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Hunt: Law and Locomotives: The Impact of the Railroad on Wisconsin Law in the Nineteenth Century

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RECENT BOOKS

LAW AND LOCOMOTIVES: THE IMPACT OF THE RAILROAD ON WISCONSIN LAW IN THE NINETEENTH CENTURY. By *Robert S. Hunt.* Madison: The State Historical Society of Wisconsin. 1958. Pp. xiv, 292. $6.50.

This is the most recent of the series of notable contributions arising out of the University of Wisconsin's encouragement of studies in American Legal History.[1] It is a first-rate study executed by one well equipped to undertake the task under the influence of a scholar perhaps best qualified to lend guidance to such a project.[2]

Admirably, this is not a long book; it has a fascinating subject matter and a highly readable, entertaining style which should furnish layman and lawyer alike with a pleasant evening's reading. But it offers a good deal more; for the law-trained person there is a series of thought-provoking inquiries which members of the legal profession might do well to ponder.

1. *The Background*

Current railroad problems, in themselves, furnish a fertile area of serious reflection upon the rapidity with which technological and commercial developments can change the economic outlook of an entire industry, the manner in which methods of financial reporting can affect that picture, the relative role of governmental regulatory policy and the rigidity of governmental controls, once imposed, in the light of changed conditions.[3] Innovations in freight-handling, automation of assembly

[1] Other recent and forthcoming volumes include: KUEHNL, THE WISCONSIN BUSINESS CORPORATION (1959); KIMBALL, INSURANCE AND PUBLIC POLICY (to be published by the University of Wisconsin Press in 1959); DUCKETT, FRONTIERSMAN OF FORTUNE (1955) (a historical biography of Moses Strong, one of the early railroad "developers" and a major character in Hunt's book). Among recent articles, see Kimball, "The Role of the Court in the Development of Insurance Law," 1957 WIS. L. REV. 520.

[2] The author acknowledges the helpful influence of Wisconsin's Willard Hurst. Hunt brings a unique collection of talents to the task. Educated at the Yale Law School, Hunt served as professor of law at the University of Iowa prior to accepting a Rockefeller fellowship in United States legal-economic history at the University of Wisconsin. In spite of the author's impressive academic qualifications, this cannot be shrugged off by "practical lawyers" as just another of "those policy-oriented jobs by an ivory-tower academician." When Hunt writes about the growth and role of the judicial and administrative processes, it is from the background of one who, as a partner in a leading Chicago law firm, has for a number of years actively represented clients before courts and federal administrative agencies.

[3] E.g., see editorial, "Logic Derailed" in THE WALL STREET JOURNAL, March 24, 1959, p. 12: "Railroads in the state are having serious financial difficulties. . . . It appears there will be subsidies of some kind. . . . But the . . . legislators . . . will not grant requests by the railroads which would have cut their costs. . . . This cost-cut would have entailed revision of a 1907 law which set the number of train crewmen to be used on each train. . . . So whether the railroads go broke or prosper, they will do so with a 'full crew' by the standards of 1907, before the invention of the diesel engine, modern signaling and a host of other technological advances."

yards and other mechanical modernization cannot entirely erase the bleak picture of retrenchment from old markets marked by curtailment of passenger services[4] and abandonment of lines.[5] It was not always thus.

Development of the world's railroads furnished the setting for some of the most significant commercial and governmental activity of the past century.[6] It is difficult to overemphasize the effect of the construction of our western railroads. Future generations will continue to be fascinated by that drama's many facets: the "politics" of the railroads and the "buying" of legislators and governors, the fantastic financial manipulations —at once both brilliant and ruthless—and the relationships between railroad management on the one hand and labor and shipper's groups on the other.

Hunt's book, however, makes no pretense of encyclopedic treatment;[7] it is limited timewise to the years 1856-1890 and, geographically, to Wisconsin. There is virtually no mention of the relations of railroad management with the rising railroad Brotherhoods, though this is the era of "The Great Burlington Strike" of 1888, the repercussions of which must have been felt strongly in Wisconsin even though only a small part of the "struck" system operated in that state.[8]

This is, however, more than a collation of selected historical gleanings. It represents the latest in a series of unique contributions to our expanding understanding of those extrinsic and external factors which were so important in shaping the current form of American law. Wisconsin is chosen for exploration, but this study is a search for the "general themes of United States legal history which appear in the interaction of law and economics" during the last half of the nineteenth century.

[4] See, e.g., Conant, "Railroad Service Discontinuances," 43 MINN. L. REV. 275 (1958).

