

criticism. Chapters v, ix, and x fall more within the field of jurisprudence itself. They deal with such topics as "The Command Theory and Its Rivals," "Legal Sovereign and Political Sovereign," and "Some Legal Concepts," and contain, amongst other good things, an extremely clear exposition and refutation of the social contract theory. Here again abstractness is mitigated by reference (a) to specific authorities such as Austin, Vinogradoff, Sir E. Barker, and many others, and (b) to apposite concrete instances.

The author's standpoint is empirical, comparative, and historical. He excludes from jurisprudence (as far as possible for one himself living in a historical period) the encroachment of value-judgments from the fields of ethics and social and speculative philosophy, and would make of jurisprudence a dispassionate scientific study of phenomena which are actual rather than ideal. He warns that a good deal of what he says is regarded as heterodox, but claims that the points of view suggested are worth further consideration.

The book is exceptionally well written, and suggests the easy mastery of a well-trained legal mind on the bench. The reviewer can find no fault with the clearness, soundness, and indeed finality of the author's summing up. But the reader, on laying the book down after enjoying it, is inclined to wonder whether the *ex cathedra* finality, which is so impressive in its reference to history which is past, is not perhaps out of place when it refers to a history which is still in the making. The feeling persists that present-day writers (e.g., Mr. Harold Laski) who are tried and found wanting as authorities in the field of theory, may actually have more to do with the creation, by legislation, of the brave new world of the future than the author's analyses, however logically brilliant, indicate.

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**Transportation under Two Masters.** By Charles D. Drayton. Washington: The National Law Book Co., 1946. Pp. 375.

Except for personal attacks on the author of *Justice in Transportation* and on Judge Thurman Arnold, who contributed the introduction to that book, Mr. Drayton, in *Transportation under Two Masters*, merely repeats the ancient arguments of railroad propagandists who have contended that the railroads, because they are subject to regulation under the Interstate Commerce Act, should be exempt from the operation of the antitrust laws. Mr. Drayton considers the enforcement of the antitrust laws by the Department of Justice a molestation or interference with the functions of the Interstate Commerce Commission and an attempt to "take out of the hands of the Interstate Commerce Commission a large measure of authority vested in that body." Mr. Drayton inquires whether the public interest would be served by the "continuance of orderly regulation of our transportation system by the Interstate Commerce Commission" or whether that tribunal should be "superseded in its regulatory function by the Antitrust Division of the Department of Justice."<sup>1</sup> The assumption that regulated carriers cannot simultaneously be required to obey these two laws enacted by the Congress is the basic fallacy of his book.

Mr. Drayton would have the reader believe that the Sherman Antitrust Act was

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<sup>1</sup> Pp. 3-5.

never intended to be applied to transportation and that when the Supreme Court reached the opposite conclusion in the *Trans-Missouri*<sup>2</sup> and *Joint Traffic Association*<sup>3</sup> cases, it committed a grievous error. He further asserts that because conditions today are different from those prevailing when the above cases were decided, the Sherman Act is no longer applicable to transportation companies. This is the burden of chapters ii and iii, wherein he restates the time-worn arguments of railroad lawyers in the two above-mentioned cases and the more current arguments of railroad lawyers in the pending antitrust suits, *United States v. Association of American Railroads*,<sup>4</sup> and *Georgia v. Pennsylvania Railroad*.<sup>5</sup> And in this connection members of the bar will be startled to learn that in Mr. Drayton's opinion the inaction of one House of Congress is sufficient to repeal a duly enacted statute! He reasons that because the Senate, in receiving a report made by the Interstate Commerce Commission pursuant to a Senate Resolution<sup>6</sup> authorizing an investigation of the Transcontinental Freight Bureau, took no further action, "this fact would seem to constitute a clear legislative recognition" that the operation of rate conferences, such as that described in the commission's report, did not constitute a restraint of trade or commerce.<sup>7</sup> Mr. Drayton conveniently overlooks the repeated refusals of Congress to enact legislation exempting such conferences from the antitrust laws.<sup>8</sup>

Notwithstanding this position, Mr. Drayton further on welcomes, indeed advocates, explicit legislative relief from the antitrust laws and hopefully predicts the passage of the Bulwinkle bill<sup>9</sup> designed to achieve that end.<sup>10</sup> Evincing further doubt as to the soundness of his interpretation of existing law, Mr. Drayton makes the startling pronouncement that "... if the Supreme Court should under present conditions outlaw such [rate] conferences and actually bring them to an end it would result in chaos and there would arise such a hurricane of public indignation and protest as to inevitably sweep aside any such decision."<sup>11</sup> This is hardly a restrained statement from a member of the bar.

At this point, it becomes necessary to test Mr. Drayton's basic assumption in the light of recent decisions of the Supreme Court, a process he studiously avoids. On

<sup>2</sup> *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

<sup>3</sup> *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898).

