification the *Apex* case has provided us. See Steffen, Labor Activities in Restraint of Trade: The Apex Case (1941) 50 Yale L. J. 787.

5. United States v. Hutcheson, 61 S.Ct. 463, 85 L.Ed. 422 (1941), discussed in Note (1941) 3 LOUISIANA LAW REVIEW 646.

a person injured in his person or property by a violation of the act.[6] During the emergency the government may resort to more drastic sanctions to protect itself as a consumer. As a longe-range proposition Congress may well consider amending the act in this respect.

The *Bottlenecks of Business* is not marked by offending boastfulness. Arnold does, however, tell us something of what his Division has been doing. Its accomplishments in the building industry in certain large centers, in the business of distributing milk in Chicago and in the movie industry were as spectacular as they were substantial. And these are only samples. There can be no question but that Arnold et al. have been rendering an important public service in bringing to light and dealing effectively with illegal practices by which tribute has been exacted from the "consumer." The long-range significance of their program and their work is another matter—one very difficult to appraise. How much of what has been achieved is due to the peculiar genius of Arnold? The answer, doubtless, is a large measure.

Arnold devotes his concluding chapter to "The Rise of a Consumer Movement." It is a long essay, covering a lot of territory, which defies brief summary or description. Arnold finds that we have a sufficient consumer movement; the question, he says, is whether it can be adequately advised of available procedures to demand practical action. He recognizes the fact that there are those who have vested interests in existing restraints of trade who constitute potential pressure groups ready to foster resort to price-fixing and government subsidies, if need be, to protect their positions. His answer is that the political branches of the government may not be able to withstand such pressure but the judiciary can; the administration of justice is, he says, the only balance wheel against political pressure. That is where anti-trust enforcement comes in.

This pleasing little formula may be a bit too simple. The courts do not initiate law enforcement; one of the political branches of the government performs that function. The consumer, moreover, does not form a class apart. We are all consumers and most of us are associated, in obtaining our livelihoods, with business or other institutions which may have vested interests in special privileges, subsidies or restraints of trade. This

6. United States v. Cooper Corporation, 61 S.Ct. 742, 85 L.Ed. 667 (1941).

obviously colors, and often controls, any so-called consumer point of view. Your reviewer laid down the volume with the impression that anti-trust enforcement can be a substantial force for economic and political good but that it lacks much of being the key to the solution of our problems.

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CASES ON CRIMINAL LAW, by Livingston Hall and Sheldon Glueck. West Publishing Co., St. Paul, 1940. Pp. xxi, 556.

Placed alongside such super-colossal monuments of legal scholarship as Michael and Wechsler's "Criminal Law and Its Administration" this 556 page book assumes pigmy proportions. The two works present equally excellent efforts based upon radically different theories of casebook construction.

Michael and Wechsler present over fourteen hundred pages of materials, covering a wide range of problems, and providing a reservoir from which the law professor may select those cases best adapted to his particular jurisdiction and his individual ideas of course content. Then too it provides a sort of encyclopedia, placing most of the available legal writing at the teacher's finger tips.

Hall and Glueck's casebook charts the course with a nice selection of generally important cases, leaving the individual professor to handle local variations by assigning or citing important decisions in his particular jurisdiction. This book should be welcomed by the inexperienced teacher who may profit by the case selection of the authors. The more experienced teacher may prefer to exert his summer energies in developing local materials and have his pruning done in advance. Then, too, the student is happier with a book which is easily handled, and which may be used without the harassment of skips and deletions. (Of course this robs the professor of one means of awing the students aforehand with his profundity.)

One of the most significant features is the absence of the conventional voluminous (eye-strain type) footnotes. In their place are "problem cases" which follow almost every principal case. These are printed in full sized type, are carefully briefed,

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