[5] See, e.g., Weissman, "Railroad Abandonments: The Competitive Ideal," 43 MINN. L. REV. 251 (1958).

[6] Consider the economic and political impact of the Deutche Bank's role in the construction of the famed "Berlin to Baghdad" railroad as the instrumentality for the German economic and political *Drang Nach Dem Osten* in the period prior to World War I. See STOLPER, GERMAN ECONOMY 1870-1940, 58 (1940). Other examples are the use of British capital in the development and economic penetration of the economy of the Argentine and the Trans-Siberian railroad's part in the emergence of Russia as a world power.

[7] For those whose curiosity has been sufficiently stimulated, there is a 15-page Bibliographic Comment which collects many of the standard references, both in terms of Wisconsin development and on a broader scale. E.g., MERK'S ECONOMIC HISTORY OF WISCONSIN; CARY, ORGANIZATION AND HISTORY OF THE CHICAGO, MILWAUKEE, AND ST. PAUL RAILROAD COMPANY (1893). Several of the railroads have had histories written about them, e.g., CORLISS, MAIN LINE OF MID AMERICA: THE STORY OF THE ILLINOIS CENTRAL (1950); and similar studies in economic history have been published with respect to other areas, e.g., BENSON, MERCHANTS, FARMERS AND RAILROADS (1955), a study of railroad regulation and New York politics from 1850 to 1887, and one of the Harvard "Recent Studies in Economic History" volumes.

[8] That epic has been recorded in MCMURRY, THE GREAT BURLINGTON STRIKE OF 1888 (1956).

2. *The Themes*

The reader need not proceed far before coming upon something of value. Immediately following the title page appears this quotation from Spinoza: "It should be the aim of a wise man neither to mock, nor to bewail, nor to denounce men's actions, but to understand them."[9]

One need not accept the premise that all law is the result of a judge's reaction to the mishaps or happy coincidence which befell him on the way to the hearing![10] But, would it not be sadly inappropriate for lawyers, law students and, indeed, law teachers to fail to recognize those factors "outside" of the "law" narrowly defined, which have shaped it or at least applied the pressures during the formative period? Only by depth of understanding can we hope to serve the profession through more effective counsel to clients, guidance to the shapers of our current law, and meaningful discussion with our students.

Such depth of understanding involves not only recognition of current influences; it requires cognizance as well of the importance of the "time" dimension in furnishing a valuable, perhaps essential, perspective to the analysis of legal problems. Most of us recognize that the lawyer who considers only the current state of the law, though he may be in some position to discuss extant doctrine, is poorly prepared to predict, as a basis for advising a client as to contemplated actions, what the law may be in the future.

Still another theme will be noted. Hunt says in his Foreword: "If, perforce, a part of the lawyer's job involves policy and politics, if he is called on more and more to assess the role of official agencies of law in dealing with economic and social issues, and if he finds his traditional forum of the court being supplanted by administrative hearing and even legislative committee room, then perhaps in this study he may find something relevant to his career. For if United States legal history is to embrace the full scope of the law, it must recount in some meaningful way how society deals, through its legal system and organization, with the problems that events thrust upon it."[11]

3. *The Book*

Hunt divided the study into two periods separated at the year 1874. The first three chapters deal with what the author calls the "formative period." Essentially, chapter 1, entitled "Wisconsin Purchase, 1856," is a portrayal of the men of vision, ambition and avarice who bribed governors and substantial portions of entire legislatures with securities and favors, and whose manipulations finally resulted in legislative investigation almost

[9] Quoted from BARUCH DE SPINOZA, POLITICAL TREATISE.
[10] See, e.g., CAHILL, JUDICIAL LEGISLATION, c. 6 "Legal Realism: The Exposition" (1952).
[11] P. viii.

a century before another famous native of Wisconsin brought this type of activity to its greatest prominence on the national stage. It is a commentary upon the mores and attitudes of a society which, "like people elsewhere at the time, came to regard the state legislature as a counter over which private groups could acquire legal rights and privileges, without undue squeamishness about the methods employed . . . ,"[12] which regarded "natural resources as virtually inexhaustible, and believed that unrestricted exploitation was the most promising way to develop America's economic potentialities,"[13] and which, in fostering the ultimate end of development of the railroad as the builder of population, the hauler of goods and the distributor of public lands, ignored ethical niceties and lost sight of basic public purposes.

"Embattled Farmers and a Common Law Court," as chapter II is titled, is devoted to the *financing* of the roads—and the legal, economic and political problems which new methods of finance, and old methods of chicanery, posed for legislature, executive and judiciary. It is, like the first, a historian's chapter, for it brings back, vividly, much of the background of the period—the type of men, the prevailing economic and political forces. But it is, even more, a lawyer's chapter.

