1958

Book Review: Foreign Commerce and the Antitrust Laws

Ward S. Bowman Jr.
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation
https://digitalcommons.law.yale.edu/fss_papers/4239

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
that Puritans and lawyers of the common law held joint ideas about many aspects of political philosophy, and that these ideas and the struggles of the two groups helped to formulate modern political philosophy. For instance, they have bequeathed to us the concept of authority which is now a fundamental part of our legal thinking. He also discusses such diverse subjects as law courts, universities, judges, the Inns of Court, the Crown, Parliament, Puritan theology, and common law.

All librarians can well justify the purchase of this book. It is extremely well written in a style marked by clarity and readability, and the type is pleasing to the eye and the format easy to handle. The book also contains a very valuable legal bibliography.

ROY M. MERSKY

Yale Law Library


Foreign Commerce and the Antitrust Laws by Wilbur L. Fugate, a trial attorney in the Antitrust Division of the Department of Justice, is one of a Trade Regulation Series which has been described by its editor as "... practical guides to good faith compliance with antitrust and cognate trade regulation laws."

The purposes of this "hand book," as stated in the editor's foreword, are to provide a guide for the general practitioner who has little experience in this field, to provide a quick orientation for the economist or business executive, and to provide a ready reference tool for the specialist. Such a multi-purpose task is particularly formidable in this area because the basic statute, the Sherman Act, has general reference to both interstate and foreign commerce. As the author recognizes, there is no limited frame of reference. All important antitrust cases are applicable to an understanding of restraint or monopolization of trade with foreign nations.

The principles which run through the foreign trade cases, as the author points out, are not new. The 1949 Timken case has much in common with the 1911 American Tobacco case. And in general because the same principles which govern trade among the states can be said to govern foreign trade, the problem of how much general antitrust background to provide cannot be avoided. Fugate's resolution of this problem is to provide a short general background introductory chapter, then to proceed directly to the jurisdictional problems (chapters 2 and 3) which raise special "foreign trade" issues. Problems of antitrust relief also are special, but their discussion is postponed for subsequent treatment.

Substantively, the principal distinguishing characteristic of the foreign trade cases, as contrasted to the interstate cases, is the question of the incidence of the restraining effect. Mr. Fugate finds, that apart from actual conflicts with foreign law, the question of the power of the United States over acts abroad affecting its commerce must now be taken as settled if the effect is substantial. One might expect, then, that considerable attention would be given to an organization and analysis designed to evaluate the substantiality of the restrictive effect on exports from imports into or trade in the United States. The book does not do this either directly or systematically. The organization and structure of the work places great stress on means and methods. Thus there is a chapter on patents and technology which runs the gamut of the practices which are used throughout the world for purposes and with effects which antitrust lawyers have come to recognize. A similar chapter deals with trademarks, another with foreign subsidiaries and foreign acquisitions. Joint exploitation abroad is also separately treated as is foreign investment. This method provides interesting and useful "foreign trade" references but the central question remains—what is the substantiality of effect on the United States.

A serious question is raised as to whether any book of this kind should be recommended, as it is in the foreword, as
"... a guide for the general practitioner who has little experience in this field."
The book does provide interesting and useful introductory information to both
the antitrust expert and the non-expert. But more is required. Landmark "for-
eign" cases are relatively few in number. Mr. Fugate's organization calls for re-
peated reference to the most important cases. The number of page references fol-
lowing the case reference in the index makes for ready identification. It is not
to disparage this work to suggest that it is a supplement to rather than a substi-
tute for these cases for any of those for
whom this book is intended.

Despite the usual and necessary dis-
claimer that his opinions do not repre-
sent those of the Department of Justice,
Fugate has nevertheless provided what
will undoubtedly be viewed as an indi-
cator of Department thinking concerning
the propriety of the foreign trade prac-
tices he discusses.

This book, according to its author, is
an attempt to provide a safe path a bit
back from the cliff-edge, citing Brandeis' refusal to advise clients how to walk on
the brink. Risk-takers will undoubtedly prefer alternative trails closer to the prec-
ipice even though the edges are crumbly.

WARD BOWMAN
Yale Law School

Kantorowicz, Hermann. The Definition
of Law. Edited by A. H. Campbell with
an introduction by A. L. Goodhart.
Cambridge [Eng.] University Press,

This essay was designed to form the
first part of the Introduction to a com-
prehensive Oxford History of Legal Sci-
ence. The major project was abandoned,
or at least indefinitely postponed, after
Dr. Kantorowicz' death in 1940. But the
nature of this project determines the au-
thor's approach to the definitional prob-
lem, for his view is that definition is no
more than a proposal about the use of a
word for the purpose in hand. He there-
fore sets out to define law in a way which
will enable him to include what he thinks
proper to a history of legal science and exclude all else.

For this purpose he believes that law
is best understood as a body of rules con-
sidered justiciable. Law is distinct from
morality because the former consists of
prescriptions directed at external conduct,
the latter of prescriptions directed at in-
ternal mental states. But within the field
of rules directed to external conduct only
those are law which are considered suit-
able for application to individual cases,
in the event of conflict between the in-
terested parties, by a representative of the
group within which the conflict arises,
acting according to a definite procedure.

This book merits inclusion in libraries
because it provides an indication of the
sorts of problems which are currently
thought to be important in English juris-
prudence. Dr. Goodhart in his introduc-
tion seems to regard the book as driving
a nail into the coffin of the American re-
alists, of whom he speaks in the past
tense. But if this book represents current
legal thinking the American realists are
not merely dead—they have vanished
without trace. Their work is not even
part of the history of legal science, though
a systematic exposition of the rules of golf
in 1908 is a part of that history.

WILLIAM L. MORRISON
Yale Law School

Law in Eastern Europe; a series of publi-
cations issued by the Documentation
Office for East European Law, Univer-
sity of Leyden. Ed. by Z. Szirmai. No. 1,
Leyden, Sijthoff, 1958. $2.50.

Difficulties encountered in obtaining
information on the law of Soviet or Soviet
dominated countries are manifold. Not
only do librarians face incredible prob-
lems in ordering Eastern European books
and in obtaining regular delivery of seri-
als published there, but also the language
problem poses frequently obstacles con-
cerning the utilization of materials re-
ceived. Translations of source and sec-
ondary materials into Western languages
and critical writings in the latter lan-
guages on Eastern European law find a