

REVIEWS

THE BASING-POINT SYSTEM. By Fritz Machlup. Philadelphia: The Blakiston Company, 1949. Pp. vii, 275. \$5.00.

OF the many paradoxes posed by the attempt to enforce competition, none is more exasperating than the riddle of basing-point pricing. Here is a system which is capable of precise exposition and graphic delineation, as has been ably demonstrated by Professor Machlup in his timely monograph. Yet the effects are controversial, and the remedies baffling. It is like a game of checkers in its geometric nicety; but the onlookers, and perhaps the players, are blindfolded.

Readers of the YALE LAW JOURNAL are presumably acquainted with the economic arguments for and against geographic price systems, lucidly set down in a recent Comment,¹ and with the political implications, etched by Professor Latham.² Such readers may well inquire why we must have a whole book on basing-points at this time, especially one which, in the author's own apt characterization, "is rich in economic theory and poor in statistical material."³

The first and not the slightest reason is that Professor Machlup just happened to have it in his pocket at this critical moment. Designed as part of a larger work on *The Economics of Price Discrimination*, the basing-point chapters were amputated as a sacrifice, and a worthy one, to the current fray.

The second excuse for his using so many words is the opportunity that space gives for clarification by patient definition and analysis. Thus, the ghostly twins, phantom freight and freight absorption, are given substance by working through every example to the real twins, net price to the seller and delivered price to the buyer. It is frequently asserted, for example, that injury to buyers near a non-base mill results from the "phantom freight" added to the base price of a more distant base mill. Machlup demonstrates what seems absurdly simple once it has been explained, that the same consequences can be obtained by manipulating base prices. Take a hypothetical situation based on the *Corn Products* case. This example is intended to focus on the plight of candy manufacturers buying glucose in the Kansas City area, where the defendant's mill constructed its prices on a Chicago base. Suppose the Chicago price is \$50, and freight is \$10 to Kansas City. The delivered price in Kansas City is then \$60, and \$60 is the mill net for the Kansas City seller. This sum is commonly said to include

1. *Price Systems and Competition: The Basing-Point Issues*, 58 YALE L. J. 426 (1949).

2. *Giantism and Basing-Points: A Political Analysis*, 58 YALE L. J. 383 (1949).

3. P.v. The illustrations are drawn, with regrets for their incompleteness, from steel, cement, and corn products. Professor Fetter's *THE MASQUERADE OF MONOPOLY* (1931) was, with a larger theme, more pungent and varied in its materials, and also more argumentative and impassioned.

\$10 phantom freight, and everyone from the Supreme Court to Senator Capehart is outraged. Very well; Kansas City is made a base, and the base price is set at \$60. The phantom freight evaporates. Similarly, on a sale \$4 (freightwise) toward Chicago, Kansas City, which formerly collected \$2 in phantom freight from the delivered price of \$56, now is said to absorb \$4 freight in meeting the same delivered price, which is still controlled by the lower Chicago base. To those who believe in freight absorption as a magic sponge which soaks up all stains of collusion, this is practically an act of charity.

But I would not like to have to explain the difference between the old and new pricing to a disgruntled candy manufacturer. Only lawyers and economists who have been long schooled in the craft of meeting competition where no competition exists can appreciate such a sleight-of-hand.

The example given is perhaps an uncommon one (though it demolishes the notion that freight absorption is good and phantom freight bad); and it would not do to infer from it that the whole basing point problem is a phantom. Professor Machlup slogs through monopoly theory to establish that, while perfected basing-point systems are an outgrowth of essentially anti-competitive industries, they are also powerful devices to keep competition from breaking out. He then weaves through the maze of discrimination inherent in the systems, and again demonstrates that even the beneficiaries of discrimination are in fact the victims of a wasteful process which makes prices to all higher than they might otherwise be.

Such findings should now be familiar, and my busy reader may still ask why they need most of a book to develop, even with refinements and qualifications. In defense I would now point to the great unsettlement that still prevails among economists over the alternatives to basing-points. Their leading trade journal, the *American Economic Review*, has recently published three articles by distinguished authorities;⁴ they are not wholly in accord. Professor Frank A. Fetter, who has since died at the pinnacle of triumph after a thirty years' war against basing-points, nails up twenty-two theses in favor of his old love, compulsory f.o.b. mill pricing. Dr. Corwin Edwards of the FTC hints as broadly as he can that the industrialists who have unwillingly cast off their chains should use their freedom in sporadic chiselling, the nearest an oligopoly is likely to come to meaningful price competition. Professor J. M. Clark, first to expound the uses of unsystematic discrimination,⁵ is now more cautious. He perceives the need for an area of uncertainty in the pricing of such products as steel and cement, but he raises the spectre of cutthroat competition, and is affrighted by it.