Following the state's decision against granting subsidies to the railroads, the entrepreneurs evolved a novel scheme of finance. Under this plan the farmer bought capital stock of the railroad by giving a negotiable note secured by a mortgage on his farm, pledging the dividends from his stock to pay the interest and principal of his note. The railroad companies then raised cash from eastern sources by floating bonds secured by hypothecation of the mortgages and notes. When the panic of 1857 caused every railroad in the state to default on its obligations to the eastern bankers, the farmer-debtors organized to meet the threat of foreclosure and the stage was set for the ensuing struggle between the local debtor interests and the powerful out-of-state creditors. The farmer-debtor groups brought effective pressures to bear upon legislator and governor. With but scant deference to any obligation of contract, elected officials, well aware of the overwhelming slant of popular opinion of the electorate, hastened to capitalize on political expediency. The governor identified himself as the farmer's friend against the outsiders. The legislators responded with legislation designed to forestall creditor action. Trial courts bent to local pressures. Only the state supreme court stood firm in the face of popular local demand—a somewhat striking parallel to developments a full century later in another section of the country, and an episode strikingly illustrative of the unique role of the courts in our tripartite form of government.

[12] Pp. 33-34.
[13] P. 36.

Chapter III, devoted to evolving methods of control, unfolds the picture of agencies of law trying to make old doctrines fit the new problems created by the railroads. Legal history is replete with such attempts. The past century has recorded the efforts to adapt doctrines of water law, developed in water-abundant England, to the totally different situation found in the western states, to solve the novel problems posed by oil and gas exploration by ill-chosen analogy to the law of "wild animals," on the one hand, or "minerals in place," on the other. Nor are we done with such tilting. We are still witnessing the attempt to solve the problem of compensation of the automobile accident victim within the framework of traditional doctrines of tort theory applied through traditional adversary methods[14] by an overloaded judicial process;[15] there is even the suggestion that the risk and compensation problems engendered by the atomic age may be accommodated within the negligence framework erected over the years.[16] Can lessons be learned from past experience?

In Hunt's view, the agencies of law failed to recognize and meet the radically new and powerful challenge of the railroad. The record of the period is of day-to-day formulation of decision to meet individual controversies and of an era spent in fashioning legal and administrative tools rather than in laying down broad policy, developing new doctrine and the imaginative creation of new methods of control. As to the role of the judiciary, Hunt concludes, "This is not to say that such work was not proper; it is what courts are for. But the fact remains that much of the court's work would have been minimized if not eliminated altogether had legislation been drafted more carefully. Many other situations could have been better handled under rules and regulations issued by administrative agencies, but such agencies were yet to be created."[17]

Thus while the railroad posed a challenge testing to the utmost the law's capacity to make itself effective (an invitation largely unaccepted), the railroads "grew more powerful, more indifferent to the public good, and more arrogant and intractable," in a period characterized by interlocking directorates, exhorbitant rates and domination of the legislature

[14] For a discussion of alternative approaches, see, e.g., Columbia University Research Council, REPORT BY COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932); CLARK AND SHULMAN, A STUDY OF LAW ADMINISTRATION IN CONNECTICUT 166-170 (1937).

[15] The situation in major metropolitan areas is well known. Even the federal courts are now faced with a record backlog, 27 U.S. LAW WEEK 2154 (Sept. 30, 1958).

[16] See Becker and Huard, "Tort Liability and the Atomic Energy Industry," 44 GEO. L.J. 58 (1955). But see, Huard, The Lawyer's Duties and Responsibilities in the Nuclear Age," 12 VAND. L. REV. 1 at 2 (1958); STASON, ESTEP AND PIERCE, ATOMIC ENERGY TECHNOLOGY FOR LAWYERS (1956); Stason, "Tort Liability for Radiation Injuries," 12 VAND. L. REV. 93 (1958).

[17] Pp. 91-92.

by the railway lobbyists.[18] Not until the mid-seventies, when dissatisfaction of the people, especially farmers injured by excessive charges, populated the legislature with advocates of reform and regulation, was there any real attempt to tailor the law to the railroad.