<sup>4</sup> Civil Action No. 246, U.S. District Court for District of Nebraska, Lincoln Division.

<sup>5</sup> Original No. 11, in the Supreme Court of the United States. This is the substantive case, not to be confused with the hearing on jurisdiction reported as *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945).

<sup>6</sup> S. R. 194, 67th Cong. 2d Sess., passed Dec. 15, 1921.

<sup>7</sup> Pp. 51-52.

<sup>8</sup> First refusal, see 21 Cong. Rec. 4099, 4753, 5950, 5981, 6208, 6314 (1890); second refusal, see 1 Sharfman, *The Interstate Commerce Commission* 52 (1931); third refusal, see Hearings before House Committee on Judiciary on Trust Legislation, 63d Cong., 2d Sess. Vol. 2, at 1894 (1914), 51 Cong. Rec. 9582, 9285, 9286 (1914); S. Rep. 698, 63d Cong. 2d Sess., 46, 60 (1914); 51 Cong. Rec. 14028, 16264, 16344 (1914); fourth refusal, see Hearings before Senate Committee on S. 942, *Regulation of Rate Bureaus*, 78th Cong., 1st Sess. (1943). The Bulwinkle bill (H. R. 2536, 79th Cong., 1st Sess., 1946), now pending in Congress, is the fifth attempt to set aside the antitrust laws as applied to rate-making in transportation.

<sup>9</sup> H. R. 2536, 79th Cong., 1st Sess. (1946).

<sup>10</sup> P. 124.

<sup>11</sup> P. 100.

March 26, 1945, the Supreme Court in the *Georgia* case<sup>12</sup> reaffirmed its former holdings that carriers are subject to the antitrust laws and that, notwithstanding the provisions of the Interstate Commerce Act, "conspiracies among carriers to fix rates were included in the broad sweep of the Sherman Act." Further, the Court saw no conflict between those two acts of Congress. Indeed, the Court made it clear that the operation of the antitrust laws in the transportation field does not retard, hamper, or supersede regulatory processes, as Mr. Drayton would have the reader believe, but is definitely in aid thereof.

In thus expounding the meaning and purpose of the Sherman Act, as applied to transportation, the Court noted that there is an area of lawful collaboration among carriers in the making of joint rates. The Court said: "It is pointed out, however, that under § 1(4) of the Interstate Commerce Act . . . it is 'the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto.' And it is noted that agreement among carriers is provided in the establishment of joint rates. § 6. That is true. But it would be a perversion of those sections to hold that they legalize a rate-fixing combination of the character alleged to exist here. The collaboration contemplated in the fixing of through and joint rates is of a restrictive nature. We do not stop at this stage of the proceedings to delineate the legitimate area in which that collaboration may operate. . . ." <sup>13</sup>

Ignoring the Court's clear statement that there is a legitimate function for rate conferences within an area of lawful collaboration (a study of which would have been a real service), Mr. Drayton chooses to concentrate on fictitious issues, such as charging that the Department of Justice favors cutthroat competition or complete abolition of rate conferences, including those which are legitimate. An examination of the Supreme Court's decision shows that it has not struck down all rate conferences. They may be established by the carriers for legitimate purposes. Thus, it appears that there will be no "chaos" and no consequent need for creating a "hurricane" to sweep the Supreme Court from its high esteem in the hearts and minds of the American people.

What is the great issue here involved? Is it cutthroat competition versus regulated monopoly, as Mr. Drayton would have the readers believe? I do not think so. I believe that the overriding issue is whether private companies operating public transportation systems are to continue as pawns employed to perpetuate economic and financial power in the hands of a few powerful banking and business houses, or whether these transportation companies are to be operated by railroad owners and managers as private enterprises within the regulatory scheme established by Congress. Mr. Drayton completely submerges this great issue. There is only a slighting reference thereto on page 68 of his book. But this is the heart of the antitrust suits brought by the Government and by the State of Georgia, both of which receive cavalier treatment at the hands of Mr. Drayton.

Let us first consider the Government's antitrust suit. In this suit, the Government seeks to free the West and the nation from the domination of the traditional railroad bankers, J. P. Morgan and Company and Kuhn, Loeb and Company, and businessmen of related interests, which has been made possible through their control of our bas-

<sup>12</sup> *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456 (1945).

<sup>13</sup> *Ibid.*, at 457.

ic industry, transportation. Such control enables these banking and business interests to dominate substantially every industrial and commercial activity, since the character and cost of available transportation determine the life of communities and of whole states, permitting one industry to flourish and condemning another to decay, stimulating the development of some resources and leaving others untouched. The Government charges that this monopolistic control of transportation by a group primarily concerned with protecting industries and investments in the East, has been used to suppress the industrial development of the West, thereby hindering the growth of population in the West and curtailing its purchasing power. And by it all, the complaint charges, the conspirators have depressed the national economy. In broad outline, the state of Georgia's original suit in the Supreme Court charges a like conspiracy to hold the economy of Georgia and the South in a state of arrested development.