Professor Machlup explores all these contentions. Unimpressed by the

4. Fetter, *Exit Basing Point Pricing*, 38 AM. ECON. REV. 815 (1948); Edwards, *Basing Point Decisions and Business Practices*, 38 AM. ECON. REV. 828 (1948); Clark, *The Law and Economics of Basing Points*, 39 AM. ECON. REV. 430 (1949).

5. In his *ECONOMICS OF OVERHEAD COST* 416-33 (1923).

likelihood that an industry with powerful leaders will destroy itself, he is receptive to any plan that will diminish the waste and rigidity of systematic interpenetration of markets. But he makes a telling objection to the assumption that a healthy anarchy will follow the dethroning of basing points.

"It would be possible for an industry to give up the basing-point system and adopt price-making policies that do not constitute a collective system, but rather consist of individual and independent ways of going after the desired business without regard to price maintenance. But is it likely that sellers who for many years have respected their own price lists as well as those of their competitors will suddenly forget all they have learned and will start doing what they have come to regard as unethical? If I am correct in assuming that this is very unlikely, then at least a period of psychological reconditioning is necessary before an industry can acquire the proper 'propensity to compete.' This is particularly necessary in industries dominated by large firms, where the small firms have become conditioned to follow the leaders, and the leaders can use discriminatory methods of imposing their will upon unwilling followers. It is doubtful, to say the least, that collusive price making can be eliminated in such an industry as long as its dominant members can practice price discrimination."⁶

He is thus driven to the conclusion that, in industries with a high concentration of control, uniform f.o.b. mill pricing is the only practical alternative to formal regulation. To be sure, the Federal Trade Commission disavows having the power to order f.o.b. pricing, and its interpretations of the *Cement* case boil down to the formula, "Do what you like, as long as it is not collusive." Machlup thinks this can be read, "Do what you like, as long as it is f.o.b. mill pricing."⁷ I hasten to add that he is not uncritical of f.o.b. In it he properly finds weaknesses that reflect the brute fact of domination by large firms in the industries concerned.

The final reason why Professor Machlup had to write a book was to dispel some of the vast nonsense that has accumulated since the *Cement* case. Witness the notion that the shift to f.o.b. in steel and cement required an increase in mill net prices. Witness the skillful appeal of the smaller companies in the corn products industry to the Federal Trade Commission to save them from the perils of competition. Witness the tendentious hearings of the Capehart Committee. And what is one to say of the gyrations of Commissioner Lowell Mason, the Don Quixote of the Trade Commission?

Lawyers may take some comfort from the apparent fact that the law of geographic pricing systems is, at the moment, more settled than their economics. Professor Machlup, as well as some of his economist colleagues I have cited, is able to lay down positive prohibitions derived from recent

6. P. 250.

7. P. 251.

cases, and to draw distinctions that would do credit to a budding Blackstone. To be sure, the proponents of competitive discrimination have a considerable chore to distinguish away the ominous perils of the Robinson-Patman Act. Spokesmen for the Federal Trade Commission may suggest that it can draw a line between good and bad discrimination; but that is not likely to be entirely satisfying to the businessman whose counsellors are startling him with interpretations of *Standard Oil Co. v. Federal Trade Commission*.⁸

Professor Machlup, I should note in conclusion, wears his economic theory easily; and his book is remarkably intelligible to anyone interested in following him across the checkerboard. Will it be convincing? That depends, I suspect, on the extent to which one shares the author's "old-fashioned . . . belief that a truly competitive order is not only the best guarantee for the preservation of freedom but also the best mechanism for the allocation of economic resources."⁹

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LEGAL PHILOSOPHY FROM PLATO TO HEGEL. By Huntington Cairns. Baltimore: The Johns Hopkins Press, 1949. Pp. xv, 583.

THIS book, the third in a series which is to be completed by a fourth on the Elements of Legal Theory, is designed by Dr. Cairns to treat the law from the point of view of philosophy in the same way that the preceding volumes have adopted the standpoint of the social sciences, of logic, and of the empirical sciences respectively. There are chapters on Plato, Aristotle, Cicero, Aquinas, Bacon, Hobbes, Spinoza, Leibniz, Locke, Hume, Kant, Fichte and Hegel. As far as possible Dr. Cairns has allowed each to speak in his own words, without attempting the hopeless task of reconciling differences or of proving the superiority of one over another. The result is a number of pleasantly discursive accounts of what these thinkers have to say about the nature of law, its relation to the state and society, and the problems of legal interpretation, with a few final paragraphs to each chapter summing up the results.

Although Plato is linked up with Bentham, Bacon with Dewey, and Leibniz with Russell, the book is mainly concerned with philosophies about the law rather than philosophies immanent in or arising out of legal systems. Readers who already have some acquaintance with the work of any one philosopher may not learn much from the pages given to him, but the student of Jurisprudence seeking an introduction to this or that thinker will find this book as useful as most. Dr. Cairns has no illusions about the imperfections of a

8. 173 F.2d 210 (7th Cir. 1949).

9. P. 50.

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