Thus begins the second era surveyed. Chapter 4 revolves around the "Potter Law," the legislation providing for the beginnings of administrative regulation of the roads. The railroads did not take to regulation easily. Eminent counsel rendered opinions that the statute was unconstitutional and the presidents of the "Milwaukee Road" and the Chicago and Northwestern wrote the governor that "they refused to be bound by the law and would not abide by the rates." When railroad agents and conductors insisted on collecting the higher fares set by the railroads in defiance of the rates promulgated pursuant to the act, the attorney general filed informations in the Supreme Court seeking injunctions restraining the collection of tolls in excess of the maximum rates specified. Thus began "The Railroad Companies" case,[19] one of the truly important cases of the time. The chapter is a study of the men involved (the eminent counsel who argued for the railroads and the strong, courageous judge, Edward Ryan, Chief Justice of the Supreme Court of Wisconsin) and of significant issues. Ryan faced not only the vexatious question of the jurisdiction of his court, but, at the substantive level, "*Dartmouth College v. Woodward* stood in Ryan's way at every juncture"[20] by virtue of the railroads' claim of rights under their charters from the state. Fascinating in its detail of the legal arguments and the manner in which the justice dealt with each, perhaps the broader significance of the chapter is the light it casts upon the role of the judge in the development of "law." Says Hunt:

> "As a product of judicial creativeness Ryan's opinion ranks high in every respect. As a whole it went beyond the presentation of counsel's briefs, and on at least two issues it deviated from the dominant line of American authority. . . . He showed, as have all great judges, an awareness of the real issues underlying the controversy. . . . Ryan dealt with these issues in the light of his philosophy of the judge's job, a philosophy that was ahead of his time. On the one hand, he did not shirk the responsibility of choice: he asserted, as a matter of conscious policy, that the state must be stronger than any private concentration of power within it. At the same time, recognizing the distinctive character of judge-made law, he preached judicial self-restraint to a degree unusual for his generation of judges; it was the legislature, not the judiciary, he said, that should determine what were reasonable rates and formulate the means of dealing with pressing public problems. . . .
>
> "The technical craftsmanship he displayed in his opinion was a model for the nineteenth-century judge. On each important issue he

[18] P. 98.
[19] Attorney-General v. Railroad Companies, 35 Wis. 425 (1874).
[20] P. 116.

> reviewed the facts in their historical setting and made a meticulous examination of all the leading cases. He did not hesitate to criticize precedent with which he disagreed, notably *Dartmouth College v. Woodward*. He was skillful . . . in mobilizing and distinguishing prior decisions to support the exercise of his own responsibility; he did not delude himself as to extent of the constraint actually imposed by precedents. . . . On the other hand, he was a man of the law, steeped in its professional tradition, and he was prepared to pay obedience to *stare decisis* when rigorous analysis showed that governing precedent existed."[21]

Thus, in a historical setting, Hunt poses two problems of our own day: the role of judge vis-a-vis legislator in adapting "law" to changing conditions, and the entwined problem of the role of "precedent" in the decision of the individual case.

Chapter V, dealing with the less spectacular developments from 1875-1890, is almost anti-climactic, sketching for that era the railroads' relations with strangers (including occupants of land it took for right of way and persons killed on the tracks, relations with users of service, intracorporate and intercorporate affairs, relations with government and relations with landowners, purchasers and employees, much as chapter II detailed in similar fashion the aspects of the 1858-1874 period.

The final 8-page chapter, entitled "Who Made the Decisions?" begins, "The morrow broke over Wisconsin when the railroads came and Wisconsin law was not quite ready." Thus begins the summary of the first four decades of the railroad in Wisconsin; and here are discussed in perspective Hunt's recurring investigative themes—Law and the Delegation of Power, Law and the Balance of Power, and the Relative Role of Court and Legislature. And thus at page 175 endeth the tale. For the data seeker and footnote reader there follow some sixty pages of chapter notes containing valuable material for the researcher, a 33-page table of legal authority and a comprehensive index.

This is a short book but one excellently done. It is the product of keen legal mind, intrigued by the impact of extra-legal forces, economics, politics, sociology, and the combined climate of the time and place on the development of the law when faced with a tremendous new force. There is here none of pedantry but rather a lucid and discerning analysis of the role played by agencies of the law in the shaping of the law concerning the greatest economic force of its time, of the role of the agencies, both with respect to creation and enforcement of law and among themselves, of the challenge to law in a relatively young and developing government, of the rugged individuals who so strongly exerted their influence, be they judge, legislator or entrepreneur—and of other men who bent to their will and would have bent the law to it as well. It will cause the

[21] Pp. 122-125.

lawyer once again to re-examine his philosophy of the role of law, of legislature and of judge, and of the role which the "felt necessities of the time" shall play in "shaping" emerging sanctions to control new forces and concepts while standing firm against the forces which would sacrifice existing fundamental premises and guaranties for the expediency of the moment.

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