Involved in both of these suits are the activities of the Association of American Railroads, an organization which the Government charges J. P. Morgan and Company, or its predecessor, helped to form. One may search Mr. Drayton's book in vain for any condemnation of this gigantic conspiracy which responsible federal and state officials charge in the courts of the land against those who are the traditional rulers of our transportation systems.<sup>14</sup>

Mr. Drayton scorns the competitive ideal in transportation, for, he states, "Regulation is the antithesis of competition." He can find no support for this view in the decided cases, nor can he find support from those who truly believe in private enterprise in transportation. A few years ago, a man entered the railroad field with a determination that, at least so far as the system he represented was concerned, it should be freed from the monopolistic control of traditional railroad bankers. This man was Robert R. Young. Mr. Young and his associates, working with independent banking houses, determined to bring about competitive bidding in railroad securities. Their long fight was brought to a successful conclusion in 1944. The railroads, security holders, and the public have already been saved hundreds of millions of dollars through competitive bidding.<sup>15</sup> This group acted in other ways to advance competition in the railroad industry.<sup>16</sup>

The point is that there is at least one great force in the railroad field and a great force in the banking field that believes in the competitive ideal in transportation—an ideal that may yet save that basic industry for private enterprise.

Mr. Drayton treads on dangerous ground when he challenges the patriotism of those who do not agree with him. In the chapter entitled "Giving Aid and Comfort to Our Enemies," which, he indicates in a footnote, constitutes treason against the United States, Mr. Drayton refers to a paragraph which the author of *Justice in Transportation* quoted from the report of the Truman Committee. Upon the basis of having quoted this paragraph Mr. Drayton builds his inferences, without being deterred by

<sup>14</sup> It is not inappropriate to add that Governor Arnall of Georgia recently testified before the Senate Interstate Commerce Committee that he brought the Georgia suit with the encouragement of President Roosevelt.

<sup>15</sup> Hearings before Senate Committee on Interstate Commerce on S. 1253, Modification of Railroad Financial Structures, 79th Cong. 2d Sess., at 318-320 (1946).

<sup>16</sup> *Ibid.*, at 321-23.

the fact that he is charging the President of the United States (who while vice president indorsed *Justice in Transportation*) with treason. I am less impressed than is Mr. Drayton with the patriotism of the monopolists in transportation. Five men, four of whom were taken from the rate-fixing conferences of the organized railroad industry, placed in uniform, and given the rank of major, were given the "duty" to agree upon the rates charged by the War Department by the railroads of the nation. The rates charged the War Department by the railroads during the war have been the subject of a recent investigation by a three-man committee of experts appointed by the executive office of the President, Bureau of the Budget. Its report has been submitted to the Department of Justice and to Congress for action. This report discloses that "the Government has not only paid excessive charges in a stupendous amount before and since Pearl Harbor, but it is still paying such excessive charges on presently moving traffic and will continue to pay them until appropriate action is taken to remedy this situation." The means and methods employed by the Association of American Railroads to further this far-from-patriotic situation were brought to light, at least in part, by testimony of Department of Justice representatives at current hearings of the Senate Committee on Interstate Commerce.

Mr. Drayton's assertion that the Antitrust Division of the Department of Justice sabotaged the war effort needs no defense at my hands. When the President established the Office of Defense Transportation, Attorney General Francis Biddle and Mr. Joseph B. Eastman agreed on an arrangement whereby carriers, upon receiving authority from that agency and the Department, might pool their services and facilities in the interest of the war effort. Mr. Eastman expressed the view that if such procedure had been available in World War I, it would not have been necessary for the Government then to take over the railroads. In the light of this fact it is preposterous for Mr. Drayton to assert that government ownership of all transportation agencies is the end now secretly sought by the Department of Justice.

The introduction by Luther M. Walter deserves comment because of the statement therein that "... there is no longer any need for the application of the principles of the Sherman Act to preserve competition among railroads." Mr. Walter, as trustee of the Chicago Great Western Railway Company and as a lawyer, has repeatedly appealed to the Antitrust Division of the Department of Justice to enforce the Sherman Act against the railroads. A notable instance was the antitrust proceeding resulting in a consent decree prohibiting the railroads of the United States from giving effect to an agreement whereby the Association of American Railroads forbade coordination of railroad and motor carriers. *Eheu, quantum mutatus ab illo.*

Mr. Drayton has missed a great opportunity to make a constructive case, if one can be made, for regulated monopoly in transportation against the concept advanced in *Justice in Transportation* of competition within the framework of regulatory laws. Instead he has chosen to offer the reader a hodge-podge of time-worn arguments, assertions, and inaccuracies, interlarded with invective. Much of the material can be found in a pamphlet written in 1945 by C. E. Johnston, Chairman, Western Association of Railway Executives, styled *Two Masters?*

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